James Ramsay

THE DECISIONS OF THE LORDS OF COUNCIL and SESSION,

IN

Most Cases of Importance, Debated, and brought before Them; From *July* 1621, to *July* 1642.

WITH AN

INDEX of the Pursuers and Defenders Names; And an other of the most Material Points Decided therein.

OBSERVED

By Sir *ALEXANDER GIBSON* of *DURIE*, then one of the *Senators* of the *Colledge of Justice*: Corrected and Revised, by *W. A. J. C.*

EDINBURGH,

Printed by the Heir of *Andrew Anderson*, Printer to Their most Excellent *Majesties*; And Sold by *George Mosman*, in the *Parliament-Closs*, near the *Exchange*. *Anno DOM.* MDCXC.

THE DECISIONS OF THE COMMISSIONERS OF COUNCIL and SESSION

IN

Decided during

Corrected and Revised, by

X9346
D934d

Unto the Right Honourable

JAMES

VISCOUNT OF

STAIR,

Lord Preſident of the Seſsion,

Sir John Baird of Newbyth,
Mr. *Alexander Swinton* of Merſington,
Sir *Colin Campbel* of Aberuchil,
James Murray of Philiphaugh,
Robert Dundaſs of Arniſtoun,
Mr. *John Hamilton* of Halcraig,
Mr. *David Home* of Corſrig,
Sir *John Maitland* of Revelrig,
Sir *John Lauder* of Fountainhall,
William Anſtruther younger of that ilk,
Mr. *Archibald Hope* of Rankillor,
Mr *James Falconar* of Pheſdo,
Robert Hamilton of Preſmennan,

SENATORS of the COLLEDGE of JUSTICE,
And Ordinar LORDS of COUNCIL and SESSION,

THE PRACTICKS, OR DECISIONS thereof, Obſerved by Sir Alexander Gibſon *of* Durie, *are Humbly Offered by,*

My Lords,

Your Lordſhips

moſt Humble and

Obedient Servant,

AL. GIBSON.

939703

Act of Sederunt,

For Printing the Lord Durie's *Practicks.*

Edinburgh, *the sixth Day of* July, 1688.

THe Lords of Council and Session Considering, That the *Practicks*, or *Decisions*, of this Judicatory, were for many years together, Judiciously, and with great exactness, Observed by the Deceast Sir *Alexander Gibson* of *Durie*, one of the Senators thereof, They Recommend and give Warrant to Sir *Alexander Gibson*, one of their Clerks, to cause Print the saids *Decisions*, with an *Index* thereto, as a Book useful and profitable for the Leidges.

PERTH Cancel: GEO. LOCKHART, CARSTAIRS, JO. DALRYMPLE, JO. LOCKHART, JAMES FOULIS, AND. BIRNIE, PATRICK OGILVIE, J. MURRAY, GEO. NICOLSON, J. STEWART, R. LYON, ALEX. MALCOLM. JO. GORDON, ALEX. SWINTON.

Act of Privy Council,

In favours of Sir *ALEXANDER GIBSON.*

Edinburgh, *the twelfth Day of* July, 1688.

FOrasmuch as the Lords of Session have Recommended to Sir *Alexander Gibson*, one of the ordinary Clerks thereof, the Printing of the *Practicks*, or *Decisions* of *Session*, that were Observed by the Deceast Sir *Alexander Gibson* of *Durie*, one of the Senators of the *Colledge of Justice*, as a Book, useful, and profitable for the Leidges; And to the end he may be encouraged to go about the Printing thereof, The Lords of His Majesties Privy Council have Granted, and hereby Grants to the said Sir *Alexander Gibson*, and his Assigneys, the sole Power and Privilege of Printing, Re-printing, Importing, and Vending of the saids Practicks; And Discharges all other persons whatsoever, during the space of Nineteen Years, from the Date hereof, to Print, Reprint, or Vend the same within this Kingdom, without the said Sir *Alexander*, or his Assigneys, their special Licence, and Warrant to that effect, under the pain of Confiscation of the Copies, the one half to the said Sir *Alexander*, or his Assigneys, and the other half to the Discoverer; and that beside such other Punishment as the Councill shall think fit to inflict upon the Transgressors, *toties quoties*, for such Contravention. Extracted by me,

WILL. PATERSON,
Cls. Sti. Concilii.

THE

THE DECISIONS OF THE LORDS OF COUNCIL and SESSION.

IN

Moſt Caſes of Importance Debated and brought before them.

From *July* 1621, to *July* 1642.

Keith contra the Tennents of *Peterhead*, *July* 11. 1621.

IN an Action purſued by *Nathaniel Keith*, againſt the Tennents of *Peterhead* and others, for abſtracting of Multures, founded upon a Tack of the Thirle-multures ſet to him by the Earl of *Marſhal*, Heretor of the Lands and Miln, bearing no exception or limitation expreſſed in the ſaid Tack, which is ſet, of all the Thirl-multures of that Miln, and Lands therein contained. The *Lords* found, that the Farm of all Corns payed to the Lord and Maſter of that Ground, which is Thirled and Aſtricted to the Miln, ought to be free of Multure-paying, notwithſtanding of the foreſaid Thirlage of the whole Corns growing upon the ſaids Lands, except that the foreſaid Farm be Grund at other Milns in the Countrey by the Tennent, but either being delivered really by the Tennent to the Maſter, or to any other to whom the Heretor or Maſter ſells the ſame, or being ſold to the Tennent himſelf, and again ſold and diſponed by the Tennent to any other perſon whatſoever in the Countrey, albeit it be not really delivered to the Maſter, but that it be bought by the Tennent, as ſaid is. The *Lords* found the Farm not ſubject,

in payment of Multures, but only in this case, *viz.* if the samine be Grund by the Tennent at any other Miln than the Miln to which the Corns of that Ground was astricted. For the *Lords* found, that the Corns so Grund shall pay Multure to the Tacksman, and no otherways, which Multure should not be payed as of out-landish Corn in that case, but of the quantity conform to the Astriction. In this same Process also, at the same time; The *Lords* found, that *invecta & illata* (which was comprehended under the same Thirlage) should not pay Multure, albeit they tholed fire and water, except the Corns in-brought were also Grund there. Likeas the *Lords* found, that the in-brought Corns, so many thereof as was so Grund, ought to pay Multure, as astricted to the said Miln, and no more nor any others Corns inbrought thereto. Actor. *Hope* and *Mowat*, Alter. *Nicolson* and *Oliphant*. *Gibson* Clerk. *vid.* 21 *March*, 1637. T. of *Innerness* contra *Cuthbert. v.* 23 *March*, 1624. T. of *Elgin* contra *Mckenzie*.

Dowglas of *Earls-Miln*, contra Earl of *Murray* and his Tennents, *July* 12. 1621.

IN the Action for abstracting of Thirl'd Multures, pursued at the instance of *William Dowglas* of *Earls-Miln*, against the Earl of *Murray* and his Tennents, founded upon a Feu set to him of some Lands, and of the Miln of *Tarnway*, with the pertinents thereof; which Miln is the only Miln of that Barony, and upon diverse Acts of Thirlage made by the Earl of *Murray*'s Bailies at many times, and fourty years possession of receiving of the Thirl'd Multures from the Tennents, Corroborat with Decreets against the Tennents, in the Baillie's Courts. The *Lords* assoilzied from the pursuit, by reason that they found that the Feu contained no expres Thirlage of the saids Lands to the Miln Disponed, and that the Baillie could not astrict or Thirl the Lands, without an expres warrand from the Lord and Master of the Ground. So whatever Acts, Decreets, or Possession, had followed thereupon, thereby the Master, who was neither called, nor consented, could not be prejudged by his Baillies, without his own expres deed. Actor *Hope*. Alter. *Nicolson* and *Aiton*. *Scot* Clerk. 13 *July*, 1632. E. *Morton*.

L. *Muckall* contra his Tennents, *July* 13. 1621.

IN a Removing L. *Muckall* contra his Tennents, founded upon his Seasin following upon a Comprising from *Philorth*, first Heretor of the Lands. The *Lords* found, that a Right set by the L. of *Philorth* to one of the Defenders, before the Comprising, of a part of the Lands, for a certain Sum then payed to *Philorth*, for the which he set to the Excipient the saids Lands, to be instantly entered to, by the receiver of the Right, and to be bruiked ay and while the Sum were repayed, and which was clad with possession continually, yet could not defend against *Muckall* the Compriser, albeit it would have defended against *Philorth*, and therefore repelled the Allegiance proponed thereupon. Act. *Peebles*. Alt. *Baird*. *Gibson* Clerk. *vid.* 2. *Jul.* 1624. *Mitchelson* contra *Law. v.* 22 *January*, 1625. *Ronald* contra *Strang*.

Livingston contra *Galloway*, *July* 14. 1621.

IN an action of double Poynding betwixt *Livingston* and *Galloway*, wherein a Term was assigned to *Galloway* to improve *Livingstons* Comprising, after that the Witnesses and the Compriser were Examined in presence of the Lords, and that the Lords had found, that the foresaid Comprising produced by *Livingston* should make no Faith. The *Lords* incontinent, before the pronouncing of the Sentence against *Livingston*, as they had found before,

found

found that *Galloway* should not be suffered to insist or prosecute the foresaid Improbation, but Decerned *Livingston* to be answered, and obeyed, and committed *Galloway* to the Tolbooth of *Edinburgh*; the reason whereof was, because *Galloway* had upon an Extrajudicial Declaration made by the persons, Appryſers taken Instruments under the Subscription of a Notar, and Witnesses, bearing, That they never made any such Appryſing, which Instruments *Galloway* produced; whereby the *Lords* found that to be a suspicious and unallowable Diligence upon the Improvers part, and which tended to engage the Appryſers, by abiding at the Instrument, to Impugn the Compryſing: Which the *Lords* found to be of a dangerous consequence; and therefore Decerned, as is above-mentioned, that by this proceeding others should beware to do the like, and to seek such extrajudicial Confessions: And here it is to be Observed, that no subornation was tryed against *Galloway*, Act. *Livingston* younger. Alt. *Craig*. *Gibson* Clerk.

Town of *Linlithgow* contra the Fleshers of *Edinburgh November* 15. 1621.

IN the Suspension pursued at the instance of the Town of *Linlithgow*, contra the Fleshers of *Edinburgh*, for Suspending of the Charges raised by the Fleshers upon the Decreet of the Burrows, in their Convention; by the which Decreet the Town of *Linlithgow* was ordain'd to desist from taking of any Custom from the Fleshers for their Goods, driving, and passing either by their Town, within their Liberties, or through the Town it self; which was Impugned by the Town of *Linlithgow*, upon this reason, that they had a Charter granted by the King of their Liberties, Customs, and of small Customs expressly, and which was shortly Ratified in Parliament, and that conform thereto they had been in continual possession of taking of two pennies for ilk Ox, Cow, or Horse, and four pennies for ilk ten Sheep that was driven either through their Town, or by their Town, within their Liberties, albeit the samine was neither bought, nor sold, nor brought to their Mercat. The *Lords* found, that the Town of *Linlithgow* had no right to uplift such Customs, and that such Customs and Consuetudes ought not to be authorized, seing all the Kings Leidges have liberty to drive their Goods through the Kings publick Way and Streets, without any exaction of that nature, except it had been granted for a Publick Good of the Realm, such as Bridges, or such like common Works. Act. *Nicolson*. Alt. *Hope*. *Gibson* Clerk.

Sclaiter contra *Ross*, *November* 22. 1621.

ANdrew *Sclaiter* having charged *Richard Ross* Baillie of *Burntisland* by Letters of Caption, to take *John Murray*, who was Denounced Rebel at the said *Andrew* his instance, for not payment of certain Sums; upon the Baillies disobedience, the Baillie is pursued for payment of the Sums; where the *Lords* found that there was no necessity to Summond the Party Principal Debitor to this Pursuit, for his Interest, nor that there was any necessity of a second Charge against the Baillie before that Pursuit could be intended, seing the Rebel was instantly at the time of the first Charge presented and shown to the Baillie. But the *Lords* sustained the Pursuit, notwithstanding of both thir Allegiances. Act. *Mcgill*. Alt. *Lawtie*. *Gibson* Clerk. vid. *March* 16. 1622. *Forbes* contra B. *Aberdene*. *Item Jan.* 16. 1622. L. *Drum-Lanrig vid.* 12 *June*, 1630. *Mowat* contra T. of *Stirling*.

The L. *Muckal* contra *Stuart*, *Eodem die*.

IN a Pursuit by the L. *Muckall*, against *Robert Stuart*, for declarator of his Liferent of such Lands as he held of *Muckall*. The *Lords* found, that no

such general Summonds could be sustained in favours and at the instance of a Subject, albeit the King has that priviledge by his Crown; whereby it is presumed that all the Subjects holds their Lands of His *Majestie*, except it be verified and shown otherwise; whereas another Superior if he claime any thing of his Vassal he must qualifie him to be his Vassal, and be special therein: And so could not have that general Action sustained, and if the Superior lybelled his Summonds upon any special Lands, The *Lords* found it ought to be proven that he held the lands of him, and so aught to abide an continuation. *Act. Peebles* and *Baird.* Alt. *Hope.* *Gibson* Clerk.

Gaits contra His Parochioners, *Novemb.* 23. 1621.

IN an Action of Spuilzie of Viccarage Teinds Pursued at the instance of Mr. *Patrick Gaits* Minister at *Bunckle* and *Preston*, Titular of the Viccarage against the Heretors thereof, against which an exception was proponed upon an Tack, set by the preceeding Minister of some of the Vicarage Teinds, for the space of three years, during the Setters Lifetime; And for the space of three years after his decease. And for proving of this exception the Tack of this Tenor being produced. The *Lords* found it proved not the exception, for the years of the Spuilzie acclaimed, which were the two years Immediatly subsequent after the deceis of the Setter of the said Tack, becaus the first entrie of the Tack to the first three years thereof was appointed to be at *Lambmass*, and so forth to continue, during the space therein contained: And the Setter dieing before the *Lambmass*, which behoved to be the Tacks-mans entrie for these three years, set after the decease of the Setter; They found that the said Tack therefore could not be sustained to defend by vertue thereof against the Spuilzie of any year after the Setters decease, he dieing before the entrie to that three years Tack; which behoved to be ruled by the time of the entrie, first appointed to the first space of the Tack, notwithstanding that the Tacks-man was ever in possession, during the Setters Lifetime, from the Date thereof, who survived thereafter a great space. Act. *Oliphant.* Alt. *Lawtie.* *Hay* Clerk.

Earl of *Niddisdale* contra *Irving*, *November* 27. 1621.

IN an Action of Removing Pursued at the instance of the Earl of *Niddisdale*, contra *Irving*, founded upon an Heretable Right to the Lands of made to the said Earl, by his Umquhile Brother the Lord *Maxwel* for the time, wherein it was excepted by the Defender, that the Seasin of the Pursuer could give him no Action, becaus the Seasin was given by Warrand of the Charter and Precept, granted by the said Lord *Maxwel*, who after the Charter and Precept, and before the Seasin was Forfaulted; and so the Seasin behoved to fall, the Authors Right falling, and the King by the Forfaultry having become in the Right, which was an Impediment to the lawfulness of the Seasin. It was answered, That the Forfaultry was rescinded *ab initio*, which made the Seasin to convalesce; which depended upon the preceeding Charter and Precept. The *Lords* repelled the Exception, in respect of the Reply of Rescission of Forfaultry and found, That there needed no other Warrand to that Seasin, nor no new Seasin after the Forfaultry; but that the said Seasin taken by vertue of the said Precept was sufficient, notwithstanding the interveening Forfaultry, in respect of the Rescission thereof as said is. Act. *Hope* and *Cuninghame.* Alter *Nicolson* and *Oliphant.* *Gibson* Clerk. *Vid. Decemb.* 3. 1623. *Harris: July* 25. 1623. E. *Niddisdale.*

L. *Grein-*

L. *Greinock* contra *November* 28. 1621.

IT was found be the *Lords* in an Action of Suspension, betwixt the Laird of *Greinock*, and That the Commissars could not be proper Judges to an Action of transferring of an Contract in the Person of the Heir of the Contracter, albeit the Contract it self was Registrat in the Commissars Books conform to an Clause of the Contract, whereby the Parties consented to the Registration thereof in their Books, and therefore in that Suspension sumarly, The *Lords* found the Decreit of transferring given by the saids Commissars null, as not proper to their Jurisdiction, albeit the Contract was Registrat in their Books. Act. *Lautie* Alt. *Vid. January* 18. 1628. *Naismith.* contra *Ruthven*, *March* 17. 1627. *Irvine* contra *Young.*

Lo. Bargenie. contra *Stuart.* *December* 6. 1621.

IN a Removing Pursued be the Lord *Bargenie*, against *Josias Stuart*, who was one of the pursuers Curators, for Removing from the House of *Bargenie*, wherein an exception being proponed by the Laird of *Dundas*, who was admitted for his interest therein, founded upon an Tack unexpyred off that House, Set to him by the Pursuer with consent of his Curators, and possession in the Tacks-mans person, by Vertue whereof, and that *Iosias* bruiked be the Tacks-mans Tollerance. The *Lords* found, That the Tack could not hinder the Pursuer to Remove that person who was once his Curator, albeit it was alledged by the Tacks-man, That he had his Tollerance, and that the Tack secluded the pursuer to Remove any person, during the space thereof, or until it was Lawfully taken away; And therefore Repelled that exception founded upon that Tack clad with possession. Act. *Nicolson* and *Stuart*, Alt. *Hope* and *Neilson. Scot* Clerk. *Vid. March* 6. 1623. *Stevenson* contra *Stevenson.*

Clerk contra L. *Balgony.* *Decemb.* 7. 1621.

THe L. *Balgony*, being pursued at the instance of one *Clerk*, as Heir to his Father; And for instructing of him to be Heir, there was an service produced, against the which it was alledged for the Laird of *Balgony*, by Mr. *Andrew Aytoun* his Procurator, That the same was null, being an service purchast be the Defender who was at that time Minor, and as yet, and then having Curators, without whose consent the service was deduced. And therefore it could not verifie him to be Heir. The *Lords* Repelled the alleadgeance, albeit it was offered instantly to be proven, in respect of the service standing, but prejudice to reduce the same, *Prout de jure.* Act. *Baird*, Alt. *Aytoun. Vid. Feb.* 16. 1627. *Simpson.*

Hamilton contra *Sinclar*, *Decemb.* 11. 1621.

William Hamilton sometimes of *Samuelstoun*, having given his Band to *Sinclar* his Mother, for payment of an certain yearlie dutie to her, so soon as he gets possession of the Teinds of *Swintoun*; whereupon he being pursu'd for payment thereof to her, Compears and excepts, that the Band is null, because it wanted a Date *viz.* Day, Moneth and Year. And therefore could not produce any effectual Action. The *Lords* Repelled the alledgance, because the Pursuer offered to prove by the witnesses insert, the Date and time of the Subscrybing thereof; And that the Bond oblidgeth the Defender to make payment, how soon he became in possession of the Teinds, whereas the pursuer offered to prove in his Summonds, that the Defender became in possession thereof, before the years acclaimed from him by the pursuer in that pursuit. Act. Alt. *Hay* Clerk.

L. *Lag*, contra the Parochioners of *Lynton*, *Decemb.* 12. 1621.

THe Laird of *Lag* being Tacks-man of the Teinds of the parochion of *Lynton*, pursues against some of the Parochioners an Action of wrongous Intromission with the Teinds of the Crop, 1619. And spulzie of diverse other years thereafter. Itwas alledged for the Defenders, that the Action could not be sustained at his instance, for the Crop 1619. Because he had no Tack standing of that year, and so he wanting an Title, which might give him Right to that years Teinds, he could not pursue the Defenders for their Intromission therewith; It was replyed, that albeit he had no present Tack standing that year, Yet seing he was kindly Tacks-man many years before, by vertue whereof he was possessor of the Teinds, and had received duties thereof from the same defender, albeit his Tack was expyred an year or two, preceeding this year contraverted, yet he bruiking *Per tacitam relocationem*, and having renewed his Tack again in *Anno.* 1620. And having payed his old Tack dutie for that same year contraverted to the Titular, who opponed not against his right, neither troubled the Defenders for that years Teinds acclaimed either by Inhibition or any other deed, which might distress the Excipient, they therefore could not quarrel the pursuers Right nor interrupt his possession and tacit Relocation, having no right in his own person, which could purge his Intromission, or liberat him of the saids Teinds that year Lybelled. The *Lords* found the exception Relevant, and found that the pursuer could not have action, for the Teinds of that year, whereof there was no Tack, nor Title standing then in his own person: And that the Renovation of his Tack thereafter, nor tacit relocation of the preceeding Teind, interveening betwixt the expyring of the old Tack, and acquiring of the New, and paying to the Titular the old Tack dutie of that year questioned, could not be an sufficient Title to sustain the Pursuers action against the Defenders. Act. *Belshes* & *Cuninghame*. Alt. *Lawtie*. *Gibson* Clerk. *Vid. July* 26. 1626. *Russel*. Where possession is sustained to infer spulzie.

M'math, contra *Nisbet*, *Decemb* 14. 1621.

William M'math Burges of *Edinburgh*, having Compriſed Umquhile *James Nisbets* Liferent of his Lands in *Restalridge*, Pursu'd his Wife and others, for the Mails and Duties of the saids Lands of the Crop 1621. Wherein the *Lords* sustained the Action for that whole years Dutie, and profites of that Land, which it was worth, and would have payed if it had been set for Farm, albeit the said *James Nisbet* died before the term of *Martinmass* in that year whereof the Dutie was acclaimed, and notwithstanding that an Creditor of the said *James Nisbets* compeared *viz.* Mr. *William Forbes*, who alledged, that the half of the duties could only belong to *James Nisbet*, and so consequently no more could pertain to the Compriser of his life-rent which alledgance was repelled, and the Pursuit sustained for the whole years duty, seing the Land was not set out for Farm, but was laboured in manſing with the said *James Nisbets* own Goods, who lived until after the *Whitsunday* that year acclaimed; Likeas for that same reason the *Lords* sustained the Pursuit for the whole years dutie, albeit the Summonds was raised before the Term of *Martinmass*, and so before the legal Terms of Payment. Act. Alt. *Learmonth*. *Scot* Clerk.

L. *Falldownside* contra L. *Bennerside*, *eodem die.*

Faldounside having Compriſed L. *Bennerside's* Lands, pursues a Removing against him upon his Seasin following thereupon, who compeared, and al-

alleadged that the Pursuer had past from that Compriſing, in ſo far as for the ſame ſums for the which that Compryſing was deduced, whereupon the Purſuit was founded, and for other ſums joyned thereto, the Purſuer had *de novo* Compriſed the ſame Lands, and taken Seaſin thereupon, whereby the firſt Compriſing was in effect paſt from and ceaſed. The *Lords* Repelled that alledgance, and found, that notwithſtanding of the laſt Compriſing, which comprehended alſo the ſums of the firſt Compriſing, the firſt was not taken away, but that the Purſuer might uſe the ſame, and purſue thereupon. Act. *Belſhes.* Alt. *Stuart*, *Gibſon*, Clerk. *vid. January ult.* 1623. La. *Dowhill.*

Halyday contra *eodem die.*

IN an Action purſued by *Halyday* againſt for payment of certain ſums and Goods pertaining to the Defunct, unto the Purſuer, as the Executor *dative*, decerned *ad omiſſa*, and having Licenſe to purſue therefore. The *Lords* found, that there ought to be a Teſtament of the omitted Goods acclaimed firſt Confirmed before the purſuit could be ſuſtained, and would not find Proceſs upon the Licence, to purſue an Action for Goods omitted out of the principal Confirmed Teſtament, albeit they ſuſtained purſuits at the inſtance of Executors, decerned in principal Teſtaments, upon licence to purſue before Confirmation of the principal Teſtament. Act. *Belſhes.* Alt. *Henderſon. Gibſon*, Clerk. *vid. January* 21. 1624. L. *Carnouſie.*

E. *Wintoun* contra *eodem die.*

IN a Declarator of Eſcheat, purſued at the Earl of *Wintoun*'s inſtance, againſt wherein it was alledged that the Horning was null, ſeing the party Denounced, the time of the Denounciation dwelt within the Regality, and he not Denounced at the Head-burgh of the Regality. The *Lords* repelled that nullity againſt the Horning ſtanding, and would not admit the ſame in that Judgment, conſiſting *in facto*, and which could not be inſtantly verified, to ſtay the Declarator; neither would in that Judgment find it neceſſary to aſtrict the Purſuer to prove, that the Rebel dwelt without the Regality, in fortification of his Horning, but prejudice to the party to reduce the Horning upon that nullity, *prout de jure.* Act. *Hope.* Alt. *Gibſon*, Clerk. *vid. July* 25. 1628. *Stirling* contra *Panther. November* 9. 1632. *Montgomry.*

Smith contra *Wood*, *December* 20. 1621.

IN an Action betwixt *Smith* Burges of *Edinburgh* againſt *Wood*, wherein *Smith* Charging the party perſonally for ſums of Money adebted to him, the other excepting that *Smith* had Compriſed the Debitors Land for that ſame ſum, whereupon he had taken Seaſin, and thereby alledged that the perſonal execution ought to ceaſe. The *Lords* found, that the Creditor might have recourſe to his perſonal execution, notwithſtanding of the Compriſing and Seaſin, ſeing the Compriſer offered to renounce the Compriſing, and make Reſignation of the Lands Compriſed *rebus integris*, he having no intromiſſion further, nor profit of the Money, which the *Lords* found he might lawfully do, notwithſtanding of the Seaſin. Act. Alt. *Hay*, Clerk. *vid. penult January* 1628. *Meldrum* contra L. *Cluny. v. January* 22. 1631. L. *Cloverhill.*

L. *Barnbarrow* contra L. of *Ile*, *December* 21. 1621.

B*Arnbarrow* purſues Removing upon a Compriſing from the Laird of *Clerie*, againſt the Laird of *Ile* and his Tennents, for removing from the Compriſed Lands; *Ile* excepts that he is Heretably Infeft and Confirmed long be-

fore the Compriſing, and by vertue thereof in poſſeſſion. The Purſuer Replyes, That that Infeſtment cannot defend him, becauſe he was denuded thereof in favours of the *Duke of Lennox*, who thereupon was infeft. Likeas the Duke was Denuded in favours of *Culriah*, and he Infeft, and which *Culriah* concurred, being perſonally preſent in this purſuit with the Purſuer. It was Duplyed, That his concurſe could not ſuſtain this Purſuit upon a Warning, not made at the Concurrers inſtance, but upon a Right of Compriſing, which was not compatible with the concurrers Heretable Right, ſpecially ſeing if he were Purſuer, he would exclude him, by alledging that he could not be in a better eſtate, nor the Duke his Author, who if he were Purſuer, could not remove the Excipient, ſeing at the time when the Defender reſigned the Lands in his favours, by his Bond he obliged himſelf not to remove him while he were payed of 3000 merks, adebted to him by the Laird of *Clerie*, which is not yet payed. It was anſwered by the Purſuer, That that was a perſonal Bond which could not oblige *Culriah*, if he were Purſuer, far leſs can meet this purſuit, aſſiſted by his concurſe. The *Lords* Repelled the exception, in reſpect of the Reply and of the Concurſe: Which Concurſe they ſuſtained to make the ſame Warning at the inſtance of the Compriſer to ſubſiſt without any reſpect that the Compriſer had only warned, or that the Duke had given his Bond to the Excipient, which they found would not bind *Culriah*, and ſo the Concurſe of the Heretor was ſuſtained to make the Warning and Removing uſed at another parties inſtance, not having, or alledging right from the Concurrer, to ſubſiſt. Act. Alt. *Lawtie. Gibſon*, Clerk. *vid. January* 26. 2622. *Turnbull* contra *Blanairne.*

Hamilton contra *Durhame, eodem die.*

MR. *Patrick Hamilton* purſues Sir *James Durhame* of *Duntarvie*, who was his Debitor in ſums of Money, and *Francis Stuart* who was debitor to Sir *James* to hear the ſaid *Francis* Decerned to pay and make forthcoming the ſums adebted by him to Sir *James*, conform to his Arreſtment, for ſatisfaction of that Debt owing by Sir *James*, wherein Sir *James* being debarred by Horning, *Francis* compeared, and alledged that the Purſuer was ſatisfied by Sir *James* himſelf, of that Debt owing to him, and ſo he could not purſue *Francis* to make the ſame forthcoming. The Purſuer anſwered, That that was not competent to him to alledge, who was Debitor to Sir *James*, who not proponing the ſame, he had no intereſt. The *Lords* Repelled the allegiance, and found that the ſame was not competent to be proponed by *Francis Stuart*, who purged not the Debt owing by himſelf to Sir *James*. Act. *Primroſe*. Alt. *Scot* Clerk.

L. *Falldounſide* contra *Bennerſyde*, *January* 11. 1622.

IN an Action of Removing, purſued by the L. of *Falldounſide* againſt *Bennerſyde*, It was alledged by one of the Defenders, that the Warning was null, becauſe at the time of the Warning, and of before, the party Warned was out of the Countrey, and ſo ought to have been Warned upon ſixty dayes: And albeit by a Warrand of the Lords Letters, (as uſe is in ſuch caſes) he was warned at the Mercat-Croſs of the Head-Burgh, and at the Peer and Shore of *Leith* upon ſixty dayes, yet that could not be ſufficient to ſuſtain the Warning, ſeing the execution thereof made at the Paroch Kirk, was only upon fourty dayes, as againſt a party within the Countrey; whereas if it had been lawfully execute, it ought to have been alſo upon ſixty dayes. The *Lords* Repelled the alledgance, and found the Warning ſufficient, being execute at the Mercat-Croſs, and Shore

Shore of *Leith* upon sixty dayes, and at the Paroch-Kirk upon fourty dayes, and found that it needed not to be execute at the Paroch-Kirk upon sixty dayes, albeit he was out of the Countrey, in respect he was warned at the Mercat-Cross upon sixty dayes, as said is. Act. *Hope* and *Belshes*. Alter *Stuart. Gibson* Clerk. *Vid. June* 4. 1631. *Christie*

The Lady *Kincaid* contra *January* 12. 1622.

THe Lady *Kincaid* Liferenter of the Lands of , in which Lands she was Infeft by her umquhile Husband, and from the possession whereof she was debarred by the Liferent-right, standing in the person of her Mother in Law, who bruiked the same by her Liferent thereof, so long as she lived after the decease of the said Mother in Law, she Charges by a *Summons* two persons who had entered to the Possession of the Houses and Lands Liferented, as said is, immediatly after the said old Ladie Liferenters Decease, to compear to hear them decerned to remove; this Summons is raised summarly upon these foresaid Grounds and Narrative, without any Warning, or precept of Removing, as is ordinary in other Actions of Removing: Against which it was alledged by the Defenders, That that Order could not be sustained so summarly upon a Charge and *Summons*, without a preceeding Warning made before the ordinary Term of *Whitsunday*, seing Actions which had the like summar proceeding, were only where Fiars enters to the possession of Lands, after the Liferenters Decease, when the Fee is affected with that Liferent, and cannot be drawn to the case of this Pursuers Right. The *Lords* repelled the allegiance, and sustained the Order without any Warning; and found, that one Liferenter after the decease of another anterior Liferenter had the same priviledge which a Fiar would have had. Act. *Hamilton*. Alter *Mcgill. Scot*, Clerk. *Vid. February* 16. 1628. *Thomson*.

L. *Drumlanrig* contra L. *Cashogil*, *January* 16. 1622.

IN a Declarator of Escheat pursued by the L. *Drumlanrig* against *Cashogil*, proceeding upon an Horning executed against him, for not obeying of Charges given to him, as Baillie of *Mortoun*, to take some Rebels. The *Lords* found, conform to the old Practick, that that Horning, and all Hornings of that nature, could not be sustained, except there had been a preceeding Charge executed against the Defender upon an other Horning, whereby the Baillie was Charged to take the Rebels, by the disobedience whereof, the Letters of Horning whereupon he was Denounced, ought to be directed, and therefore ordained the prior Letters, and Charges to be produced, without production whereof, the *Lords* found the Horning null. Act. *Hope*. Alter *King. Scot*, Clerk. *vid. July* 11. 1628. *Dumbar* contra M*ckie*. *November* 22. 1621. *Sclaiter*. *Item March* 16. 1622. *Forbes* contra B. *Aberdeen*.

Hamilton contra *Sinclar*, *January* 17. 1622.

SIR *George Hamilton* pursues the Lord *Sinclar* as Heir to his Father, who by Contract obliged himself to Infeft the Lady *Sinclar*, from whom Sir *George* had his Right, (whereupon that pursuit was moved) in a certain Annualrent out of his Lands, to make payment of that Annualrent, *personali actione*, whereto the Defender alledging, that the party Contracter was not obliged thereto, but only to give Infeftment, which she ought first to crave, and if she were therein distressed, so that the Infeftment could not be profitable to her, then she might seek personal execution as accords; but she first ought to seek the Implement of the Contract according to the Tenor thereof. The *Lords* found, that the party being obliged to give Infeftment, he was obliged *hoc ipso* to make payment of that whereof he was obliged to give Infeftment, and

therefore sustained the personal Action for payment. Act. Alter *Aiton* and *Nairn.* Hay Clerk. *vid. February* 26. 1622. *Inter eosdem. December* 23. 1630. *Ogilvie* contra L. *Ogilvie.*

L. *Silvertounhill* contra his Father. *January* 18. 1622.

THe young Laird of *Silvertounhill*, gave in this day a Supplication to the Lords, craving Inhibition against his Father, upon this ground, *viz.* There was a Contract of Marriage made betwixt umquhile President *Provand* and his Daughter *Elizabeth Baillie* on the one part, and the old Laird of *Silvertounhill*, and his Son on the other part, for a Marriage to have been made betwixt the two young folks; wherein it was appointed that young *Silvertounhill*, and *Elizabeth Baillie* his Spouse should be Infeft in Conjunct-fee, and the Bairns procreat betwixt them Heretably in the Lands, mentioned in the Contract, and bearing a Clause for Interditing of the foresaid young Laird to his Father and Good-father, and now after the decease of the Father in Law, and of the old Laird *Silvertounhill*, who were Contracters; this young Laird *Silvertounhil*, who is eldest Son and appearant Heir, begotten of that Marriage, gave in his Supplication, craving Inhibition against his Father, that he should not Annailzie any of the Lands contained in the Contract, wherein he and his Wife were appointed to be Infeft in Conjunct-fee, and the Bairns Heretably as said is, alledging that Clause to be expresly introduced in his favours, and so that he might competently seek Inhibition thereupon: Which was refused by the *Lords* to be granted, seing the parties Contracters, who might lawfully seek Execution upon the Contract, were all dead except the Supplicants own Father, against whom it was sought, and that the Supplicant could not seek it upon that Clause. *John Gilmour* writt this Bill.

Methvin contra an appearand Heir, *eodem die.*

ITem, this same day a Supplication being given in by *Methvin*, who was Cautioner for a Tutor *dative*, craving Inhibition against the appearand Heir of him who was bound for his relief of that Cautionry: The Bill was also refused by the *Lords*, because they thought according to the form which is in use, that the same could not be granted against an appearand Heir, as no Action, Charge, or Execution could be used, or sought against him, *hoc nomine*, as appearand Heir until such time as he might be Constitute such a person as might represent the Defunct, who was bound, or charged to enter Heir to him. *John Gilmor* also writt this Bill. *Vid. July* 5. 1623. *Kirkwood.*

Cowan contra *Murray*, *January* 26. 1622.

JOhn *Cowan* Burgess of *Stirling*, having pursued *Murray* eldest Son, and lawfully Charged to enter Heir to his Father; and also in this same Process having pursued another Son of a second Marriage, who was provided to certain Lands by the Father, for payment of a Debt owing by the Father to the Pursuer. The *Lords* found no Process against the eldest Son of the second Marriage, until the general Heir were first discust; albeit it was answered, that the said general Heir was called in this same Process, and that the Pursuer could not discuss him any further, seing he being conveened in the Process, as charged to enter Heir, he compeared, and offered to renounce to be Heir, which the Pursuer alledged ought to make his Process to be sustained against the Son of the second Marriage, he being conveened as Heir of that Marriage, upon the Provision conceived in favours of the Heirs of the second Marriage. Which the *Lords* would not sustain, untill the general Heir were fully discust, as said is. Act. Alter. *Nairn.* Hay, Clerk. *vid. July* 13. 1626. *Thomas Edgar.*

Her-

Herring contra *Ramsay*, *eodem die.*

CAptain *Herring* having pursued *George Ramsay* for Spuilzieing of certain Goods; the Defender compeared and alledged, the Action was prescribed; for albeit that the Pursuer alledged, that the Prescription had no place, seing the Summons and Action was intented and executed, and called *debito tempore*, within the space of three years after committing of the Fact; Yet the Defender Duplyed, That the Prescription behoved to have place, by reason that since the intending and the wakening of the Cause, there had interveened more than the space of three years, during the which, nothing was done, neither by Calling of the Action, nor by wakening of the same, by the whole space of three years together, which rendered the matter in the like estate, as if the Summons had not been raised in due time. The Pursuer answered, That the Summons being once raised in due time, the Prescription ran not thereafter, albeit the Cause had sleeped longer than three years. The *Lords* Repelled the allegiance, and found the Prescription run not in this Cause, which was intented, and called in due time, albeit it lay over thereafter three years, seing the Defender being once Summoned, he might have compelled the Pursuer to have insisted by his ordinar course of Process, in seeking Protestation, and charging him to insist, with Certification. Act. Alter *Oliphant. Gibson*, Clerk. *November* 27. 1630. L. *Lawder.* *March* 4. 1630. L. *Leslie.*

The like done *February* 11. 1637. betwixt *Mckie* and L. *Lag*, *Gibson* Clerk thereto. Where a Spuilzie once intended *debito tempore*, albeit lying over after the Citation upon the second summons, ten years together, without calling or wakening. Yet the *Lords* found the Action did not prescribe, but sustained it as a Spuilzie, to give *juramentum in litem*, for they found, once an interruption made, was sufficient to interrupt for ever; But the *Lords* declared, that after probation, when the parties Oath should be taken, they would tax the same as they found requisite, and reserved the modification of the quantities to themselves.

Trumble contra L. *Blanerne*. *eodem die*,

TRumble pursuing the L. *Blanerne* to remove from certain Lands; he alledged that he ought not to remove from such a particular priviledge of Pasturage and winning of Fail in the Commontie of the saids Lands, because the Pursuers Right proceeded from one *Atchison*, which *Atchison* his Author in the Contract of Alienation, whereby *Atchison* first acquired right to the Lands, reserved the priviledge foresaid to the L. *Blanerne* and his Heirs Heretably, and so the said Servitude behoved to affect the Land. It was Replyed, That the Pursuer being singular Successor, and no such condition being either in his own right, or his Authors Charter or Seasin, but only alledged to be in a Clause of the Contract, it could not affect the Ground, specially against the singular Successor, and the most that the Excipient could benefit himself, was by his recourse of Warrandice against that party, and his Heirs, Granters of that priviledge, neither could that priviledge defend the Excipient, he having no real right to the Land by vertue thereof, not being Infeft, nor Seased, and not being of that quality, which without Charter or Seasin, could be Transmitted in the person of the Defender, and his Heirs and Successors Heretably. The *Lords* found the Allegiance relevant, albeit the Defender had no Seasin, seing it was a Servitude, which being insert in the Contract, which was the ground of the Pursuers Authors Charter, and Heretable Right, it affected the Ground therewith, in whose hands soever the Right of the Land came; and therefore they decerned

the Defender to remove from the Land, with reservation, and but prejudice of the liberty of the Priviledge and Servitude above-mentioned, to be retained and bruiked by him. Act. Alter *Lawtie*, Clerk. *vid. December* 21. 1621. L. *Barnbarrow.*

The Stewart of the *Merse* contra L. *Westnisbet*, *January* 30. 1622.

IN an Action of Double Poynding, pursued at the instance of one *Johnston* in the *Merse*, who for Blood committed by him, was Convicted by the Laird of *Westnisbet*, Heretor, and Vassal to the King, of the Lands within the which the Blood was drawn, and the Fact committed, albeit he was no Baron: And also the said *Johnston* was Convict by the Earl of *Humes* Baillie, as Stewart of the *Merse*, for the same Blood. The *Lords* in respect of the prevention of the Kings Vassal, preferred him in the right of the Unlaw, to the Stewart, albeit the Vassals, *viz*. *Westnisbets* Decreet was quarrelled by the party upon thir Nullities, *viz.* That the Laird of *Westnisbet* was no Baron, and so could not have right to Blood-wits. 2°. That it was given only upon probation of the Committers confession, testified by the Clerks assertion, whose affirmation could not make Faith without the parties Subscription, in a matter of an hundred pounds, contained in that Sentence, being for two Blood-wits, or that he might be bound by that assertion of that Clerk, being a Clerk of a base Court, who had not the power of any common Nottar, and that any Nottars assertion would not bind a party in such a sum. 3°. That the pursuit being Criminal, should have been determined by an Assise, and could not have proceeded upon any other Probation. 4°. That thereby no satisfaction was appointed to the Party hurt. All which Reasons and Allegiances, the *Lords* Repelled, and sustained the Decreet given by the King's Vassal; but they modified ilk an of the two Unlaws to twenty seven pounds. Act. *Belshes.* Alter *Henderson-Hay*, Clerk. *Vid. December* 17. 1629. L. *Lamingtoun*, *February* 13. 1634. Baillie of *Melross*, *March* 16. 1622. L. *Buchan*, *March* 20. 1623. *Fithie.*

Paterson and his Spouse, contra *Hope* and *Dowgal* and their Spouses, *Eodem die.*

John Paterson Burgess of *Edinburgh* and his Spouse *Galbraith* being Executors decerned to umquhile Mother to the said *Galbraith*, who died untested, pursues *Henry Hope* and *John Dowgal* and their Spouses, who were Executors confirmed to umquhile *Thomas Galbraith*, which *Thomas* was Brother to the said *Patersons* wife, and son to the said their Mother, for payment and deliverance to them as Executors to the said her Mother of the particular Goods libelled, pertaining to her the time of her decease, and which were intrometted with by the said *Thomas* her son after her decease, and therefore that his Executors should be decerned to restore the same to them as being Executors decerned to her as said is. The Defenders alledged, That the saids Goods pertained to *Thomas*, and consequently to them his Executors, seing the Mother in her own Lifetime made Assignation to the said *Thomas* her son of her whole Goods, with Provision that the said *Thomas* should pay her Debts; according thereto *Thomas* having intrometted in his own Lifetime, and having satisfied her Creditors, the said Assignation as it would have defended *Thomas* himself, if he had been pursued in his own Lifetime, far more must it defend these Excipients his Executors. No Action being moved against him, whereby that Assignation was quarrelled while he lived, he surviving divers years thereafter. The *Lords* found this exception relevant to elide this Pursuit, albeit it was Replyed by the Pursuer, that the Assignation, which was the ground of the Defenders Exception and Right, could not be found valid to have defended the Assigney, far less his Executors, seing it was an Assignation made by

by the Woman *in articulo mortis*, ſhe having deceaſt within two days after the making thereof, and wherby *libera teſtandi facultas tollebatur & erat aſſignatio omnium bonorum*; which being ſuſtained, would tend to a dangerous preparative, both to defraud Creditors, and to defraud the Bairns of their Portions, and to prejudge their Executors, and alſo the Quot, and that there needed never any Teſtament to be made thereafter; and if the *Lords* ſhould incline to ſuſtain that Aſſignation, in reſpect of that Clauſe inſert therein, ordaining her Debitors to be payed, and that it might appear thereby that none were prejudged, ſeing there was no Bairns *unforisfamiliat* the time of the Womans deceaſe, and albeit there had been any, yet the Bairns by their Mother would fall no Portion natural. It was Anſwered, That the like Proviſions might be inſert in all Aſſignations hereafter, if ſuch Writs ſhould be ſuſtained as lawful, and the moſt that the Aſſignation could be found good for, behoved only to be for ſo much of the Defuncts Means, as might correſpond to ſatisfie the Debts owing by her, and which were ſatisfied by the Aſſigney; but for the overplus thereof, the ſame behoved of all reaſon to pertain to the Executors of the Woman, who could never have prejudged her Executors by that Deed, albeit the Bairns could have no *legitim* by her, yet they were her Executors of the Law, whom ſhe could not hurt by that Aſſignation, made at that time of her death, and in manner foreſaid; Notwithſtanding of all which Anſwers, the *Lords* ſuſtained the Aſſignation, and exception founded thereupon, for the whole Goods of the Defunct, albeit the ſame exceeded the whole Debts owing by her, in reſpect alſo the Defender offered to prove that the Aſſigney had payed in his Lifetime an part of the Tocher owing by the Womans Cedent to the ſame Purſuers, whereby it was inferred that it was a tacite Ratification of the Aſſignation done by the Purſuers Mother. Actor *Peebles*, *Henderſon* and *Daling*. Alter *Hope*. *Gibſon* Clerk. Vid. 12 *July* 1626. L. *Craigie-Wallace*. vid. 4 *Feb.* 1623. *Guild* contra *Guild*.

Robertſon contra *Fleming*, *February* 1. 1622.

UMquhile *Robertſon* gave Infeftment of Liferent to *Fleming* his Spouſe, of an Tenement of Land, by the ſpace of 12 or 13 days before his deceaſe, which Right was craved to be reduced by *Robertſons* Heirs, upon this reaſon, *viz.* as done in *lecto ægritudinis*, the Husband being ſick of a Fever and Flux four or five days before the Infeftment, which continued to the time thereof, and continually to the time foreſaid of his deceaſe, he dying within ſo ſhort a time, *viz.* 12 days. Thereafter it was alledged by the Defender, that the Infeftment was but an Liferent given by the Husband to the Wife, who of the Law could not be prohibite to help his Relict upon his Death-bed. Attour it was offered to be proven, that at the time of the giving of the Infeftment, and divers days thereafter, the Husband was in that eſtate that he might have come out to the Kirk or Mercat, and that he lay not Bed-faſt, but ſat at Table, and eat and drank as at other times when he had Health, and his Sickneſs being a Flux, that reaſon could not take away the Excipients right. The *Lords* repelled the Allegiance, and found the reaſon relevant. Actor *Mowat*. Alter *Ruſſel*. *Scot* Clerk. Vid. *January* 7. 1624. *Schaw* contra *Gray*. *Feb.* 24. 1624. *Donaldſon*. *July* 7. 1629. *Maxwell*.

Laird of *Craigie* contra his Vaſſals, *eodem die*.

IN an Action of Improbation purſued by the Laird of *Craigie Wallace* againſt his Vaſſals. The *Lords* found, that where the Purſuers of ſuch Actions calls for the Evidents made by their Authors and Predeceſſors, particularly condeſcended upon in the Summons, that the Purſuers muſt prove

that theſe perſons his Authors, if they be ſtrangers to him, were Infeft themſelves in theſe Lands; for the Evidents whereof, the Defenders are conveened, and alſo that the Purſuer his Right proceeding be a lawful progreſs from theſe Authors, who were firſt Infeft, and if the Purſuers Predeceſſors be ſuch perſons to whom he may ſucceed in Blood *in linea recta*, that likewiſe he muſt prove that he is lawfully ſerved Heir by progreſs to all theſe Predeceſſors, whoſe Deeds done by them are called for by that Improbation, without which the *Lords* found the Action could not be ſuſtained. *Act: Hope.* Alt: *Nicolſon* and *Cuningham*. *Gibſon* Clerk. Vid. *July* 14. 1626. Sir *John Hamilton.*

Smith contra *Elleis*; *Eodem die.*

JOhn *Smith* and *Janet Elleis*, conveens the Executors of Umquhile *Patrick Elleis* Burges of *Edinburgh*, to make Payment to them of the Fourth part of the Goods, contained in the ſaid *Patricks* confirm'd Teſtament, by vertue of an Clauſe contain'd in the ſaid *John Smiths* Contract of Marriage, whereby it is provided that the ſaid *Janet*, ſhall be an Bairn of the ſaid *Patricks* Houſe at the time of his deceaſe, and that ſhe ſhould have an Portion off the ſaid *Patricks* free Gear, with the reſt of his Bairns, providing that the reſt were foriſfamiliat and provided likewiſe by their Father; againſt which Action it was alledged, that Abſolvitor aught to be granted, ſeing according to the Clauſe of the Contract, the Purſuer could not Subſume that the reſt of *Patrick Elleis* Bairns were foriſfamiliat, before his deceaſe, ſeing that there is two of them yet un-married, and ſo not foris-familiat: And where the Purſuer Lybelled and Reply'd that the whole Bairns were provided, to as much Lands and Goods by the Father, before his deceaſe, as ſurmount the ſum given to the Purſuers in Tocher: It was Anſwer'd by the defender, that that Proviſion was not foris-familiating, as the proviſion of the Contract requires in expreſs Terms, which can receive no other interpretation, but in caſe they had been Married; neither was that proviſion given by the Father to the ſaids Bairns in ſatisfaction of all portion which they might acclaim by their Fathers deceaſe. The *Lords* repelled the alledgance, and found the Summons Relevant, albeit the reſt of the Bairns were not foris-familiat by Marriage, when the Father died; and found the proviſion Lybell'd, made by the Father to the reſt of his Bairns to as great a quantitie as the purſuers Tocher being proven, to be als ſufficient as if they had been foris-familiat, and therefore ſuſtained the Purſuers Action. *Gibſon*, Clerk. *vid. Feb.* 8. 1622. *Finlaſon Feb.* 9. 1631. *Corſan.*

Grier contra *Maxwel Feb.* 6. 1622.

GIlbert *Grier* Heretor of the Miln of *Gleniſland*, and thirle Multures thereof, Purſues *Homer Maxwel* Heretor of the Lands of *Speedoch*, which were aſtricted to the ſaid Miln, for abſtracting of the Thirle Multures thereof, Againſt which the defender alledged that he was Infeft in the ſaids Lands, *cum molendinis & multuris*; by *John* his Author, likeas his ſaid Author was likewiſe Infeft in the ſame Lands, *cum molendinis & multuris* before the Purſuers Right; This exception being admitted to the Defenders Probation, He uſed incident againſt certain Perſons, for having of his ſaids Authors evidents, which Incident the Lords would not ſuſtain, for the writs made to his Author, becauſe it was preſumed that the ſame behoved to be in the Defenders own hands, he having acquired his Right from that ſame Author, who is probably preſumed to have delivered all the evidents made to him of theſe Lands, the time when the Excipient acquired the right thereof from him; And therefore the Incident for his Authors Writs was refuſed, likeas the ſame Incident was refuſed againſt

againſt certain perſons conveened therein, who was out of the countrey, ſeing they were not Summoned upon threeſcore Dayes, albeit the uſer of the Incident alledged, that he behoved to Summon them neceſſarly to that day which was aſſigned by the Act of Litiſ-conteſtation, and could not chooſe another day, ſo that it was not his default, ſeing there was not a Term of ſixty Dayes aſſigned by the Act, and it behoved that the day of Compearance in the Act, and in the Incident ſhould conveen together, which was repelled by the *Lords*, and the Incident refuſed. Actor, *Lautie*. Alt. *Cuningham*. *Gibſon* Clerk. *Vid.* 19. *July* 1625. *Hay*. *March* 31. 1626. E. *Kinghorn*. *Feb.* 28. 1629. *Muir* contra his Tennents.

Lord *Pitſligo* contra L. *Muckall*, *Eodem die*.

THe Lord *Pitſligo* having Wodſet ſome Lands to the Laird of *Muckall*, redeemable upon a certain Sum, and during the not Redemption *Muckall* having ſet an Back-tack of the Lands to *Pitſligo* for payment of a certain yearly Silver-duty, which anſwered to the Annualrent of the principal Sum, to be payed yearly at the Terms appointed by the Back-tack; whereupon *Pitſligo* being charged to make payment of the Silver-duty for the term of *Martinmaſs* 1621, the Party ſuſpended upon the late Act of Parliament, which prohibites any Annualrent to be taken before the Term of payment of the principal Sum were firſt come; and therefore ſeing the Party could not charge for the principal Sum at that *Martinmaſs*, it being only appointed to be payed at the *Whitſunday* thereafter, he could not ſeek the Duty of the Back-tack till the Term of Payment of the principal Sum were come, albeit the ſaid Back-tack conferred the payment of the yearly Duty to the Terms preceeding the Term of payment of the principal Sum, in reſpect of the ſaid Act of Parliament, and that the Back-tack albeit it appointed the Duty to be payed yearly, as for the Duties of the Lands, yet it was only in effect the Annualrent for lent Money, which ought not to receive any other conſtruction. The *Lords* found not the reaſon relevant, but ordained the payment to be made at the Terms appointed by the Back-tack, albeit the ſame preceeded the terms at which the Party was Debitor for the Principal Sum, ſeing the Duty appointed by the Back-tack came in place of the Farm of the Land, the Right whereof remained in the perſon of the Setter of the Back-tack foreſaid, ſo long as the Wodſet ſtood, and ſo he having ſet the Lands for that Duty, he might ask payment of the Duties of theſe Lands at the Terms appointed therefore by the ſaid Back-tack. Actor *Hope* and *Nicolſon*, Alter *Peebles* and *Baird*. *Gibſon* Clerk.

L. *Muckall* contra *Innes*, *February* 8. 1622.

THe L. *Muckall* having charged one *Innes* to enter Heir upon 40 days, as uſe is, purſues him thereupon for payment of his Fathers Debt. The Defender compearing alledged, that that Summons could not be ſufficient, becauſe the ſame was raiſed before the 40 days of the Charge was expired, and therefore no Proceſs ought to be granted thereupon, ſeing it was not lawful to raiſe the Summons till after all the days were expired, after which he might conveniently intent his Summons, and no ſooner. This Alledgiance was repelled by the *Lords*, and the Action ſuſtained upon that Summons and Charge; for the *Lords* found, that albeit the principal Letters and Summons were raiſed and dated before the 40 days of the Charge were run, yet ſeing it was not executed, nor the Party ſummoned therewith till the 40 days were compleatly expired, albeit the Letters were raiſed before the days were paſt, that the ſame was ſufficient. Actor *Baird*. Alter *Hope*.

Clerk. Vid. *Decemb.* 17. 1623. E. *Galloway.* Item *Feb.* 5. 1624. *Wood* contra *Waddel*, and *June* 19. 1628. *M'culloch* contra *Marſhel.*

Finlaſon contra *Veitch, Eodem die.*

Janet Finlaſon, Daughter to Umquhile *Adam Finlaſon*, being Married upon one *Veitch*; the ſaid *Adam* oblig'd himſelf by Contract, that the ſaid *Janet*, notwithſtanding of her Foris-familiation, ſhould have her Bairns part of Gear and Portion Natural, with the remanent of his Bairns the time of his Deceaſe, and of *Elizabeth Wallace* his Spouſe, whereupon the Bairns of the ſaid Umquhile *Janet Finlaſon*, being Decerned Executors to their Mother, who died after the Deceaſe of *Adam* her Father, purſues the ſaid *Adams* Executors for payment of her Portion Natural belonging to her, as one of the Defuncts Bairns, and alſo for her part of the Deads Third, who died Un-teſtat, and conſequently claiming her part of the ſaid Defuncts Third to be divided betwixt her and the reſt of the Defuncts Bairns. Againſt which the Defender alledg'd, That the foreſaid Clauſe of the Contract gave her right only to the Portion Natural, and could not be extended in her favours for any of the Deads part, which behoved totally to pertain to the Bairns *unforis-familiat*, the time of the Fathers Deceaſe, who of the Law only were his Executors, ſeing the Purſuer *Janet* could not be his Executrix of the Law, being then *foris-familiat*, as ſaid is, at his deceaſe. And as to the Proviſion of the Contract, he alledged, that by the expreſs words thereof above-written, the Purſuer had right allanerly to the Portion Natural, which excluded her from all benefite of the Dead's part. The Purſuer Replyed, that ſhe behoved to have both a Portion Natural, and a part of the Deads Third, ſeing the Contract appoints, that ſhe ſhould have a Bairns-part, and Portion Natural with the reſt of the Bairns, notwithſtanding of her foris-familiation; which Clauſe gave as much right to the Purſuer of the Defuncts Goods, as the reſt of the Bairns had, and as if ſhe had been in *familia*. And it is true, that the reſt of the Bairns had both a Portion Natural, and a part of the Defuncts Third, he dying Unteſtat; *Ergo*, &c. The *Lords* repelled the Allegiance, and found that the Clauſe of the Contract gave the Purſuer right both to the Portion Natural, and to a part of the Deads Third, in reſpect of the Clauſe in the ſaid Contract, which appointed her to have her Bairns-part, and Portion Natural with the reſt of the Bairns, as if ſhe had not been *foris-familiat*, which the *Lords* found comprehended the Defuncts Third, as well as the Portion Natural. Sicklike the *Lords* found, that the ſame Parties were due to the Purſuer, at the Deceaſe of the Father, albeit the Clauſe of the Contract was conceived in thir terms, *viz.* That the ſaid *Janet* ſhould have the ſaid Bairns part at the deceaſe of her Father and Mother, and that the Defender alledged that the Purſuer could not ſeek the ſame while the Mother were dead, who was then living: Which alledgiance the *Lords* repelled, and found the ſame, as ſaid is, due to be payed at the Fathers Deceaſe, ſeing it could not hang *in pendente* in the mean time, while the Mother died, and that the Mother, nor no other had right thereto, being that part of the Gear which pertained to the Defunct of his Third, and the Bairns *Legittim.* Actor *Hope.* Alter *Henriſon* and *Aiton. Gibſon* Clerk. *Vid.* 1. *Febr.* 1622. *Janet Elleis.* 9 *Feb.* 1631. *Corſan.*

Mortimer contra *Scrimzeour, Feb.* 9. 1622.

IN an Action Purſued by *Will. Mortimer* Burgeſs of *Edinb.* who was Donatar to the Eſcheat goods of one *Ja. Watſon*, and whereupon he had obtained Decreet of general Declarator againſt one *Scrimzeour*, for making them forthcoming to the Donatar. The *Lords* found the Poynding execute at *Scrimzeours* inſtance

inſtance, by vertue whereof he would have purged his Intromiſſion with the ſaid Rebels Goods Libelled, to be null, becauſe the ſame was execute upon a Sunday, which the *Lords* found not to be a competent day for ſuch Acts, and therefore repelled the alledgiance founded upon the ſaid Poynding. *Hay* Clerk. *Vid.* 24. *Feb.* 1627. E. *Caſſils. vid.* 4. *July.* 1628. Mr. *Rachelet* contra Sir *L. Lauder.*

Denniſton contra *Young, February* 12. 1622.

IN an Action betwixt *Alexander Denniſton* and *Young*, Daughter to umquhile Mr. *George Young*, it being controverted if an alledgiance founded upon the Act of Sederunt made againſt Diſpoſitions made by Bankrupts, and Ratified in Parliament, within the compaſs whereof *Young* alledged that *Denniſtons* Right fell, ſeing it was an Aſſignation made to him by a confident and conjunct perſon, without any juſt, true, or neceſſary cauſe preceeding, as the Act expreſſeth, if that part of the Alledgiance required any Probation, *viz.* bearing, that it was made without any true or neceſſary cauſe for which the ſame was made, ſeing *Denniſton* alledged that the Act appointed that that ſhould be proven, either by Writ, or the Parties Oath. The *Lords* found, that the ſame was not neceſſary to be proven, ſeing it was a negative, which proved it ſelf, and that the Party in whoſe favours the Writ was granted, ought to qualifie and alledge the juſt and neceſſary cauſe preceeding, for the which the ſame was made to him by the Bankrupt to the confident perſon, otherwiſe that the ſame could not be ſuſtained againſt a true Creditor. Actor *Stewart.* Alter *Mowat.* *Gibſon* Clerk. *Vid:* 22 *June* 1642: *Nisbet* contra *Foulis.* 22 *January* 1630: L. *Hop-pringle.* 24 *Nov:* 1626: *Glen.* 21 *Feb:* 1623: *Craw* contra *Irving.* 23 *March* 1624: *Duff* contra *Kellie:* 29 *January* 1629: *Auld* contra *Smith.* 28 *January* 1625: *Livingſton.* 13 *June* 1628. *Purves.*

Bain contra *Feb.* 14: 1622.

IN an Action purſued at the inſtance of one *Bain* as Executor Dative, decerned to certain omitted Sums, left out of the Defuncts principal confirmed Teſtament. The *Lords* found, that the Teſtament *ad omiſſa,* which was the Purſuers title and ground of his Action, to be null, becauſe the Executors confirmed in the principal Teſtament were not cited to the Teſtament Dative *ad omiſſa* ſpecified by the Edict, and that the ſaid Teſtament made no mention that they were warned thereto; And therefore the *Lords* found no Proceſs in that Action upon the Teſtament Dative *ad omiſſa.* *Gibſon* Clerk. *Vid:* 28 *June* 1623: *Anthony White.*

Stevin contra *Govan, eodem die.*

IN an Action of Regiſtration purſued by *Beſſie Stevin,* Relict of umquhile *John Govan*, for Regiſtration of an Obligation made to her and her umquhile Spouſe; and which ſhe craved to be regiſtrat to that effect only that ſhe might have Execution and Payment of the one half of the Sum contained in the Obligation, which pertained to her as Relict, there being no Bairns betwixt her and her Husband. The *Lords* found, that ſhe as Relict could not ſeek Regiſtration, ſeing the Sums contained in the Bond would come under her Husbands Teſtament, and ſo pertained to his Executors, who had only that Action competent in their perſons for regiſtration of the Bond, and againſt whom ſhe had her Action for her half of that Sum, and if they, who of the Law would be Executors, or who were nominate, refuſed to confirm the Defunct's Teſtament, the Relict in that caſe might mean her ſelf to the Commiſſars, and obtain her ſelf confirmed Executor Dative. *Vid.* 11 *March* 1623: *Dowgall. vid.* 7 *July* 1625: *Falconer.* 12 *Feb:* 1623: *Wallace.*

L. *Steel* contra *Feb:* 23: 1622.

L. *Steel* as Sub-tacksman, having pursued an Action of Spuilzie of Teinds against certain persons, who compeared, and alledged that he ought to produce, before Proceſs could be granted at his instance, his Authors Tack for his Title, to instruct that he had Right to the Teinds, without which the Sub-tack was not a sufficient Title to sustain the Pursuit. The *Lords* repelled the Alledgiance, and sustained the Pursuit upon the Sub-tack, the Sub-tacksman proving *cum proceſſu*, and producing where the Setter of the Sub-tack had a Tack standing for the years libelled, and found no neceſſity to produce the said principal Tack for the Pursuers Title, seing that the Pursuer also offered to prove, that the Defender had acknowledged the Pursuers Sub-tack, by paying the Duty for the saids Teinds to him divers years preceeding the years acclaimed. *Gibson* Clerk.

Carnegy contra his Tennent, *Eodem die.*

IN an Action pursued by Sir *John Carnegie* of *Ethie*, against a Tennent who was Farmer of some of his Lands, without any Tack or Rental, to hear him decerned to find Caution for payment of the Farms owing to him of certain bygone years, and in time coming, during his occupation, or else to remove from the Lands, so that the Pursuer might enter thereto without peril of Ejection, conform to the order observed in such cases, which are pursued against persons having Tacks of Lands; which Cause being called, and the Defender not compearing, the Clerk of the Proceſs advised with the Lords, if they would sustain the Proceſs against a Farmer sicklike as they used to do against a Tacksman. The *Lords* sustained the Action, albeit the Defender was a naked Farmer, and therefore decerned in that case, albeit it was reasoned by some of the Lords, that this preparative tended to take away all Actions of Removing, and that thereby none would use a warning against their Tennents. Actor *Aiton.* Alter absens. *Gibson* Clerk. 16 *Decemb:* 1628: *Straerlie* contra *Lundie.*

E. of *Kinghorn* contra L. of *Inchstuir*, *Feb.* 26. 1622.

IN an Action of Improbation pursued by the E. of *Kinghorn*, as Heretably Infeft in the Lands of *Inchstuir*, against the L. of *Inchstuir*, for Improbation of the Evidents made to him, or any of his Predeceſſors. The Defender compearand, produced a Right anterior to the Right which the Pursuer produced for his Title in that Proceſs, and alledged that he could not be compelled to produce any more, seing thereby he eleided the Pursuers Right; which being found sufficient by the Lords. The Pursuer Replyed, That his Predeceſſors to whom he succeeded, had anterior Rights, before the Defenders Right produced, and condeſcended upon the eldest Right, which any of his Predeceſſors had of these Lands; Which the *Lords* sustained by way of Reply to be proven, albeit it was not instantly produced; and found that the Pursuer needed not to produce his eldest Right instantly, but that it might be proven *cum proceſſu*, and that the Defender should not be urged to produce while it were proven; but being proven, they found that the Defender should produce all other Writs made to his Predeceſſors of these Lands, or else a Right made to them anterior to that eldest Right condeſcended on, and offered to be proven by the Pursuers Reply. Actor *Hope.* Alter *Nicolson.* *Gibson* Clerk. *Vid:* 14 *July*, 1626. Sir *John Hamilton.*

Hamilton contra Lo: *Sinclar*, *Eodem die.*

IN an Action pursued by Sir *George Hamilton* against the Lo. *Sinclar*, for payment of 100 pounds yearly of Annualrent, conditionat, and obleist to be payed

payed to the Lady *Sinclar* by the umquhile Lo: *Sinclar* her Husband, conform to the Contract made thereupon; for the which the said Sir *George* pursued as Assigney to the Lady; It being alledged by the Defender, that the Action upon that Contract was prescribed, conform to the 28 *Act* of the 5 *Parl.* K. *Ja.* the 3. seing the same appoints all Obligations, which are not pursued within 40 years after the date thereof, to prescribe; and this Contract Libelled, not being urged within 40 years after the date thereof, behoved to prescribe. The *Lords* repelled this alledgiance, and found that the Contract Libelled, being a Contract of Marriage, whereupon Marriage followed, prescribed not, nor came under that Act. Actor Alter *Aiton* and *Nairn*. *Hay* Clerk. *Vid:* 27: *No:* 1630. L: *Lawder*, contrà *Colmsly*.

L. *Clunie* contra L. *Boquhen*, *March* 7. 1622.

L. *Clunie* as Baillie-Depute to the Marques of *Huntlie*, who was Heretable Baillie to the B. of *Aberdene*, obtains Decreet against the L. *Boquhen* before his own Depute, and Letters conform before the Lords, for some Unlaws for his not compearance to answer in the Head-Courts holden by the L. *Clunie*: The which being Suspended by the L. *Boquhen*, upon this reason, *viz.* that he being constitute Baillie-Depute by the Marques, who was Principal Baillie within such particular bounds within his Deputries therein specially design'd, within which bounds the Lands for which he was unlawed lyes, and that long before the Deputry given to *Cluny*: In the which anterior Deputry of the Suspenders, there was a special place designed to him to hold his Courts, therefore by his Bailliary-Depute he was exeemed from suit and compearance, to answer for the Lands contained in the said Deputrie, either at Head-Courts, or any other Courts; especially against another Baillie-Depute, who was constitute posterior to himself. The *Lords* found this reason of Suspension relevant, and suspended the Sentences thereby: Albeit it was answered for *Clunie*, that his Deputry was universal through the whole bounds of the Bishoprick, and that the Suspenders Bailliary was only particular within some certain bounds, which could not be extended to exeem him from compearance for his own Lands in the Head-Courts, but gave him only the liberty to hold common Courts against his own Tennents, possessors of his Lands within the bounds of his Deputry, and against the other Vassals of this Bishoprick within his saids bounds, and that the said Deputry could not be further extended: Which alledgiance was repelled by the *Lords*, in respect the question was betwixt two Baillie-Deputes, and not betwixt the Lord or his principal Baillie and the Depute. Actor *Baird*. Alter *Lawtie*. *Gibson* Clerk. *Vid.* 3 *March*, 1630. Lo: *Lorn*. *Vid:* 22 *July*, 1631. *Dowglas*.

La: *Corsinday* contra Tennents, *March* 8. 1622.

THe Goodwife of *Corsinday* being Infeft by her Husband in Liferent of some Lands to be holden of her Husband after his decease, pursues the Tennents for Mails and Duties thereof, wherein compeared for their interest *James Garioch* of *Kinstair*, who was Infeft in the same Lands upon a Comprising, deduced at his instance against the Laird of *Corsinday* her Husband, for a Debt aughtand by him, and who by vertue of the said Comprysing and Infeftment was in possession of the saids Lands seven years before *Corsindays* decease, and in respect thereof alledged, that the Lady could not be found to have right to claim the saids Duties, especially seing that the Excipients Infeftment was publick, granted to be holden of the Superior, and clad with possession, and the Pursuers Seasin was but base, given by the Husband *stante Matrimonio*. Which alledgiance the *Lords* repelled,

and preferred the Pursuer upon her Seasin, because the same was given in recompence of some other Lands wherein she was Infeft, by vertue of her Contract of Marriage; which Lands so provided to her, she had renounced to her Husband, so that the Lands Libelled being given to her in place of others Lands, whereof she had renounced her Right, they behoved to be in that same case as if she had been provided thereto, and Infeft therein by vertue of her Contract of Marriage, and therefore sustained her Right thereof, albeit base, and preferred the same to the publick Right and Possession of the Compriſers, albeit the Compriſer Duplyed, that he ought to have been preferred in that possessory judgment, by reason foresaid of his publick Infeftment, holden of the Superior, clad with possession, and of the baseness of the Pursuers Seasin, which he alledged could not be found to depend upon a Contract of Marriage, as coming in place of the Lands therein contained, which she had renounced, seing that Renounciation was her own voluntar deed, and that none of the Leidges could have been prejudged by that base Seasin, or put in *malafide* to have bought the Lands from her Husband, far less could it hurt a Compriſer *ex causa necessaria*; which alledgiance was repelled, as said is. Likeas, before the proponing of this exception, the Tennents alledging that they were Tennents to the said Appryser, to whom they had payed their Mailles, and he not being Summoned, no Process ought to be granted: This was also repelled, and therefore he compeared for his interest *ut supra*. Actor *Lawtie*, Alt: *Gibson* Clerk.

L: *Barns* contra the Feuars of *Craill*, *March* 9. 1622.

THe L: *Barns* having of old Feued certain of his Lands for payment yearly of some Bolls of Victual to be payed with the mett and measure of the common Firlot of *Craill*, and thereupon the Feuers being charged to make payment, whereupon controversie being betwixt the Parties anent the measure, in respect of the Act of Parliament, discharging all Metts except the Prick-mett, which the Feuers alledged to be more than that Mett of *Craill*, with the which their Bolls were of old payed. The *Lords* found that that Mett of *Craill* mentioned in the Feu, should be conferred and broken with the Prick-mett, and according as the same was less or more than the said Prick-mett was established by Statute, that the Bolls should be payed now according to the quantity which the said Firlot of *Craill* held, but with the measure of the Prick-firlot now allowed, to the which the same should be proportionat; so that what difference is betwixt the measure appointed in the Feu and the Firlot established by Parliament, whether it be more or less, it shall be conformed and proportionat to the said Prick-mett, without loss to any of the Parties; And therefore the *Lords* gave commission to some persons in *Craill*, to try the difference of the Metts foresaid, and to break the Measures truly, and thereafter to make report to the Lords. Act. *Nicolson* & *Ker*, Alter *Hope*. *Gibson* Clerk.

Fairlie contra *Fairlie*, *March* 12. 1622.

IN the Action betwixt Sir *William Fairlie* and umquhile *John Fairlies* Creditors, and *John Fairlies* Relict and his Executors. The *Lords* found that the Defuncts Executor was holden to imploy Money upon Annualrent for the Liferent of the Relict, which the Defunct was oblidged to do, albeit it was alledged both by the Executor, and also by the Defuncts other Creditors, to whom the Defunct was owing moveable Debts, that that deed was a fact of that nature, which was not prestable by an Executor, but by the Heir; and that the Executor of the Defunct, and the Defuncts Moveables should be *primo loco* answerable for payment of the Defuncts Moveable Debts; Which

was

was repelled by the *Lords:* for it were not equitable, that becauſe the Party provided himſelf of an Heretable form of Bond, that for that Clauſe he ſhould be in worſe eſtate than they who had only moveable Bonds. Actor *Peebles* & *Nicolſon.* Alter *Hope.* *Scot* Clerk. *Vid: penult June,* 1624: *Haliday* contra *Edgar,* 11 *December* 1632: *Shaw. December* 7. 1627, *Perteous.*

Marſhal contra *Blair, Eodem die.*

IN an Action betwixt *Marſhal* and *Blair,* where *Blair* being acted in the Baillie-Court-Books of *Cannongate,* for keeping of the Kings peace, under pain of 40 Pounds, whereupon Action of Contravention being purſued before the Baillies of the *Cannongate,* for contraveening of the Act. This Action being deſired to be Advocat upon this reaſon, that no inferiour Judge ought to cognoſce in contraventions, and that ſuch Actions was not proper to their Judicatory; but that the Lords of Seſſion was only competent Judges to all ſuch Cauſes. The *Lords* remitted the matter to the Baillies of the *Cannongate,* and found that inferiour Judges might proceed in contraventions of ſuch ſmall importance, eſpecially where the ſame depends upon Acts of Lawborrows, found in their own Courts, and where the pain is ſo little. Actor *Megill.* Alter *Oliphant.* *Scot* Clerk.

L: *Drumlanrig*'s Son contra *Maxwel* of *Hills, March* 14. 1622.

IN an Action purſued by the L: *Drumlanrig*'s Son againſt *Edward Maxwel* of *Hills,* for Reduction of a Tack ſett to the ſaid *Edward* by the Provoſt of *Lincludin,* of the Parſonage Teinds of *Lothrinton,* upon this reaſon, becauſe the ſame was not ſett by the Provoſt with conſent and ſubſcription of the moſt part of the Convent. The *Lords* repelled that alledgiance, whereby the Defenders Procurators would have maintained the Tack, alledging the ſame to be ſufficient, being ſubſcribed by the Provoſt and the juſt equal half of the Chapter, ſeing they affirmed that the half of the Chapter and the Provoſt's ſelf, was the moſt part of the Colledge, and their Tack being ſo ſubſcribed, ought to be found lawful. Which alledgiance the *Lords* repelled, becauſe they found the Provoſt to be a ſetter in all ſuch caſes, and that the Chapter were but conſenters, whoſe conſents to the Provoſts deeds behoved to be teſtified by the ſubſcription of the moſt part of the Convent, and not of the juſt half only; in the which computation, the Provoſt who was the direct ſetter, could not be repute nor counted to make up one of the number of the Chapter, added to the half of the Chapter, thereby to make up the moſt part of the Chapter, ſeing the conſent of the Chapter behoved to be teſtified by the Subſcription of the moſt part, beſide the principal ſetter.

In this ſame Proceſs alſo the *Lords* found, that it was neither requiſite nor neceſſar to the validity of the ſaid Tack, to have the conſent of ſuch perſons of the Chapter who were Minors, not paſt the age of 14 years at the time of ſetting of the Tack, albeit they were then 13 years of age and 9 moneths, nor yet of ſuch perſons of the Chapter, who at the ſetting of the Tack were out of the Countrey, and diverſe years before the ſetting thereof, and diverſe years thereafter, and therefore found, that albeit the Minors and abſents out of the Countrey were of the Chapter, and bruiked their own parts of the Patrimony of that Benefice properly belonging to them; yet Tacks and Deeds done of that Benefice, required not neceſſarly to the validity thereof the conſent of ſuch perſons, ſo that whatever Tack, or other Right of that Benefice wanting the conſent of ſo many of the Minors, or abſents, as would make up the moſt part of the Chapter, were not null of the Law; but de-

clared, if the Rights or Tacks had the consent of the most part of them, who were remanent of the Chapter, by and attour the Minors and absents, who were repute not as of the number of the Chapter to this effect, *viz.* for the necessity of their consents, that the same should not be quarrelled upon nullity, for want of consent of the most part of the Chapter. Likeas the *Lords* declared, that if all the Chapter were Minors, that there was no necessity of any of their consents. Actor *Hope* & *Nicolson*. Alter *Peebles*, *Stuart* & *Cunninghame*. *Gibson* Clerk. *Vid*: 24 *June*, 1623: betwixt the same Parties, and 9 *Novemb:* 1624. Mr: *Thomas Hope*.

L: *Boquhen* contra L: *Clunie*, *March* 16. 1622.

IN an Action of Suspension pursued by L: *Boquhen* contra L: *Clunie*, for suspending of a Decreet given by L: *Clunie* against *Boquhen*, for his Unlaws for absence from the Head-Courts holden by *Clunie*, as Baillie-Depute of the Bishoprick of *Aberdene*, which Unlaws for absence from ilk Court, were decerned each Unlaw to 40 pounds. The *Lords* found that the Unlaw for absence from any Barons Head-Court, should not exceed 10 pounds; therefore modified ilk Unlaw in that Sentence to 10 pounds. Actor *Baird*. Alter *Lawtie*. *Gibson* Clerk. *Vid:* 7 *Feb:* 1624: *Sandilands*. penult *Jan:* 1622: L: *Westnisbet*.

Forbes contra Baillies of *Aberdene*, *Eodem die*.

ONe *Forbes* in *Montross* having charged one of the Baillies of *Aberdene* to take Burgess in *Aberdene* Debitor to the Charger; the Baillie suspended upon this reason, that he could not be compelled to take him upon the first Charge, but that the Party behoved to use and raise new Letters, and a second Charge, before there were necessity to the Baillie to take the Party. 2°. That the Baillie could not be compelled to take the Party Debitor, seing he was Brother to the Baillie, against whom he could not be compelled to use such rigorous execution of Caption, seing there was other three Baillies within the Town, whom he might more conveniently charge to execute that Caption. The *Lords* found none of the reasons relevant, and therefore sustained the Charge against that same Baillie. Actor Alter *Gibson* Clerk. *Vid:* 22 *Novemb:* 1621. *Sklaiter* contra Baillie of *Burnt-Island*, 16 *January* 1622: L: *Drumlanrig*.

M'math contra *Home*, *Eodem die*.

SIr *George Home* was pursued by *William* M'*math*, to make payment to him of a certain Sum of Money alledged borrowed by the said Sir *George* from *Janet Nisbet*, Spouse to the said *William* M'*math*, whereupon he had given to her his Obligation, and which the said *William* alledged he had intimat to the said Sir *George*, while he remained Debitor in the said Sum; and this Summons was referred to Sir *George* his Oath, who granted the borrowing of the sum from the said Pursuers Wife, and that he had given her his Obligation thereupon, and that *William* M'*math* acquainted him therewith, and desired him to take order for the same before he had repayed the Sum; but he declared, that thereafter he had payed the Sum to the Pursuers Wife, to whom he was bound by his Bond, and retired his own Bond again out of her hands, *&c.* Which payment made to the Wife, the *Lords* sustained, and assoilzied the Defender from the Husbands pursuit. Actor Alter *Nicolson* younger. *Scot* Clerk. *Vid:* 17 *Novemb:* 1635: *Seaton* con: *Carnegie*.

The like was done 19 *July*, 1634. betwixt *Guthrie* Cook in *Edinburgh*, and *Betson* of *Cardin*. *Hay* Clerk. Where upon a Bond and Inhibition delivered by the Creditors Wife to the Debitor, who had payed a part of

of the Debt to the Wife, for the rendering the same to him, it was not sustained to free the Debitor at the Creditors hands, *viz.* The Husband who knew not of the delivery.

Lo. *Borthwick* contra L. *Gallowsheils*, *March* 23. 1622.

THE Lands of *Howlatstoun*, *Prestoun*, *Brock-house*, and some other Lands being united by the B. of *St. Andrews* Charter, Superior of the whole Lands, and of the Lands of *Halltree*, and erected in a Tennentry in favours of the Lord *Borthwick*, called the Tennentry of *Halltree*; thereafter the Good-man of *Gallowsheills* Compriſes the Lands of *Halltree*, with Annexes and Connexes, Parts, Pendicles, and Pertinents, and some other of the same Lands particularly which are annexed to *Halltree* by the said Charter of Union. In the which Comprising the Lands of *Howlatstoun*, and some others of the united Lands are omitted, and not specially Compriſed: After *Gallowsheills* resigns the Compriſed Lands in favours of the Lord *Borthwick*, who is Infeft therein by the Bishop, upon that Resignation, conform to the words foresaid of the said Comprising; an other thereafter takes a Gift of the Non-entry of the Lands of *Howlatstoun*, which were severally Compriſed, whereupon Declarator being sought. The *Lords* found this exception relevant to eleid the Non-entty, *viz.* that the Lord *Borthwick* was Infeft upon the Compriſers Resignation in the Lands of *Halltree*, with Annexes, Connexes, Parts, Pendicles, and Pertinents thereof; which Infeftment and Comprising of the Lands of *Halltree*, bearing that Clause of Annexes, Connexes, *&c.* The *Lords* found comprehended all the whole Lands which were before annexed by the Charter of Union of *Halltree* in a Tennentry, albeit that the Donatar to the Non-entry alledged that the Comprising and Charter following, whereupon the exception was founded, comprehended not the Tennentry, and that the Tennentry was not Compriſed, nor the whole Lands of the Tennentry, but only the Lands of *Halltree*, and not the whole Tennentry thereof, and of some special Lands of the Tennentry, which are specially Compriſed, and as much other Lands of that Tennentry omitted out of the Comprising, whereto the Comprising under that Clause of Annexes, *&c.* could only be extended; seing that Clause could only be interpreted, and extended to the pertinents of the special Lands enumerat in the Comprising, and the other Lands omitted out of the Comprising could not be drawn in under the same: notwithstanding of the which answer, the exception was sustained, and the *Lords* found that the Lands of *Halltree*, with the Annexes, *&c.* thereof being Compriſed, was all alike as if the Tennentry wholly had been Compriſed; and therefore found the Infeftment extended to the whole, and so purged the Non-entry of the Lands acclaimed, which were a part of the Tennentry. Actor *Belshes*. Alter *Oliphant*. *Gibson* Clerk. *Vid.* 16 *Jan.* 1623. Mr. *Hary Aitkine*, where this concerning Union was thereafter otherwayes decided by the Lords.

Ramsay contra E: *Rothes*. *Eodem die*.

MR. *Simon Ramsay* having Compriſed the Lands of *Corstoun* for the sum of 2500 Merks addebted to him by the L. of *Corstoun*, and having charged the Earl of *Rothes* Superior to Infeft him therein. The *Lords* found that the Superiour could not be compelled to Infeft the Compriſer, except the Compriſer payed first to the Superiour a years Duty of the Lands, albeit the Compriſer offered a years Annualrent of the Sum for the which he had Compriſed: Which the *Lords* found not sufficient, seing he had not Compriſed an Annualrent for his Principal Sum out of the

Lands, but that he had Comprised the Property of the Land. In the same Process, the *Lords* found that the Superiour could not be compelled to receive the Compriser, except that he shew that the person from whom he Comprised, or some of his Predecessors to whom he was appearand Heir was Infeft of before in these Lands, as Vassals to the Earl of *Rothes*, without which were proven, the Superiour could not be charged. Actor *Aiton*. Alter *Hay* Clerk. *Vid.* 21 *Decemb.* 1626. *Logan* contra Town of *Edinburgh*. 12 *March* 1629. *Colmsly*. Penult *March*, 1637. *Paterson* contra *Murray*.

Lo. *Leslie* contra L. of *Pitcaple*, *Eodem die*.

LO. *Leslie* having pursued the L. of *Pitcaple*, who held certain Lands of him by service of Ward and Relief, for payment of the Maills and Duties of the Lands of all years during the Ward; and sick-like, of all years during the Non-entry of the appearand Heir, after the expiring of the Ward. The *Lords* found, that the Superiour nor his Donatar could not have Action for the Maills and Duties of the Lands of any years during which the same was in Non-entry, before he obtained Decreet and Declarator finding the Lands to be in Non-entry, preceeding the which Declarator the Superiour could not have right to Maills and Duties of the Lands of any year preceeding the Declarator, but for the preceeding years he had only right to the Retour'd Duty, and no further, except alwayes the three Terms immediatly subsequent to the Ward; for the which three Terms allanerly, and no more, the Non-entry was found to be of the nature of the Ward, and that the Superiour might seek the Maills of the Lands for the three Terms, without a Declarator of Non-entry, sick-like as he might do during the time of the Ward, without any Declarator, but after the expiring of the three Terms the Non-entry ceased to be of the nature of the Ward, so that he could get no more but the Retour'd Duty before Declarator.

This same Cause being thereafter called again in presence of the *Lords*, and the Parties heard to Dispute at length therein. The *Lords de novo* found, as it is here noted, that before Declarator, the Superior not being in possession, nor his Donatar of the Lands, by vertue of the Ward, he could seek no more for the Non-entry, albeit subsequent to a Ward except the Retour'd Maill. Also they found, that the Retour of the whole Barony, whereof the Lands Libell'd was a part, served for the Lands fallen in Non-entry, to exclude any further to be sought for these Lands before Declarator, except the proportion of the Mail to which the whole Barony was Retoured, albeit these Lands were not specially Retoured *per se*. Actor *Hope* & *Aiton*. Alter *Peebles* & *Baird*. *Hay* Clerk. *Vid.* 5 *Feb.* 1623. *Mark Ker* contra *Scot*. *vid.* 19 *July*, 1631. E. *Kinghorn*.

Gordon contra L. *Gairlies*. *Eodem die*.

THe L. *Gairlies* having obtained Decreet against one *Gordon*, decerning to render unto him certain Rentall'd Teind-Bolls intromett with by the Defender after Inhibition, which interrupted the payment of the old Duty used to be payed therefore by the Defender, which being desired to be reduced by *Gordon*, upon this reason, *viz* that the L. *Gairlies* had received payment of the Kings Taxation imposed upon the same Teinds for this same year, of the which he had obtained Decreet, whereby the Pursuer had prejudged the Inhibition served for that year, so that the Defender could never be pursued for any greater Duty for the Teinds of that year, neither in Rental'd Bolls, nor otherways, but only for the old Duty accustomed to be payed by the Defender for the Teinds the years preceeding

ceeding the years controverted: In the which duty the sum payed for the Taxation ought to be allowed in the first end thereof *pro tanto*: Which reason the *Lords* found no ways relevant, but assoilzied therefrom in respect the Decreet was not given for spoliation of the Teinds, but only for payment of the Rental'd Bolls, which they found not to be of the nature of a Spuilzie, and allowed only the payment of the Taxation in the first end of the Rental'd Bolls decerned. Actor *Neilson*. Alter *Belshes*. *Gibson Clerk. Vid.* 13 *Feb.* 1627. E. *Linlithgow*. 22 *Feb.* 1628. Lo. *Londoun*.

Murray of *Lochmaban* contra *Scot* of *Harden*, *Eodem die*.

IN a Decreet Arbitral betwixt *Scot* of *Bonnitoun* and *Scot* of *Haining*; *Scot* of *Bonnitoun* and his Heirs are decerned to have three Chalders of Victual yearly and perpetually out of certain Lands pertaining to *Haining*, which being bruiked conform to the Decreet, and uplifted by *Bonnitoun*, and also by his Heir after his Decease, the Heir thereafter remaining year and day at the Horn, *John Murray* of *Lochmaban*, as Donatar to his Liferent, pursues for that yearly Duty during the Rebels Life-time; against which *Scot* of *Harden*, Donatar to the simple Escheat of this same Heir, alledged the same belonged to him by the simple Escheat, in respect the Decreet Arbitral fell under the simple Escheat; and albeit thereby the Victual was ordained to be payed to the Heir yearly thereafter perpetually, yet that could not cause it pertain to the Donatar to the Liferent, seing it was neither a Liferent-right to the said Heir, nor an Heretable Right, and had no holding, nor no lawful security perfected thereupon, without the which it could not fall under a Liferent-escheat, but behoved to pertain to him by vertue of his single Escheat acquired long before this Donatars Right: Which alledgiance the *Lords* repelled, and found no more fell under the simple Escheat but so many years bygone as were owing the time of the giving of the said single Gift, and that all the rest fell under the Liferent.

In this same Proces, the Relict of *Scot* of *Haining* having compeared and alledged that her Husband (out of whose Lands the foresaid yearly Duty of three Chalders Victual was appointed to be payed by the said Decreet-Arbitral) had by Charter and Seasin Infeft her in the saids Lands before the date of the said Decreet, during her Lifetime; so that the said Decreet being after her Right, and she not being a submitter nor consenter to the Decreet, the Donatar nor the Rebels self could have no Duty out of the foresaids Lands during her lifetime. This alledgiance the *Lords* repelled, because the Donatar offered to prove by Reply, that the Charter and Seasin was but base, given by the Husband to the Wife. Likeas *Scot* of *Bonnitoun* during his lifetime, and after his decease his Heir the Rebel, whose Liferent was craved, remained in possession, not only during the lifetime of the Relicts Husband, but also diverse years after his decease; the Relict doing no lawful deed to recover possession by vertue of her Right, nor quarrelling the Rebels possession, which she might have done after her Husbands decease, if her Right had been lawful; but suffering the Party to bruik the said Victual conform to the Decreet Arbitral, so that now she cannot obtrude that Right. Which Reply the *Lords* admitted to the Pursuers probation. Actor Alter *Scot*. *Gibson* Clerk. *Vid.* 8 *March*, 1622. Goodwife of *Corsinday*. *vid.* 22 *Novemb.* 1628. *Clappertoun*.

L. *Rosline* contra L. *Haltoun*, *June* 15. 1622.

L. *Rosline* pursues a Declarator of Liferent of the Lands of *Alderstoun*, against the L. of *Haltoun*, wherein *Haltoun* having proponed an ex-

ception of Improbation against the Horning, whereupon the Declarator was sought, and being admitted, and the Cause holden as concluded upon that Improbation, after the conclusion, and before the advising of the Proces, the Pursuer produced certain Articles of approbation of the Hornings, which he desired to be received and discussed by the *Lords*: Which the *Lords* found ought not to be received, nor taken in after the Improbation was concluded, and sicklike refused to take the improvers Oath upon the verity of the Hornings, which was desired by the Pursuer, in respect that the Proces was concluded by receipt of the Depositions of the Witnesses insert, after which it was not time to ask the Parties Oath. Actor *Hope*, & *Furlie*. Alter *Nicolson* & *Lermonth*. *Gibson* Clerk.

Gordon of *Glunie*, contra *M'culloch*, or *M'clellan*, *Eodem die*.

IN an Action of Spuilzie pursued at the instance of *Gordon* of *Glunie*, against one *M'culloch*, or *M'clellan*, wherein after Litis-contestation made, admitting the Summons to probation, in absence of the Defender. The Defender compeared, and desired to be restored to propone a peremptor exception, which he offered to verifie instantly, there being no Witnesses produced, neither of before, nor at that Term any ready to be produced, nor no other probation deduced by the Pursuer: Which the *Lords* would not admit, nor suffer the Defender to compear to propone any Defence, albeit the Pursuer had adduced no probation upon the Libel, because of the state of the Proces, which stood not at the first Term of Probation, but that it was at the second Term of further diligence, after the which the order and course of the Proces could not be interrupted as after the first Term, by receiving of any exception; and so found that in the like cases, after the second Term, the Defender should not be heard to propone any defence against the Action, which was competent before Litis-contestation. Actor *Belshes*. Alter *Nicolson*. *Gibson* Clerk. *Nota*, This same was found in the like case *in terminis*, betwixt the Sheriff of *Forrest* and the Earl of *Nithsdale*, *Feb.* 2. 1625. *Nicolson* being for the Pursuer, *Hope* for the Defender. *Gibson* Clerk.

Sir *James Erskine*, contra *Stevin*, *June* 25. 1622.

IN an Action pursued by Sir *James Erskine* contra *Stevin*, for removing from the Lands of *Tillibody*, the Defender alledged, that he should not remove, because he bruiked by tollerance of *John Stevin*, who had a Tack of the Lands Libelled, during all the days of his lifetime, set to him by the Pursuers Author, and which *John Stevin* Tacksman is not warned. To which it was answered by the Pursuer, that it was not necessary to warn the alledged Tacksman, except the Defender would alledge that he were in life, seing the Tack being set only for his lifetime, he ought to alledge and prove that he was living the time of the Warning, and so much the rather he ought to alledge the same, seing it is so long since the Tack was sett, *viz.* in *Anno* 1559. and the Tacksman is out of the Countrey, and hath been so thir many years, and since hath never returned. It was Duplyed, That he had no necessity to prove that he was on life the time of the Warning, because he being once on life, *præsumitur de vita nisi probetur mors*. The *Lords* found no necessity to the Defender to prove that the Tacksman was on life, seing the presumption of the Law proved the same, (he being once living) and therefore found the exception relevant without that astriction, except the Pursuer would alledge that he were dead at the time of the Warning *positivè*. Actor *Hope* & *Rollo*. Alter *Kaip*. *Gibson* Clerk.

Lo. *Berthwicks*

Lo. *Borthwicks* Bairns contra their Father, *Eodem die.*

IN an Action of Declarator pursued at the instance of the Lord *Borthwicks* Bairns, as Donatars to their Fathers Escheat. The *Lords* found the same to be null, seing it was alledged that it was simulat, taken to the Rebels behove, in so far as it was taken to the behove of his Bairns, he remaining Rebel, which was alike as if it had been taken to himselt; which alledgiance the *Lords* found relevant: but here the Bairns were *in potestate patria unforisfamiliat. Nicolson* for the Pursuer. *Vid:* 20 *March*, 1623. *Dalgarno* con: E: *Marshal*, where the contrair seems to be done, except that the Donatar was not *in potestate.*

Inglis contra L. *Capringtoun*, *June* 26. 1622.

IN an Action of Declarator of the L: *Ochiltries* Escheat and Liferent, pursued at the instance of *John Inglis*, who was Donatar thereto. The L: of *Capringtoun*, who was a contrair Donatar, compeared, and alledged, that the Gift could not produce an Action to the Pursuer; for albeit his name was insert therein, yet seing he offered to prove, that it was taken, and purchased, and exped the Seals, upon the Lo. *Ochiltries* own Charges, and Expences, and upon his Moyen, it was alike as if his own name had been insert therein, and must be compted as done to his own behove, and so could not be sustained against him, who was a contrair Donatar, and also a Creditor, especially seing the Gift never became the Pursuers Evident, till very lately, before this pursuit, but ever since the date thereof remained in the Lord *Ochiltries* own custody, and in *Gilbert Neilson* his Agents hands. It was Answered, that seing *John Inglis*'s name was insert therein, who now used the same to his own behove, and that the said *John* was a true Creditor to the Lo. *Ochiltrie* at the time of the said obtaining of the Gift, albeit the Lo: *Ochiltrie* had exped the Gift upon his own Charges to the Pursuers behove, to whom he was Debitor then truly, thereby to give him some security for his Debt, that ought not to prejudge the Pursuer in his Right; for the Debitor might as lawfully procure that Gift to his Creditor for his satisfaction, as he might otherways have lawfully payed him: And further, he offered to prove that the Donatars self payed for a part of the expences in expeding of the Gift, so that the Defender could not be heard to quarrel the same upon the foresaid alledgiance. The *Lords* found the alledgiance relevant, notwithstanding the answer made thereto. Actor *Lawtie* & *Nicolson* younger, Alter *Hope* & *Neilson*. *Gibson* Clerk. *Vid. March* 11. 1624. *William Dowglass.* *

Bishop of *Aberdene*, contra his Tennents, and the Lo: *Drumlanrig's* Son. Penult *June*, 1622.

IN a double Poynding pursued at the instance of some of the Tennents of the Bishop-lands of *Aberdene*, against the L. of *Corss* being then Bishop, on the one part, and *Dowglass*, Son to the Lo. *Drumlanrig* on the other part, either of them claiming to the Duties of the Lands, the Bishop as a part of the Patrimony of the Bishoprick, and the other claiming the same by vertue of a Pension given by Umquhile Bishop of *Aberdene*, to *Dowglass* of *Tosts*, during his lifetime, containing power to transferr the same to an Assigney at any time in his lifetime, and upon the which Pension Decreet conform was obtained by the Pensioner, and continual possession had by him of the Duties contraverted, which were Assigned in the Pension for satisfaction of the same; which Pensioner conform to the clause and power of the Pension had transferred and assigned the samine in favours of the said *Dowglass*, the other Party now complain'd upon, by a

lawful Disposition of the same made to him by the space of a year and an half, or two years at most before his decease, and who deceast but by the space of a year at the most before the dependance, after whose decease the said *Dowglass*, to whom the Pension was assign'd had intented his Action of Letters conform, and in respect thereof, he alledged that he ought to be preferred to the Bishop. The *Lords* repelled the Pensioners alledgiance, and found the Bishop had right to the Duties foresaids, and not the Pensioners Assigney, because it was alledged by the Bishop, that the Pensioner, notwithstanding of his Translation made in favours of this Party, had remained in possession of the said Pension during his lifetime, and the Assigney never apprehending possession, nor making intimation of his Right, could not claim the Right after his Authors decease, which took no effect by possession in his Authors lifetime, as said is, nor no intimation being made thereof: Which alledgiance of want of possession and intimation in the Pensioners lifetime, The *Lords* found relevant to cause the Assignation become simulate and extinct; albeit it was answered, that the want of possession could not make a Right which was lawful of it self, and which was made by one having power to make the same (and whose power was confess'd by the Party) to fall, seing the Pensioner, or his Executors would be comptable to the Party Defender for the Duties uplifted and possest by him ever since he was denuded; which was repelled by the *Lords*, and the Bishops alledgiance found relevant, as said is. Actor *Nicolson* elder & *Lermonth*. Alter *Nicolson* younger & *Mowat*. *Scot* Clerk. *Vid.* 28 *Feb:* 1628. *Mauld* contra *Mathers*. 17 *Decemb:* 1628. *Chalmers* con. L. *Craigivarr*. 18 *Decemb:* 1633. Bishop *St. Andrews*.

Carmichael contra *Lermonth*, *July* 2. 1622.

IN an Action of Declarator of Liferent of some Lands which were holden by one *Lermonth* of the Laird of *Kilspindie*, and pursued by *Carmichael* Donatar constitute by the Laird of *Kilspindie*. The *Lords* found that this Summons needed not to abide continuation, seing the Donatar produced a Seasin to verifie that the Superior, *viz.* the Laird of *Kilspindie* was Infeft in the Land, and that there was no other necessity to prove any more that a continuation might appear to be requisite: for that part of the Summons, that the Defender held the Lands of *Kilspindie*, needed not be proven, seing he might disclaim him to be his Superior, and so found, that the Action needed not be further delayed by continuation. And this is contrair to the Decision made, 22 *Novemb.* 1621. In the Action L. *Muckall* against *Robert Stuart*; But the *Lords* declared in time coming they would decide, where the like question occurred, conform to the last Decision, *viz.* That in such cases there should be no continuation where the Superiors Seasin is shown, and the Defender to be year and day at the Horn. Actor Alter *Hay* Clerk. *Vid.* 23 *June*, 1625: Lo: *Stormonth*. 6 *March*, 1624. *Dowglass*, *vid:* 24 *March*, 1632. L. *Lochinvarr*.

French and the L. *Thorndykes* contra *Cranstoun*, *July* 3. 1622.

IN an Action for declaring of the Marriage of the Heirs of L. *Thorndykes* pursued at the instance of *French-land*, against *John Cranstoun*. The *Lords* found the requisition made to the Heirs not valid to infer the double of the Marriage, because the Donatar who made the requisition, at the time of the requisition, had not the Gift in his hands, which gave him right to the Marriage, and whereby it might have been then known that he had power to require, and the said Gift was not then shown nor exhibited, for the Instrument of the Requisition produced, albeit it bore, that the Pursuer

ſuer as Donatar, and having the Gift of the Marriages required, yet it bore not that the Gift was there extant, and was then ſhown and exhibite by him; Which the *Lords* found ought to have been done, and therefore would not ſuſtain it, albeit the Purſuer offered to prove in fortification of the Inſtrument, by the Witneſſes inſert therein, that the Gift was at that time exhibite and ſhown, and was extant and read, which was not admitted by the *Lords*, ſeing they found that the Inſtrument ought to have proported the ſame: Sicklike they found the ſame Inſtrument not ſufficient, becauſe the Parties were required to come to the Donatars own Lodging, where he remained in *Edinburgh* for the time; whereas the *Lords* found that they ought to have been required to come, to treat and confer upon that purpoſe of Marriage in ſome common unſuſpect place, as to a Kirk, or Tolbooth, or ſome other ſuch-like, and not to the place of the Purſuers reſidence: And the *Lords* found, that this and the like requiſitions being made to perſons Minors, needed not to be made to their Tutors and Curators; but found this ſufficient, being made to the Minors themſelves, becauſe the conſent of Tutors and Curators is not requiſite to the Minors Marriage, and ſo they needed not to be required. Alſo in this ſame matter, the *Lords* found it was no diſparagement, albeit the Party offered, was not equal in Rent with the Party required; and albeit that the Party offered had no Rent, ſeing he was equal in Blood with the Party to whom he was offered, for diſparagment conſiſted not in the Means, but in the Blood and Parentage, or in the defects and imperfections of the body, as if he had been blind, or lame, or dumb, or ſuch like, or in the great inequality of years, as if an old man were offered to a young woman. Actor *Hope* & *Scot*. Alter *Nicolſon*, *Belſhes*, & *Cunninghame*. *Scot* Clerk. *Vid*: 11 *July*, 1622, betwixt the ſame parties. 13 *Novemb*: 1622. L. *Baſs*, 7 *Feb*: 1628. *Ja*: *Maxwell*. 8 *Decemb*: 1631. L. *Cleiſh*. 26 *June*, 1628. L. *New-wark* 8 *March*, 1627. E. *Rothes*.

Donatar to the E. *Tullibardine*'s Eſcheat, contra *Adinſtoun*. *July* 5. 1622.

IN an Action of Declarator of the Earl of *Tullibardin*'s Liferent, purſued by a Donatar, and the Donatars Aſſigney, who was a Creditor to the Rebel. The *Lords* repelled the alledgiance which was proponed againſt the Declarator by *Thomas Adinſtoun* Creditor to the Rebel, founded upon the Compriſing led againſt the Rebel of the Lands, deſired to be declared, and publick Infeftment granted by the King's *Majeſty* to him of the Lands Compriſed, and diligence by purſuits intented thereupon, which was a good and lawful poſſeſſion, as the Excipient alledged; which Exception and Infeftment foreſaid, Right and Diligence therein contained, The *Lords* found could not take away the Liferent which pertained to the King, and fell by the Rebellion, and by lying thereat year and day, and which was gifted to the Donatar before the Compriſing, and albeit no more diligence was done by the Donatar before the deducing of the Compriſing, yet the *Lords* found that the Liferent pertained to the King, and the Compriſers Infeftment was affected with that condition of his Debitors Liferent, whereof the King nor his Donatar were not prejudged by the Subſequent Infeftment granted by the King, which proceeded upon the Compriſing, as ſaid is; and ſpecially, ſeing the right to the Liferent and Gift thereof was devolved upon another Creditor of the Rebels, who was made Aſſigney thereto by the Donatar, and which Aſſigney purchaſt the ſame for a further ſecurity of certain Lands bought by him from the Rebel, and to the which Lands bought by him he reſtricted the Declarator; which Aſſigney was found to be in a better caſe than the Donatar, who was alledged to have procured the Gift to the Rebels uſe, and which was not reſpected, it not being alledged that the Aſſigney

was partaker of that Fraud. Actor *Hope* & *Nicolson*. Alter *Peebles* & *Aiton*. *Gibson* Clerk. *Vid.* 10 *Decemb:* 1623. *Dowglass* contra *Belshes**

French and the L. of *Thorndykes*, contra *Cranston*, *July* 11. 1622.

IN the Action pursued at the instance of *French* of *Frenchland* against L. *Thorndykes*, for the Marriages of the appearand Heirs of *Thorndykes*, being three Sisters, whereto the L. of *Frenchland* claimed right, as Donatar thereto, constitute by the King's *Majesty*. It was alledged for the Defenders, whose Marriages was acclaimed, that they ought to be assoilzied, and that they should not be subject in payment of any Marriage, because the Lands falling in Ward by the decease of their Umquhile Father, who was the King's *Majesties* last Tennent thereof, and so by that Ward the Marriage of the Heir or appearand Heir of that Vassal, pertained to the King. It is true that the Defunct their Father, left a Son behind him, who was Brother to these Women now Defenders, Which Sons marriage was gifted by the King's *Majesty* to a Donatar, who had recovered Decreet thereupon for a Sum modified by the *Lords*, to be payed in satisfaction thereof, and which Sum was payed; But therefore that Marriage of the appearand Heirs being declared against the Excipients, since the decease of the said appearand Heir, and also being payed by them the same must liberat the Defenders from all payment of another Marriage, seing they alledged that by the decease of one Vassal there could be no Marriages sought but only one. This alledgiance was repelled by the *Lords*, and it was found that one Vassal deceasand, the Marriage of his appearing Heir dying Marriagable, albeit never entering to the Lands, pertained to the King, and after that appearand Heirs decease, the Marriage of the next appearand Heir Marriagable, and after his decease, the Marriage of the next appearand Heir, and so forth *successivè*, of ilk appearand Heir Marriagable after others, how many soever they were; and albeit they nor none of them were entered to the Lands, but that they died before their Majority, the Marriage of every one of them pertained to the King; and so that by the decease of one Vassal, as many Marriages fell to the King as there should happen to be appearand Heirs to the Vassal; and that the payment of the Marriage for the first appearand Heir marriagable, eleided not the right of the Marriage of the next appearand Heir to that Vassal, after the firsts decease, and so forth, from the second to the third and fourth, and further how many soever there were, the said appearand Heir dying marriagable; and this they found they would observe hereafter, where the like cases occurred, which was never decided before at any time.

In this same Process the *Lords* found, that a requisition made to the party whose Marriage was sought, to come to the Kirk to accomplish the Marriage, was not sufficient alone to infer an Action for the double avail of the Marriage, except there had been also a lawful requisition made to that party to come to some unsuspect place, for conferring with the person who was offered, and which conference should have been required to have been had, before the time against which the requisition was made to come to the Kirk, for accomplishment, *&c.* without which requisition to come and conferr had preceeded, The *Lords* found the other could not be sustained. Actor *Hope* & *Stuart*. Alter *Nicolson*, *Belshes* & *Craig*. *Scot* Clerk. *Vid:* 3 *July* 1622. betwixt the same Parties.

Caldwell contra *Caldwell*, *July* 18. 1622.

IN an Action of Ejection pursued by *Caldwell*, which was Libelled to have been committed by *Caldwell* Defender, being a Woman, and whom the Defender

Defender alledged to have been clad with a Husband at that time, when the Pursuer by his Summons affirms that she committed the Ejection, which was now pursued against her after the deceale of her Husband, and therefore alledged that no Process ought to be granted against her, while the Heirs or Executors, or some person to represent her Umquhile Husband were called in that Process, seing if the Action had been pursued against the Defender while her Husband lived, he behoved to have been called; sicklike now being pursued against her after his death, some to represent him ought to be called. The *Lords* repelled the alledgiance, and sustained the Process against the Woman who was Libelled to have committed the Fact, and found no necessity to Summon the Heirs or Executors of the Defuncts Husband, seing the Fact was only pursued against the Womans self, as committer, *& noxa caput sequitur.* Actor *Miller* for the Defender. Clerk. *Vid.* 16 *Feb.* 1633. *Stuart* contra *Bannerman.**

contra *July* 19. 1622.

IN an Action pursued by against which was intented by the Pursuer, as Heir to his Predecessor, and for instructing of him to be Heir, he produced a Decreet recovered at his own instance, before the Commissars of *Aberdene*, as Heir to that same Predecessor, verified in that Judgment: Which Sentence the *Lords* found was not sufficient to prove him Heir in this Process, except he produced some other sufficient Writ in this same Process, then pursued before the Lords, which should be sustained to make him Heir, by and beside that Decreet, seing in that Decreet, either the Defender therein might have suffered the same to proceed in the Pursuers favours, or might have omitted to propone any Argument against the Writ then used to prove, which the Defender in this Process might competently propone, if the same Writ were produced, as they found it should be in this same Process. Actor *Cheyn.* Alter

Weir of *Blackwood* contra *Durhame*, *July* 20. 1622.

WEir of *Blackwood* being Married upon a Daughter of the Lord *Elphingston*, in the time of his Marriage begets a Bairn upon *Durham*, Daughter to Sir *James Durhame*, and after the birth of the Bairn, gave a Bond to the Mother to provide that Bairn to a certain Sum, which Bond being desired to be Registrat by the Woman against the maker: The *Lords* found, that it ought not to be Registrat, and that it could produce no manner of Action, neither in favours, nor at the instance of the Woman, nor at the instance of the Bairn, in whose favours it was conceived, seing it was a Writ given for reward of Adultery, albeit that Cause was not therein expresst; for it was given to one begotten in an adulterous conjunction, which was not allowable, and therefore the *Lords* found that it was null, and could not produce Action at no persons instance, being given *ob turpem causam*, albeit the cause of the turpitude preceeded the giving of the Bond: for it was alike being *præmium adulterii & turpitudinis.* Actor *Stuart* & *Hamilton.* Alter *Hope. Scot* Clerk. *Vid.* 18 *Feb.* 1624. *Firm* contra *Wishart.* *

Cranston contra L. of *Eastinshoir*, *eodem die.*

IN an Action depending betwixt *John Cranston*, and the L. of *Eastinshir*, a Bond of this tenor and nature being conceived, whereby the party obliged was bound to pay the Sum then borrowed, and to infeft the Creditor in an Annualrent yearly therefore; and yet notwithstanding of that Heretable Clause, the Debitor was, by an posterior Clause of the obligation,

bound to pay the Sum at what time the Creditor should please to seek the famine, upon an simple charge of six days preceeding: the Debitor giver of this Bond, his Land being compriſed, for the principal, and expenſes therein-contained. The *Lords* found, the compriſing null, becauſe the Debitor was not charged upon six days to pay the principal Sum, without which Charge had preceeded, no Compriſing could be deduced for the principal Sum; for albeit, by the foreſaid poſterior clauſe of the Bond, the neceſſity of an requiſition was taken away, which is required in an Heretable Security, yet there was a neceſſity, by that ſame Clauſe, of an preceeding charge on six days. Act. *Nicolſon* & *Craig*, Alter *Hope* & *Stuart*. *Gibſon* Clerk, *vid.* 6 *March* 1623. *Finlaſon* con. *Johnſton*, 2 *March* 1624. *Colthird* con. *Paterſon*.

Eodem die.

AN exception being admitted to probation againſt a *Removing* purſued by againſt Excipient, bearing, That the Excipient had Tacks to run for Terms the time of the Warning, and for proving thereof, two Tacks being produced, one whereof the laſt year of it was expired that year of the Warning, and another Tack ſet ſome years after the firſt Tack, for certain years therein contained, whereof the entry was appointed to begin at the expiring of the other former Tack, and which poſterior Tack was dated by the ſpace of two years preceeding the Purſuers Right; againſt which Tack it was objected by the Purſuer, that the ſamine could not prove the exception, becauſe, albeit the ſame preceeded the Purſuers Heretable Right, yet ſeing the time of the entry thereof was deferred to the time of the expyring of the firſt Tack, before the expyring whereof the Purſuer had acquired the Heretable Right of the Lands, and ſo he was Infeft before the time of the *Defenden* entry, and the interveening of that Heretable Right in his Perſon, who was ſingular ſucceſſor in the Right of the Lands, was a lawful impediment, why the ſecond Tack, which was a ſeveral and diſtinct *Right* from the firſt, and not inſert in one Body, and to the which the Excipient could not be heard to aſcribe his poſſeſſion, in reſpect of the firſt Tack, at that time ſtanding unexpired, could not be obtruded to take effect againſt the Purſuers Heretable-Right foreſaid, he being ſingular ſucceſſor, as ſaid is, and the ſaid Tack againſt him could not be reſpected, as cohering with the former Tack, but only ought to be reſpected, as if it had been ſet, appointing the entry thereof to begin at the year after the warning ſpecified; for in effect it is ſo conferred, and if it had been ſo ſet, it would not have defended againſt the Purſuers Heretable Right, but might have produced warrandice againſt the ſetter. This alledgiance proponed againſt the Tacks was repelled by the *Lords*, and the Tacks ſuſtained, ſeing they were lawfully ſet *ab initio* before the purſuers Right. Actor *Hope* & *Miller*. Alter *Nicolſon* younger. Sir *William Scot* Clerk, *vid.* 11 *July* 1627. *Wallace*.

E. of *Deſmont* contra *Hay*, *July* 23. 1622.

IN an Action of Redemption purſued by the E. of *Deſmont*, againſt *Hay*, for redeeming of certain Lands compryſed from the Compryſer, by vertue of the legall Reverſion. The *Lords* found, that the order of the Solemnity of this *Redemption* ſhould not be keeped ſicklike as in other *Redemptions*, which are uſed by vertue of *Reverſions* conventional betwixt parties, (except concerning the time and ſpace of the *Requiſition* and *Premonition*, which in legal *Reverſions* requires to be uſed only on ſix days;) and therefore they

they found in this Proceſs, the *Requiſition* made by vertue of Letters raiſed by deliverance of the *Lords*, craving Charges thereby to be directed againſt the Party, to come and receive the Money, whereupon the Compryſing was deduced, with the Charge given by the Meſſenger, and execute againſt him, conform to the ſaids Letters, not to be a ſufficient *Requiſition*, and found the order ſo uſed not to be ſufficient; and therefore aſſoilzied from the order of *Redemption*, ſeing they found, that in order of *Redemptions* of thi nature, the *Requiſition* ought to be made by an Procurator, having power from the Partie to require, and that Inſtruments ſhould be taken thereupon, in the hands of an Notar, and before Witneſſes, as in all other Redemptions. Actor. *Belſhes.* Alter. *Cuningham. Gibſon* Clerk. *vid. Decem.* 11. 1638, *Finlaſon* con. *Weymes.*

L. *Lagg* contra the Baillie of *Hallywood. July* 24. 1622.

IN an Action of double poyncing betwixt the Laird of *Lagg*, as Sheriff of *Dumfries*, and the Bailly of *Hallywood*, for an unlaw of Blood. The *Lords* preferred the Bailly to the Sheriff, becauſe the Baillies Decreet was given before the Sheriffs, albeit the Sheriff had done the firſt diligence, by the firſt Citation and firſt Proceſs, by reaſon the Baillies Decreet was long before the Sheriffs, as ſaid is. Actor. *Belſhes* & *Cunningham.* Alter. *Gibſon* Clerk.

Davidſon contra L. *Buckie.* 26 *July.* 1622.

IN an Action of Declarator purſued by *Davidſon*, Donatar to the Eſcheat of L. *Eſſilmont* againſt L *Buckie*, for ſpecial Declarator of an Bond of ſome Money which *Buckie* was obliged to pay to *Eſſilmont*; and which Bond bore not, that the Party was reſtand awand the Sum therein contained, but that he obliged him to pay the ſame, and had no cauſe therein expreſſed, for the which it was granted. The *Lords* found, that the cauſe of the granting thereof might be proven by the Witneſſes inſert in the Bond; for albeit the Bond was pure and ſimple in it ſelf, yet ſeing *Buckie* alledged, that it was given for an ſpecial cauſe condeſcended on by him, and which ſhould have been fulfilled to him by *Eſſilmont*; to whom he was bound, and which was not fulfilled, no reaſon was he ſhould pay the Sum, being obliged *ex cauſa data*, & *non ſequuta*, and which he offered him to prove, by the Witneſſes inſert, as ſaid is; Which alledgeance, The *Lords* found relevant to be ſo proven; albeit the Bond was in it ſelf pure and ſimple, ſeing the Purſuer could not condeſcend upon any other Cauſe, for the which it was given; But this alledgeance, The *Lords* would not admit againſt the Fisk, and Donatar, but only againſt the Parties ſelf, to whom the Bond was granted. In this ſame proceſs, The *Lords* found an alledgeance of Compenſation, founded upon the like Debt owing by the Rebel to *Buckie*, relevant to compenſe the Debt acclaimed from him by the Rebels Donatar, which is ſuſtained againſt the Donatar, to meet the Donatars Action; likeas if it had been ſought by the Rebels ſelf. Actor. *Nicolſon* & *Lermonth.* Alter. *Hope* & *Lawtie. Hay* Clerk. *vid. June* 23. 1626. *Maxwel. Novemb.* 15. 1627. *Black. Feb.* 3. 1635. *Innes. March* 3. 1624. *Fletcher.*

L. *Dundas* contra *Hamilton*, 6. *Novem.* 1622.

THe Deceaſt, L. of *Dundas* obtained Decreet againſt Umquhile *Hamilton* of *Peell*, for ſpulziation of Tiends; which Decreet being deſired to be transferred, at the inſtance of Sir *James Dundas*, Executor to his Father, obtainer of the Sentence, againſt the Oye of the ſaid Umquhile *Hamilton*, againſt whom the Spulzie was decerned, as

Heir by progreſs to him qualified in the following manner, *viz.* In ſo far as the Purſuer offered to prove, that the Oye Defender, was Heir to his Umquhile Father, which Father was Heir to his Father, who was decerned in the Spulzie, at the leaſt, he behaved himſelf as Heir to him, in ſo far, that as after the deceaſe of his ſaid Father, who was decerned, he had intromett with his Fathers Heirſhip-goods underwritten, in manner after-qualified, *viz.* That by the ſpace of four years, or thereby, after his Fathers deceaſe, he had entered, and dwelt in the houſe of *Peill* of *Livingſton*, pertaining to his father, where there being then within that houſe, his Umquhile Fathers beſt Board, and ſtanding Bed, with an brewing Caldron, he uſed the ſame, by eating at the Board, lying in the Bed, and brewing in the Caldron: Likeas, he delivered an great Pot, which was the beſt Pot, to a Fleſher, for ſatisfaction of ſome Fleſh, furniſhed to himſelf, after the deceaſe of his Father; as alſo having ſold the Lands & Houſe of the Peill to the E. of *Linlithgow*, he delivered, and freely gifted the ſaid Board and Bed to the E. of *Linlithgow*, which was a Diſpoſition, and Intromiſſion ſufficient of the Law, to make him Heir to his Father, and conſequently, to make the Defender his Son, who is ſerved Heir to his Father alſo, by progreſs to the Goodſir, his Father having intrometted with and diſponed upon the Heirſhip Goods foreſaid, as ſaid is. The *Lords* found not the forſaid qualification relevant, concerning the Defenders Fathers uſing of the Board, Bed and Caldron, to make the Defender, or his Father Heir to the Goodſir, and as to that part of the qualification anent the giſting of the ſaid Bed, and Board, and delivering of the Pot to the Fleſher; The *Lords* alſo found it not relevant to make him Heir, except the Purſuer would prove, that the ſame was giſted by writ, becauſe the particulars foreſaids, ſo intrometted with, and diſponed, were but matters of ſmall importance, and not of ſuch conſequence, whereby the Defender ſhould be found Heir to his Goodſir. In which Deciſion, The *Lords* were alſo moved by conſideration, that the Sentence deſired to be transferred, was recovered about 36 years ſince, and that it was never execute againſt the Goodſir, againſt whom it was recovered, in his own time, nor againſt his Son in his Lifetime, but only now craved againſt the Oye, who was not born the time of the Sentence; and ſicklike, that the Goodſir's Wife lived after the Goodſirs deceaſe, and keeped the Poſſeſſion of the alledged Heirſhip Goods, 4. or 5. years after her Huſbands deceaſe, before ever the Son intrometted. Actor. *Aiton* & *Olyphant*. Alter. *Burnet*. *Gibſon* Clerk. *Vid. Jan.* 17. 1627. *Frazer* con. L. *Monimusk*.

L. *Baſs* contra *Wauchops*. *November* 13. 1622.

L. *Baſs* being obliged to *Wauchops*, in payment of ſome Money, at any Term againſt which he was required, and being required by one as Procurator, and in name of *Wauchops*, to whom the Bond was given; and thereupon being charged to make payment. The *Lords* ſuſpended the Charges, becauſe the Procurator, who required, at the time of making Requiſition, ſhew not the Partie required the Procuratory, whereby he had power to require: And therefore the *Lords* would not ſuſtain the Requiſition, albeit the Creditor ratified the Requiſition at the Bar, and that alſo there was an Procuratory produced, lawfully ſubſcribed before the Requiſition making, yet becauſe it was not ſhown at the very time, when Requiſition was made, it was not ſuſtained; albeit it was not alledged, that the Debitor, when he was required, deſired to ſee the Procuratory, but only becauſe the Requiſition bore not that the Requirer offered to ſhow his Procuratory, or that he ſhewed the

ſame

ſame. Actor. *Hope* & *Nicolſon*. Alt. *vid. July* 3. 1622. *French* and L. *Thornydyks*.

Bonnar contra *Nicolſon*. *Eodem die.*

IN an Action purſued by *Bonnar*, againſt Mr. *Thomas Nicolſon*, for Reduction of an Decreet of Removing, obtained by the ſaid Mr. *Thomas*, which Reduction, was founded upon an Rental ſet during the Rentallers Life-time, who was yet living, by the ſaid Mr. *Thomas Nicolſons* Authors. The *Lords* found the Rental null, by way of Exception, and that it could not be a ground to Defend againſt the Removing, and aſſoilzied from the Reaſon, becauſe that Rentaller ſet the Lands contained in the Rental, in Sub-tack to another Perſon, and ſo had loſt the benefit of his Rental, by denuding himſelf of the Rental, which was found not to be tranſmiſſible, and that the Lands could not be ſet by the Rentaller to any other, albeit the Sub-tacks-man offered to put the Rentaller again in his own Place, which was not ſuſtained. *Nicolſon per ſe*. Alter. *M'gill* & *Primroſe*. *Gibſon* Clerk. *vid. March* 21. 1623. L. *Craigy Wallace*, *July* 5. 1625. L. *Aiton*.

Forbeſſes contra *L. Muckall*, *Eodem die.*

TWo *Forbeſſes*, *viz.* the Father and the Son, as Principals, and with them the L. of *Muckal*, and ſome others as Cautioners for them, being all obliged conjunctly and ſeverally, in Sums of Money to an Creditor, and the ſame two Principals, by the ſame Obligation, being bound for relief of the Cautioners, by the which Clauſe of relief, the ſaids two Principals were not obliged conjunctly and ſeverally, as the Cautioners were all obliged to the Creditor, but only after this manner, *viz.* The ſaid *Forbes* and *Forbes* his Son obliged them to relieve their ſaids Cautioners. The *Lords* found, that this clauſe reſolved not in a Conjunct Obligation, by the which every one of the ſaids two Principals ſhould be allanerly ſubject, in the relief of the Cautioners, ilk one of of them for their own parts, but declared that thereby they were obliged Conjunctly and Severally, ſeing that Clauſe behov'd to be ruled by the Tenor and Courſe of the reſt of the Obligation, wherein the Cautioners, and Principals being obliged Conjunctly and Severally to the Creditor, equity craved, that the two Principals ſhould ſtand after this ſame manner obliged to the Cautioners, notwithſtanding of the words of the Clauſe of Relief inſert in the Bond, bearing as is abovewritten. Actor. *Hope* & *Nicolſon*. Alter. *Aiton* & *Stuart*. *Gibſon* Clerk. *vid. Feb.* 13. 1624. *Sinclar* con. *Sinclar*.

Liddel contra Dr. *Rob*. *November* 26. 1622.

IN an Action of Suſpenſion purſued by *Liddell* Midwife in *Aberdeen*, againſt Doctor *Rob* in *Aberdeen*, for Suſpending of an Decreet, given in favours of *Rob*, againſt the ſaid *Liddel*, by the Commiſſar of *Aberdeen*, decerning her to pay to the ſaid *Rob*, the Sum of eighty pounds *Scots*, which was modified by the Commiſſar, for the Price of the Curing of the ſaid *Liddel*, and pains taken by the ſaid *Rob* therein, as the ſaid Decreet proported. The *Lords* found in that ſame Suſpenſion, that Decreet null, as being given by the Commiſſar, who was not Judge competent to that nature of Action, albeit the Party obtainer of the Decreet alledged, that the Commiſſars have ever been Judges to Actions *ſuper ſalariis medicorum*, of the nature whereof that Action was, and that the Commiſſars have ever been in uſe to decide therein, and that the Canon Law allows the ſame; notwithſtanding whereof, The *Lords*

found the Decreet null as given *a non suo judice*. Actor. *Mowat*. Alter. *Nicolson* elder. Clerk.

Murray contra *Durham* and the Lady *Winton*, *November ult.* 1622.

SIr *James Durham* being general Tacks-man of the Teinds of the Kirk of *Selkirk*, sets a Tack to Sir *John Murray* of *Philiphaugh*, of some Teinds of certain Lands pertaining to him, within that Paroch, for payment of twenty pounds of Duty yearly; thereafter Sir *James* makes the Lady *Winton* Assigney to his whole Tack of the whole Kirk, and also specially to Sir *John Murray's* Tack-duty, in whose Tack there was a Clause irritant, that if Sir *John* suffered two years Duty to run in the third unpayed, the Tack should be null. Sir *John* raises a Summons of double Poynding, alledging him to be distressed by Sir *James Durham*, and the Lady *Winton*, for his Tack-duty, and desires that the same may be given to any who shall be found to have best Right thereto, and in respect he made offer of his Duty to Sir *James*, to whom he was *specifice* bound in payment thereof, before the expiring of two years, therefore he desires in that same Letters of double Poynding, that the same may be found, by the *Lords*, to be sufficient to liberat him at all Parties hands, and free him of the danger of the Clause irritant. This Cause being called, Sir *James* compeared not, only the Lady *Winton* compeared, and alledged, that the offer made to Sir *James*, could not purge the Clause irritant, seing he was not the right Party, to whom the same should have been offered, he being denuded, as said is, before the Offer, in favours of the Lady *Winton*. And whereas it was alledged, by Sir *John Murray*, that his denuding could not put him *in mala fide*, to make the offer to that Person, to whom he was bound, there being no Intimation thereof made to him, before the offer. The Lady *Winton* answered, that before that offer, she had Intentit Pursuit of Spulzie, upon this same Right made to her by Sir *James*, against the same Party, *viz.* Sir *John Murray* for Spulzie of Teinds of other Lands, which were not comprehended in Sir *John's* Tack; In the which Action of Spulzie, he had compeared, and saw the same Right made to her by Sir *James*, which was the Title of that pursuit, and so he could not pretend ignorance of her Right, nor to misken her by making of any offer thereafter to that person whom he saw and knew to be denuded in her favours, and so the offer not being made to her cannot be sustained, her Right being more than lawfully intimate to him by that pursuit founded thereupon, wherein he compeared, and saw the same before his offer. It was Answered, That albeit that pursuit was founded upon that Title, and that he compeared therein, and saw the same; yet seing that pursuit was moved for Teinds of other Lands, whereof he had no Tack, and that no mention was made in that cause, of the Teinds contained in this Tack, he had no necessity to take any notice of the Right, but so far as the same instructed the pursuit for the Teinds then contraverted; neither can that pursuit be respected as an intimation for any other part of her Right, but allanerly concerning the subject then acclaimed: for although he should grant, that he knew that the Right extended to the whole, yet intimation ought to have been legal and orderly made to him of the whole Right, without which had been done, he cannot be put in *mala fide* to have made this offer, but the same ought to liberat him of the danger of the Clause irritant. It was Answered, Seing the pursuit was founded upon that Title, which comprehended all the Teinds, albeit thir Teinds were not then contraverted, yet he compearing, and seing that Title

which

which was contained all in one Body, he could not misken it for one part, and take notice of it for another part; but that pursuit ought to found a sufficient intimation for all which was comprehended within the Body of that Writ, so far as concerned him who was then party in that pursuit; for if he had been making a specifick intimation thereof, there was nothing requisite but to deliver the same to the party to be read and considered by him, which was done in the Pursuit foresaid by him at length. The *Lords* sustained the offer foresaid, albeit made after the pursuit founded upon the Lady *Wintons* Right, which pursuit they found only to serve for an intimation of the Ladies Right, so far as concerned these Teinds, which was then contraverted by that pursuit, and would not allow the pursuit as a sufficient intimation of the foresaid Right for any other thing therein contained, which was not pursued for by that action, albeit the Title of that action contained all in one Body of one Writ, for if a Party had intimate his Right *pro parte*, and had kept it unintimate, *pro reliquo*, the intimation could not have been respected, but so far as it was intimate, so in this pursuit ought the like respect to be had, specially where the falling of the Tack was urged by the irritant Clause, which was an odious pursuit. Actor *Nicolson* & *Scot*. Alter *Hope* & *Stuart*. *Gibson* Clerk. *Vid.* 13 *Decemb:* 1626. E. *Galloway*. 27 *January* 1624. *Stevin*. 14 *March*, 1626. L. *Westraw*. 31 *March*, 1624. Mr. *Patrick Sands*, 15 *June*, 1624. *Adamson* contra *Mcmitchell*.

Hamilton contra *Ross*, *Decemb:* 6, 1622.

IN an Action betwixt *Hamilton* of *Milburn* contra *Ross*; The *Lords* found an Assignation made by the Cedent, and delivered blank in the name of the Assigney to the Receiver upon his own trust, might be filled up by the receiver of the Assignation, with any persons name he please to insert as Assigney, and which he might do, and fill up and insert the name in the blank after the Cedents decease, albeit it remained blank all the time of the Cedents life, seing by making of the Assignation the Cedent was denuded, and the delivery of the same blank, in effect gave him liberty to fill up what name he pleased, in filling up whereof with any name the receiver thought convenient, the Cedent who was lawfully denuded, by subscribing of the Assignation, could not have prejudice by inserting of any name therein. *Scot* Clerk.

Innes contra *Innes*, *Decemb.* 8. 1622.

ONe *Innes*, Vassal to the Bishop of *Murray*, being holden by the expres Clause of his Infeftment, to compear in the Bishops Court to be holden at the place of *Spynie*, and being unlawed by *Alexander Innes* of *Cotts* the Bishops Baillie, for not compearance in his Courts holden at another place than the place designed by his Charter or Infeftment, which being Suspended on this reason, that he ought not to compear in no other place than the place designed by his Evident. The *Lords* sustained the Act unlawing him for being absent from that other place where the Courts were holden, notwithstanding of the place appointed by the Infeftment, because it was alledged by the Baillie, that the Suspender and his Predecessors expresly, as also the rest of the Bishops Vassals hath been in use these 30 years bypast, to come to that other place at which only the Bishops Courts were kept, and not to the place designed in the Infeftment; which alledgiance of the Suspenders and his Predecessors use of coming to that other place, being their own deed; The *Lords* found relevant to eleid the reason founded upon the Infeftment, and place therein mentioned, seing the Suspender could not qualifie nor alledge any prejudice which he could sustain by coming to that place, where the Courts were in use to be holden, and by that change,

from the place of his Infeftment. Actor *Aiton*. Alter *Gibson* Clerk.

E. *Rothes* contra *Gordon* of *Hallhead* and *Cushny*, *Decemb*: 10. 1622.

IN an Action of Reduction pursued by the E. of *Rothes*, against *Gordon* of *Hallhead* and *Cushny*. The *Lords* found a particular Act of Parliament made in favours of the Earl of *Rothes* (whereby all deeds done since a certain time therein mentioned to any person in the Earls prejudice were annull'd) to be a sufficient Act, and valid to make any Infeftment, albeit preceeding the Act, being done since that time designed in the Act, to be null; albeit it was alledged, that these privat Acts could not be of force to take away parties privat Rights lawfully acquired, who were not specially called to that Act, to hear their Rights annulled, and who if they had been called, would have maintained the lawfulness of their Rights, that the same could not be taken away; for it was alledged, that all such particular Acts which are purchast upon Parties, by privat or wrong information, ought not to prejudge the King's good Subjects, who had not faulted, nor had been called nor cited thereto, but that the same was understood, & should be understood, when any question arises thereupon, *Salvo Jure Cujuslibet*, which clause and tacite condition, is comprehended and understood to be in all such Acts; which alledgiance was repelled by the *Lords*, seing they found they could not be Judges to annul an Act of Parliament, which was clearly conceived, and had no difficulty in the interpretation, but the said Act standing, it was not within their Judgment to decide, whether it was justly or unjustly Statute, but if any wrong was therein, it ought to be tryed by Parliament; neither could that Clause, *Salvo Jure Cujuslibet*, be understood to be comprehended in that Act, seing that Clause would be contrair to the tenor of that Act, and would destroy the same *in totum*, and so could not subsist together. Actor *Hope*. Alter *Nicolson* & *Burnet*. *Gibson* Clerk.. *Vid.* 27 *Novemb*. 1621. E. *Nithsdale*. 25 *July* 1623. E. *Nithsdale*. 23 *July*, 1624. Lo. *Herreis*, 23 *July*, 1625. *Pat. Whitelaw*. 27 *July*, 1626. *Finlason*.

Seton & *Elleis* contra Creditors of *Acheson*, *Decemb*. 11. 1622.

IN an Action of Reduction pursued at the instance of *Henry Seton* and Mr. *Alex. Elleis* Burgess of *Edinburgh*, as persons to whom umquhile *George Acheson* was Interdyted, for Reduction of an Obligation made by the said umquhile *George*, after his Interdiction foresaid, and publication thereof, upon the reason of the said Interdiction published before the granting of the said Obligation. The *Lords* found, that in the publication thereof no other execution was necessar, but the publick and open Proclamation thereof at the Mercat-Cross, and that the said publication needed not to be made, nor intimate to the Party maker of the Interdiction. *Item*, The *Lords* found the reason of Reduction founded upon the said Interdiction published relevant, notwithstanding that it was alledged by the Defenders, *viz.* by the Relict of umquhile *George Lockhart*, and by Mr. *Alex. Cumming* her Husband, to whom the Bond desired to be reduced was granted, that the said Interdiction ought not to be sustained, being the Parties own voluntar deed done by himself, without tryal of the necessity of any preceeding lawful cause which might import the same, and so not authorized by the Judge *causa cognita*, and therefore for the danger of the preparative, it ought not to be allowed, seing it tended to uphold the fraud of Parties, in prejudice of many who might be thereby disappointed of their true Debts and Contracts made with the Parties so Interdyted. Likeas this Interdiction was made by the Father in Law to the Sons in Law, now Pursuers, who had married his two Daughters,

Daughters, who were his only Bairns and Heirs, and tended only to keep his Gear to themselves, and to prejudge all other true Creditors; and by the tenor of the Interdiction, the Pursuers were obliged to the persons Interdyted, to make Compt and Reckoning to him of their Intromission of their whole Goods, when ever he required the same, which in effect detected the intention of fraud, in fortification whereof the Pursuer offered to prove, that the Obligation contraverted, was given for satisfying of a preceeding Debt, owing by the said *George Acheson*, in so far as before the Interdiction, the said *George* was owing the like Sum to the Pursuers Husband by his Bond. Likeas, she being Executrix to her Husband, and in his confirm'd Testament made before his Interdiction, that Sum and Debt being given up, the said *George Acheson*, after his Interdiction made this Bond to the Defender Executrix to her Husband, confirmed of before, and then received back his prior Bond made to her Husband of before unregistrat, and which she offered to prove by the Nottar, writer of the last Bond, and Witnesses insert therein; and which alledgiance the *Lords* repelled, because the Bond contraverted made no mention, that it was given for satisfaction of another prior Bond, and they would not admit the same to be proven by Witnesses; And they had no respect to the Testament, albeit it preceeded the Interdiction, seing that Testament could not bind *Acheson*, and therefore sustained the Reason and Interdiction. Actor. *Hope.* Alter. *Nicolson* & *Aiton.* *Scot* Clerk. *Vid.* 20 *Decemb.* 1622. *Campbel* contra L. *Glenurchie.* 4. *Decemb.* 1623. *Hay* contra *Gechin.* 29 *July*, 1624. L. *Collingtoun* contra *Foulis.* 7 *July*, 1625. L. *Innerweik.* 22 *Jan.* 1631. *Hardie* and the cases there.

Hamilton contra *Cochran*, *Decemb:* 12: 1622.

ONe *Hamilton* having obtained from the Admiral the gift of certain wrack Goods, and thereupon obtained sentence before the Admiral for the same against *James Cochran* of *Babachlaw*, as being holden as confest upon his intromission therewith. This sentence was desired to be suspended upon this reason, because the Decreet amongst the rest of the particulars of the wrack Goods, decerns him to make payment of the price of an Ox which escaped, and was intrometted with by him, and so there being one living Beast escaping out of the Ship which was broke, and whereof the wrack was craved, and so confest by the sentence it self, the Goods of the Ship could not be esteem'd a wrack, there being one Creature alive, which escaped safe, as said is: Which reason the *Lords* found relevant, and proven by the sentence produced, and therefore annulled that Decreet *hoc eodem ordine*, and suspended the Letters *simpliciter.* Actor. *Stuart.* Alter. *Mcgill.* *Scot* Clerk.

Thomson contra L. *Murthill* and his Tennents, *Decemb:* 13. 1622.

IN an Action pursued by *George Thomson* Writer, against L. *Murthill* and his Tennents, in whose hands certain Sums were Arrested, for making of the saids Arrested Goods forth-coming. The *Lords* would not sustain the pursuit, because the Arrestment, which was the ground thereof, was raised upon an Heretable Bond made to the Pursuer, for satisfaction of the which Heretable Sum, before it was made Moveable by the party to whom the Heretable Bond was granted, by raising Charges against the Party obliged, for causing of him to pay the Principal Sum. The *Lords* found that no such Arrestment could be execute, nor pursuit thereupon sustained for the Principal Sum, albeit the Pursuer Replyed, that albeit the Bond bore, that the Party was obliged to pay Annualrent for the Sum; yet it is thereby provided, that he should pay the Principal Sum, whensoever

the Pursuer should suit the same. and by his Arrestment he suits the same; neither is it necessar to him to use any preceeding Charge; for as he may Poynd without a personal Charge preceeding, and could not be debarred therefrom by that alledged Heretable Clause of paying Annualrent contained in the Bond, so he might Arrest lawfully, notwithstanding of that Clause; Which alledgiance and answer was repelled by the *Lords*, and the Action was not sustained. Actor. Alter. *Haliburton.* *Hay* Clerk. *Vid.* 6. *March*, 1623. *Finlason.* 20 *July*, 1622. *Cranston.* *Penult Feb.* 1623. Betwixt the same Parties *.

L. *Blackeder* contra E. *Murray. December* 19. 1622.

IN an Action pursued by the L. *Blackeder* con. the E. of *Murray*, for Exhibition of Writs, to be transumed. It was found, that no Vassal, having Lands of any Superior, might call or pursue by any Direct Action, his Superior, of whom he held the Lands, for an transumpt of the Writs, made by that Superior himself, albeit the Lands had been disponed by that same Superior, to that same Vassal, who desired that Transumpt; and, so albeit he had been his Immediat Author, in the Lands whereof the Evidents were desired to be produced, and albeit the Production was only craved of the Evidents made to the Immediat Author himself, who had made the Disposition to the Vassal, and extended not to the Production, of any higher Progress of Writs made to that Superiors Predecessors, yet it was found, that the Vassal ought not to have any such Action sustained against his Superior. Actor. *Nicolson* & *Belshis.* Alter. *Hope.* *Gibson* Clerk.

Campbel contra L. *Glenurchy. December* 20. 1622.

IN an Action pursued by *Campbel* against L. *Glenurchy*, for reducing of an Interduction made by the said *Campbel* to the L. of *Glenurchy*. The *Lords* sustained this Reason of Reduction, *viz.* That it was made by a Person *satis prudens & rei suæ providus*, and without any necessity of an preceeding impulsive Cause, but voluntarly, and without good deed, and without any preceeding Tryal, or Pre-cognition of an ordinar Judge, finding a necessar cause of Interdiction, they therefore reduced it *in foro contentioso.* Actor. *Nicolson* & *Stuart.* Alter. *Prymrose.* *Gibson* Clerk. *vid. Decem.* 11. 1622. *Seaton* and *Elies*, and the Notes there. *July* 7. 1625. L. *Innerweick.* *December* 4. 1623. *Hay* con. *Gichan. July* 29. 1624. L. *Collington.*

Preston contra the Minister at *eodem die.*

SIr *John Preston* having Compriſed Sir *John Kers* Heretable Right of the Teinds of *Craking*, for Debt owing to him, by the said Sir *John Ker*, and being charged to pay the Ministers Stipend, wherewith the Teynds were affected, Suspended on this Reason, that he was not Intrometter, and that he renounced his Compryſing of these Teinds, which Compryſing not being profitable to him, for his own Satisfaction, could not bring any other Burden upon him, there being other persons, who intrometted with the Teinds. The *Lords* found this Reason no wayes relevant, but found, that Sir *John Preston* having Compryſed, and been Infeft, ought to pay the Stipend: Sicklike as Sir *John Ker* should have done, in whose Right he succeeded, seing by his Compryſing, and Right following thereupon, he might have intrometted by Law, and if he was debared by any other who intrometted, he had by vertue of his Rights a competent Action of Spulzie against the Intromettors. Actor. *Lawty.* Alter. *Scot* Clerk. *vid. Martii* 21. & *July* 23. 1633. Minister at *Strabrock.*

Marshall contra *Marshall. January* 9. 1623.

IN a Suspension raised by *Marishal* con. *Marishal* and his Son, and *Zuil* Spouse to his Son, for Suspending of the Charge raised at their instance, upon

upon the Contract of Marriage, wherein the Suspender was obliged to procure to his Son, during his Life-time, and to the said *Zuil* his Sons future Spouse, during her Life-time, a Rental of certain Lands, as the Contract of Marriage bears. The *Lords* found, that the Spouse might seek Implement of that Part of the Contract, conceived in her own favours, and raise Charges thereupon, at her own Instance, or at the Instance of any Person, whom she would constitute Procurator for her, to that effect, and which Procuratory the *Lords* would Authorize; and sustained the Charge so rais'd, and Action so Intented, or to be Intented thereupon; albeit the Husband should refuse to concur with the Spouse, or to authorize her, and albeit the Husband, and the Wife also with him, had discharged that Contract in that part, and had granted the same fulfilled: for the *Lords* declared, that the Discharge, if it was granted by the Husbands self alone, could not prejudge his Wife; and if it was granted by her, with her said Husband, it sicklike ought not to prejudge her, being done *ob reverentiam maritalem*, they living then together, and now she coming against the same, and revocking it. Therefore sustained the Charges raised at her instance. Actor. *Hamilton.* Alter. *Nicolson* & *Miller.* *Gibson* Clerk. *vid. Novem.* 29. 1626. *Scot* of *Harden.* *Feb.* 4. 1623. *Guild* con. *Guild.* *vid. July* 19. 1629. Mr. *Sam. Gray.* 11 *January* 1625. *Hamilton.* 26 *Nov.* 1624. *Johnston* contra *Rorison.*

M'dougal contra Prior of *Ardchatan.* *January* 10. 1623.

IN a Suspension raised by *M'dougal* against the Pryor of *Ardchatan.* The *Lords* would not sustain the Charges raised upon a Decreet of the Commissar of *Bute*, because the Decreet was subscribed by the Commissar in absence of his Clerk; for the *Lords* would not allow of such Extracts, subscribed, and extracted by the Judge: albeit the Clerk of that Judgement was absent for the time, seing the Office of the Judge and Clerk are distinct Offices, and cannot be supplyed the one by the other, and that the Clerk, if he had a necessar cause of absence, ought to deput, and supply his Place, which cannot be supplyed by the Judge. Actor. *Prymrose.* Alter. *Monat.* *Gibson* Clerk. *vid. Feb.* 10. 1631. Commissar of *Brichin.*

L. *Dirlton* contra L. *Eastnisbit*, *eodem die.*

IN a Suspension betwixt *Dirlton* and L. *Eastnisbit.* The *Lords* found a Decreet given by the Sheriff of *Berwick* null, for in the *Because* of the Sentence, the same bears not that the Summons was found relevant, and admitted to Probation, and an Term assigned to prove, which Words they found it ought to have born, in special Terms, and that it was not sufficient, albeit it bore, that the Pursuer of that Action, proved, that the Quantity acclaimed by him, extended only to the special Quantity decerned, within the which Words, the Defender alledged, was comprehended, that the Summons behoved to be found relevant by the Judge, *hoc ipso*; likewise, he offered to prove by the Act of Litiscontestation, the same was found Relevant, and admitted to Probation, and diverse Terms of Probation was deduced thereupon, which he offered to prove, by the Acts of the Process, and which was not sustained, seing the *Because* of the Sentence bore not the same in expres terms. Actor. *Nicolson* younger. Alter. *Craig.* *Gibson* Clerk.

Aitkin contra L. *Grinislaw*, *January* 16. 1623.

IN a Removing pursued by Mr. *Hary Aitkin* contra L. *Grinislaw.* The *Lords* found, that no Subject under the King, might in his Charter of diverse Lands lying discontigue, disponed to his Vassal, unite the Lands, and appoint a Seasin to be taken at one place, for all the Lands disponed by him; and therefore would not sustain the Seasin taken, conform to that

Charter, at the place appointed, by the Charter, for the taking of Seasin, seing they found that Seasin should be taken at the Ground of ilk Tenement; and consequently found, that the Seasin taken at the place appointed by the Charter for the Miln, was not sufficient for the Miln, which being discontiguous, required that Seasin should have been specially given thereof, by deliverance of the Clap and Happer; and therefore found that the Seasin, by vertue of that Union made by a Subject, not sufficient, except the same were Confirmed by the King, who only might unite Lands, and that no Subject could do it. Actor. Alter. *Mouat. Hay* Clerk. *vid. Jan.* 26. 1636. La. *Borthwick*, *Feb.* 10. 1631. E. *Galloway*, and the Cases there. *Vid. December* 16. 1628. Lady *Borthwick*. *March* 23. 1622. Lo. *Borthwick* con. L. *Gallosshiels*. *July* 12. 1626. *John Stuart*.

E. *Lothian* contra Sir *John Ker*, *&c. January* 18. 1623.

IN an Action pursued by the E. of *Lothian*, who had Compriſed Sir *John Ker* his Lands and Houses, for delivery of the saids Houses to him, as Compryser, upon a Summons of six days, without any preceeding Order of Warning before a Term, as is used in Removing. The *Lords* sustained that Order, against all the Persons, from whom the Lands was Compryſed, and against whom the said Compryſing was deduced, and found no neceſſity, to use a Warning against them; But found that this summar Order without Warning should not be sustained against a Stranger, Poſſeſſor of the Houses, who might maintain their Poſſeſſion, by any Right, who having Right, ought not to be put from their Poſſeſſion, but by a Warning, and an Ordinar Pursuit of Removing pursued thereupon, against them. Actor. *Belshes.* Alter. *Morison*, *Hay* Clerk.

Executors of *Kinnier* contra Executors of *Adam Rae*, *Jan.* 28. 1623.

THe Executors of Umquhile *James Kinneir* Writer, who had written, and formed diverse Writs and Securities to Umqhile *Adam Rae*, pursues the Executors, and Bairns of the said Umquhile *Adam*, for payment to them, of the Prices of the saids Writs, and referred to their Oaths the Summons, *viz.*, both anent their Knowledge of the said Umquhile *Jame's* Forming, and Writing to the said Umqhile *Adam* their Father, diverse Writs, and Securities; and also to their knowledge, that the same remained yet unpayed. The *Lords* found, that the Defenders ought not to be compelled to give their Oaths, albeit the Pursuers referred the Knowledge of the Debt, that it was true, and that it remained unsatisfied as yet, to their Oaths, seing they were Minors, the time of the forming, and making of the saids Writs, and could not have knowledge thereof, neither could they have knowledge, nor Depone, whether it was payed or not. Actor. *Hope* & *Belshes*. Alter. *Nicolson* & *Lawtie*. *Hay* Clerk.

Stuart Commissar of *Dunkell* contra Lo. *Gray*, *January* 29. 1623

IN an Action pursued by Mr. *James Stuart* Commissar of *Dunkell*, against the Lord *Gray*, for Poynding of the Ground, for an Annualrent owing divers years, preceeding the deceaſe of Umquhile the Defenders Father, who was alledged to have died at a certain Term lybelled. The *Lords* found, that that Summons ought to abide Continuation, becauſe it bore the time of the Defenders Fathers deceaſe, which behoved to be proven, and so consisting *in facto*, that the Summons ought to abide Continuation; It being an Action of poynding of the Ground, pursued by Mr. *Ja. Stuart*, as Assigney constitute to the bygones of that Annualrent, preceeding the Lord *Grays* deceaſe, by him who had right to the Annualrent. Actor. *M'gill* & *Lawtie*. Alt. *Aiton* & *Cheap*.

Fotheringham

Fotheringham and *Scrimzour* contra *Watson. January ult.* 1623.

IN an Action pursued by *Fotheringham* and *Scrimzour*, of *Kirktoun* her Spouse, against one *Watson*, for payment of the Sum of two hundred Merks, conform to his Obligation. The *Lords* found the Obligation null, because it was not subscribed by two Notars, and four Witnesses, conform to the Act of Parliament, Act 80. Parl. 6. *Ja:* 6. *anno* 1579. And found that any thing exceeding a hundred pound, of whatsomever quality the Parties were, whether Poor or Rich, was to be repute a matter of great Importance, and came under the Act of Parliament; And so this Obligation, to produce no Action, albeit it was subscribed by two Nottars, and three Witnesses. *Vid. Novem.* 13. 1623. *Marshal* contra *Marshal.*

La. *Dowhill* contra *Lindsay* of *Dowhill. Eodem die.*

IN a Removing pursued by the Lady *Dowhill*, against Mr. *John Lindsay* of *Dowhill*, Mr. *John* having Defended against that Removing, by vertue of a Wodset Infeftment, given to him of the Lands controverted. The *Lords* found, that that Infeftment became extinct, and Mr. *John* had tacitly past from the same, and so could not cloth himself therewith, in so far as, since the date thereof, he had Compriſed the Reversion of the same Lands, which he had in Wodset of before, from the Wodsetter, with certain other Lands, for the same Sum, for the which the Wodset was granted to him, by the which Compryſing standing unrenounced, he had prejudged himself of the preceeding Wodset, and could not come back again thereto, seing he had, by the Compryſing, received Satisfaction in effect, of the Sum, whereupon the Infeftment of Wodset was granted. Actor. *Foulis.* Alter. *Lermonth. Hay* Clerk. *Vid. July* 2. 1625. L. *Raploch. Decem.* 14. 1621. L. *Fauldinside.*

Guild, contra *Guild. February* 4. 1623.

IN an Action pursued by *Guild* to hear the Right of the Sum of 200 merks Decerned to pertain to the Pursuer, which Pursuit was founded upon a Testament of the Pursuers Father, wherein he assigned to the Pursuer the Right of that sum which was adebted to him, conform to an Obligation made to him thereupon by his Debitor, and to the which Assignation made by the said Testament his Wife consented, and the Testament was subscribed by her, and she was pursued thereupon. The *Lords* found the Wifes consent subscribed in the Testament could not prejudge her, but that notwithstanding thereof she had right to her own third of the Defuncts free Gear, and of this Sum controverted, amongst the rest of the whole free Goods, whereof she was not prejudged by the said Assignation, contained in the Testament, and consented to by her, seing that Assignation was but of the nature of a Legacy, which could go no further than the Defuncts own third; likeas they found, that the Fathers giving in Tocher with the Pursuer since that Testament, a certain Sum of Money, ought to be ascribed by her, to be given in satisfaction of so much of the Defuncts part, or of her own part, as the Pursuer acclaimed from the Defender, as intrometted with by her *pro tanto*, and that the same ought to liberate the Defender *pro tanto* anent her intromission with the Defuncts Goods and Gear. Actor. Alter. *Lawtie. Hay* Clerk. *Vid. 9 January* 1623. *Marshal. penult January* 1622. *John Paterson. 24 July* 1623. *Stuart* contra *Fleming*, and the cases there.

L. *Balnamoon* contra L. *Balcomie, eodem die.*

IN an Action pursued by the Laird of *Balnamoon* against the Laird of *Balcomie* for payment of a Sum of Money owing by him to Mr. *John Leitch*, and which was left in Legacy by the said umquhile Mr. *John*: The *Lords*

found, that the Legatars self, nor the Pursuer his Assigney, had no Action against the Debitor, and that they could pursue no person for the Legacy but the Executor of the Defunct, who had the only Action competent to him against the Debitors of the Defunct, and that he was subject to answer to the Legatars for their Legacies. *Gibson* Clerk. *Vid.* 10 *March* 1627. *Forrester* contra *Clerk. vid.* 20 *Feb.* 1627. *Bisset* contra *Bisset.*

Schaw contra *Auchinleck, Feb.* 5. 1623.

IN an Action *Schaw* contra *Auchinleck*, the *Lords* sustained the Action against the Relict of the Defunct, who was conveened as Intromissatrix with certain particular Goods of the Defunct, to make the Goods intrometted with by her forth-coming to one of the Defuncts Creditors, notwithstanding that the Relict alledged, that there were Executors confirmed, who ought to be conveened for the Defuncts Debts, and to which Executors she ought only to be comptable for her intromission: But the Pursuer Replyed, that she might be pursued for that particular lybelled wherewith she intrometted, seing it was not contained in the Defuncts confirmed Testament: She Duplyed, that she could not be conveened therefore by this manner of Pursuit, but any having right thereto, as omitted out of the Testament, and obtaining a Dative thereof, might pursue therefore, to whom she should be answerable as accords. This Alledgiance was repelled, and the Action sustained against the Relict for her Intromission, seing the Testament wherein the Bairns are confirmed Executors, was given up by her self, and that her omission to give up the particular Goods of the Defunct, which was fraudulently done by her, ought not to be profitable to her, nor prejudicial to the Creditors, and found in respect of her fraudulent Omission, that there was no necessitie to seek a Dative *ad omissa*. Actor. *Monat.* Alter. *Hamilton. Gibson* Clerk. *Vid. Decem.* 5. 1623. *Scot* con. *Livingston.* 18. *March* 1624. *Barbara Cant.* 20. *March* 1624. *James Cochran.*

Ker contra *Scot* of *Hartwoodmyres, eodem die.*

MArk *Ker* pursuing *Scot* of *Hartwoodmyres* for the Mails and Duties of the Lands of pertaining to him, as Donatar to the Non-entry thereof: The *Lords* found, that the Retour of the Barony, whereof the Lands libelled were a part, albeit the Lands libelled were not specially retoured by themselves, was sufficient to liberate the Defender from all further duty claimed for the saids Lands, for all years preceeding the Declarator of Non-entry, except the proportion of the retoured duty, to the which the whole Barony is stented by the Retour, effeirand to the proportion of the saids Lands, compared and considered with the rest of the Lands, whereof the whole Barony retoured was componed and made up: Actor. *Oliphant.* Alter. *Scot.* *Hay* Clerk.

contra *eodem die.*

IN an Action betwixt contra The *Lords* found a Decreet null given against the Defenders therein-contained, pronounced by the Commissar of *Glasgow*, because it was given against them as Intromettors with the Defuncts Gear, which Intromettors dwelt not within the bounds of his Jurisdiction, and of the Commissariot; albeit it was answered, that the Defunct died within his Jurisdiction and Commissariot, and that his Testament was subject to be confirmed by him, and that the Goods intrometted with by the Defenders lay within his bounds, and was intrometted with by them there, which was repelled by the *Lords*, and the Decreet found null, because the persons who intrometted dwelt not within his bounds.

Watson

Watson contra *Watson*, *Feb.6.* 1623.

IN an Action of Tutor Compts, *Watson* contra *Watson*; The *Lords* found that the Tutor ought not to be answerable for any Debts owing to the Minor by Persons *qui non erant solvendo*, and that his not doing of diligence, by intenting of Process, and raising of Charges or Letters of Horning against them, could not burden him, nor make him subject to the Pupil for his omission; in respect whatever should have been depursed in pursuing of such Debts, was but unprofitable spending of the Minors Money: And therefore the *Lords* found the Tutors alledgiance relevant, *viz.* That the Debitors were not able to pay, but astricted the Tutor to prove by the Neighbours, and such others who knew the Debitors, that they were repute and known in the Countrey, to be unable either in Lands or Goods, to satisfie the Debt owing to the Minor, which being proven, The *Lords* declared it sufficient to liberat the Tutor, albeit he had done no diligence; but if the Minor would alledge, that the Debitors were *solvendo* in Lands or Goods, Then the *Lords* would prefer that, to the alledgiance of their inability alledged by the Tutor, and admitted to the Minors probation to eleid the Tutors exception of their insufficiency; which alledgiance of their sufficiency being proven, they found the Tutors negligence a sufficient cause to make him answerable for the Debt.

Item, In this same Process they admitted an Article of Defalcation, founded upon the Tutors entertaining of the Minors, after the expiring of the years of the Tutory, and divers years after they had chosen Curators; and found that the entertainment after the Tutory should compense with the sums acclaimed by the Minors *pro tanto*, and would not put the Tutor to any further Process to pursue an Action therefore against the Minor or his Curators, but found it might be received in the same Process to compense, *ut supra*. Actor. *Stuart*. Alter. *Lawtie*. *Hay* Clerk.

Wallace contra *M^cdougal*, *Feb*: 12. 1623.

IN an Action of Registration pursued by *Wallace* contra *M^cdougal*, of a Bond given by *M^cdougal* to *Wallace*, obliging the Debitor to pay the sum at a certain Term, and failing of payment thereof, to pay Annualrent therefore to the Creditor, and to his Wife, and to the longest liver of them two, and after their decease to the Heir of the Husband: The Husband being dead before the Term of payment appointed in the Bond, this Bond being desired to be Registrat at the instance of the Heir of the Defunct, and at the instance of the Husbands Relict, to whom the Liferent was conditionat by the Bond, against the Debitor. The *Lords* found, that it ought not to be Registrat at their instance, seing the man died before the Term of payment, and so the Sum remained Moveable, and never became Heretable by the foresaid Clause, and consequently that the same would belong to his Executors, and not to the Heir nor Relict. *Hay* Clerk. *Vid*: 10 *March* 1630. Doctor *Lindsay*. 15 *July* 1623. *Anderson*. 22 *Feb.* 1623. Mr. *Leitch*. 14 *Feb.* 1622. *Stevin*. 8 *Jan.* 1624. Bairns of Col: *Henderson*.

Arnot contra Executors of *Home*, *Eodem die*.

John Arnot having recovered Decreet against the Executors of umquhile *John Home*, who was his Debitor, and having denounced them to the Horn, thereafter pursues *Patrick Abernethie*, who was Cautioner in the Confirm'd Testament for the Executors, to make the Goods Confirmed forthcoming, to hear him decerned to make the saids Goods forth-coming, seing he had discust the Executors, by putting them to the Horn. The *Lords* would not sustain the Process against the Cautioner upon that ground, be-

cause the Executors were denounced Rebels, seing thereby they found the Executors not sufficiently discust; for the Creditor ought to have sought the Executors moveable Goods, and Poynded them, if they had any; and if they had none, he ought to have Compriſed their Lands, which ought all to have preceeded, and been done, before he could have recourſe againſt the Cautioner in the Teſtament; or if they had no Moveable Goods, nor Heretage, they ought to have lawfully ſearched the ſame, and after diligence, if they had none to Poynd or Appryſe, then they might come upon the Cautioner, and no otherways; for without that diligence the Executors were not diſcuſt ſufficiently, albeit they were denounced upon the ſentence obtained againſt them. Actor. *Nicolſon.* Alter. *Gibſon* Clerk.

L: *Saltcoats* contra *Brown*, *Feb*: 14. 1623:

THe L. *Saltcoats* having arreſted the Maills and Duties of a Tenement of Land pertaining to his Debitor, and purſuing to make the ſame forth-coming, compeared one *Brown*, and alledged that he ought to have the ſaids Maills and Duties, becauſe he had Compriſed that Tenement long before the Arreſtment, whereby he became in the Heretable Right of the Land, and conſequently ought to be preferred to be anſwered of the Duties thereof. The *Lords* preferrs the Arreſter, by vertue of the Sentence, notwithſtanding that the Compryſing was alſo a Sentence, and that preceeded the Arreſtment; becauſe there interveened a great ſpace betwixt the Compryſing, and before the Arreſtment, during the which whole ſpace neither had the Compryſer obtained Seaſin, nor yet ſince was he Seaſed; neither had he done diligence to recover Seaſin, nor uſed any other diligence all that interveening time, upon the Compryſing, without the which he could not be found to have a real Right, and ſo repelled his alledgiance founded upon his Compryſing. *Hay* Clerk. *Vid.* 1 *July*, 1624. L. *Balvaird.* 14 *Jan*: 1625. L. *Kilſyth.* 13 *Decemb*: 1627. Sheriff of Forreſt.

Ratray contra *Grahame*, *Eodem die.*

IN a Reduction of a Decreet of Removing obtained by Mr. *James Grahame*, which was purſued by one *Ratray*, upon this reaſon, *viz.* that the Lo. *Gray* who was Author to Mr. *James Grahame* in the Right, whereupon he had obtained the ſentence of that Removing long before the Right made to Mr: *James*, had ſet a Tack and Aſſedation of theſe Lands controverted to one and his Spouſe, during their Lifetimes, and to their Heir after their deceaſe, and that the eldeſt Son of theſe Liferenters, and appearand Heir, had made the purſuer of that Reduction Aſſigney to his Right of that Tack, who being on life, as he and his Aſſigney might have defended againſt the Removing, if they had compeared; ſo now he as Aſſigney conſtitute to the Tack by the appearand Heir yet on life, might reduce it. The *Lords* aſſoilzied from this reaſon of Reduction for theſe two cauſes, which were both found relevant, *viz.* becauſe the Aſſignation was made by the appearand Heir, who albeit he might bruik *hoc nomine* as appearand Heir, yet he could not tranſmit nor aſſign the Tack and right thereof, except he had been ſerved Heir, the Tack being ſet to the Heir, otherways the Aſſigney might bruik, during the lifetime of the appearand Heir his Author, and yet after his Authors deceaſe another might come and ſerve himſelf Heir to the firſt perſons, who were the firſt Liferenters in the Tack, and bruik during that Heirs Lifetime, and ſo the Tack ſhould be extended to a Liferent longer than it was granted, and then the tenor thereof proports, which cannot be, ſeing the appearand Heirs Aſſigney ſhould bruik during the appearand Heirs lifetime, and he who truly entered Heir ſhould bruik during his Life-

time

time also, whereas the Tack is only set for the lifetime of one Heir. 20. The *Lords* assoilzied from that reason, because the Tack was set personally to the Liferenters therein named, and to their Heir, without making mention of the Assigneys, and so the Tack being thus conceived, not giving power to make Assignation, he could not make an Assigney to his Tack, which was personally set: both which alledgiances were found relevant. Actor. *Cunninghame*. Alter. *Aiton*, *Russel* & *Craig*. *Gibson* Clerk. *Vid.* 3 *March*, 1626. *Dowglass*. 21 *Jan.* 1636: *Buchanan*. 14 and 28 *July*, 1625. E. *Morton*.

Hoppringle contra E. *Home*, *Feb.* 15. 1623.

IN an Action of Reduction pursued at the instance of *James Hoppringle*, as Heretor of certain Lands against the E. of *Home*; the Title and Interest of which pursuit was Libelled and founded upon his Seasin, being pursued at his instance, as Heretable Proprietar. The *Lords* sustained the pursuit, and the Seasin produced to instruct the Pursuers Title, albeit the same was a Seasin which was transumed after the intenting of the Summons of Reduction, and after the Defender was Summon'd in the Action; and albeit the Defender alledged, that the Title whereupon the Summons was founded ought to preceed the same, and that a Seasin which only had authority after the intenting of the Summons, by that subsequent Transumpt thereof, could not instruct and be a Title to a preceeding intented Cause; yet the *Lords* repelled that exception, seing the Seasin it self was of a date long preceeding the Summons, albeit it was transumed thereafter. Likeas also the same was sustained, albeit the Defender was not cited to the Transuming, who, as was alledged by the Defenders Procurators, ought necessarly to have been Summoned to the transuming, seing he was cited in the principal Cause before the transuming, and so could not be miskenned in the transuming, but should have been Summoned thereto, which alledgiance was repelled; And the *Lords* found no necessity to have Summoned the E. of *Home* to the transuming of the Seasin, albeit he was made Defender before the Transumpt by his preceeding citation in the principal Cause. Actor. *Aiton* & *Nicolson* younger. Alter. *Hope* & *Belshes*. *Scot* Clerk. *Vid.* 5 *March*, 1624. *Mongrenen*. 1 *July* 1626. *Inglis* and *Scot*.

Blaikburn contra *Dryſdale*, *Feb.* 18. 1623.

ONe *Blaikburn* in *Innerkeithing* having obtained Decreet against *Dryſdale*, for Poynding of the Ground of a Tenement of Land, for satisfaction of the bygones of an Annualrent, which *Blaikburn* had by Infeftment out of that Tenement; which Decreet being Suspended, and at the purchasing of the Suspension, another *Dryſdale* being enacted Cautioner for payment of these bygones, conform to that Decreet, after this Suspension was discust, and the Letters found orderly proceeded, the Party raises Charges upon the Act of Caution, and charges the Cautioner to make payment of the bygones foresaids contained in his Decreet, for the which the Tenement was decerned to be Poynded; these Charges being Suspended by the Cautioner, The *Lords* found this reason of his Suspension relevant, *viz* that the Cautioner could not be personally charged for payment, seing he could not be obliged as Cautioner to do any further than his Principal might be compelled, and he could not be charged personally, seing the Decreet given against him was only real for Poynding of the Ground, and not personal to make payment, and consequently the Cautioner could not be astricted to any further. This reason was found relevant, and all personal execution and charges of Horning against the Cautioner were Suspended, albeit in his

Act of Cautionry he had obliged himself to make payment, which the *Lords* found behoved to have relation to the Decreet, which bore only real execution, and declared that the Cautioner remained obliged, to make that Ground Poyndable, and answerable to the satisfaction of that Annualrent contained in the Sentence, so that if the Party should be frustrat in the Execution of his Poynding, or Compryfing, the Cautioner was holden and stood obliged for the same, but that he could not be summarly charged by Letters of Horning. *Hay* Clerk. *Vid:* 18 *July,* 1632. *Trotter* contra *Logan.*

Craw contra *Irvine* and others, *&c. Feb:* 21. 1623.

ONe *Craw* Arrests in the hands of certain persons some Sums and Corns addebted by them to one Mr. *James Irvine,* who was addebted to *Craw* in some Money, for satisfaction whereof they being pursued to make the same forth-coming, compeared a person who was made Assigney to the particulars Arrested by the said *Irvine,* and alledged that the Goods should be decerned to pertain to him, in respect of the Assignation made to him before the Arrestment, and that the same was also intimat before the Arrestment; in fortification whereof the said Assigney condescended on the onerous cause, for making of the said Assignation, and offered him to prove, that *Irvine* his Cedent being Debitor to sundry persons his Creditors, in certain Sums of Money, this Assigney at his desire promised to the saids Creditors payment of their Debts: Likeas, he had truly made payment to them, for satisfaction whereof, and relief of the said payment, the said Assigney got the said Assignation, and so depending upon that onerous cause, he ought to be preferred to the Arrester, and the foresaid cause he offered to prove it by the Oaths of the saids *Irvins* Creditors to whom he had made payment. It was answered for the Arrester, that that Assignation ought not to be respected in prejudice of him who was a lawful Creditor, and who had a Registrat Obligation, which was a sentence against the common Debitor, long before the said Assignation, before the which Assignation he had also charged his Debitor, and who becoming Bankrupt and Fugitive out of the Countrey since, could not make an Assignation to another of his Creditors in prejudice of his Debt, and Sentence, and Charge preceeding, thereby to prefer one Creditor at his pleasure to another doing more timely diligence; and so alledged that that Assignation came under the Statute of Dyvours, specially seing there was no Writ extant to prove the preceeding Debt, for which the alledged Assignation was made; It was answered for the Assigney, that there was no necessity for him to shew any preceeding Debt in Writ; for what was betwixt *Irvine* and his Creditor, it was neither pertinent nor possible for him to know, but it was certain, that he at *Irvins* desire, having promised to pay them, and having according thereto made payment, and receiving this Assignation for his relief or warrand, he therefore hath a just cause of his Debt, whereupon he offered to give his own Oath of verity, which is the manner of probation prescribed by the Act, and so he ought not to be urged to any further probation, and yet he also offered to prove the whole cause of the Assignation by the Oaths and Depositions of the saids persons Creditors of the said Mr. *James Irvine,* who were persons *omni exceptione majores,* viz. the one being the Bishop of *Dunkell,* and the other the Minister at The *Lords* astricted the Assigney to prove by Writ, that *Irvine* was Debitor to these two persons payed by the Assigney, and would not sustain the same to be proven by the parties Oaths, neither would sustain the said alledgiance of the cause of the Assignation to be proven by the Assigneys own Oath, notwithstanding of the Statute; but that part anent the Debt owing by *Irvine* to the Creditors, being proven by Writ, they found

found the reſt of the alledgiance, anent, the promiſe and payment made by the *Aſſigney*, might be proven by the ſaids two Creditors their Declarations, otherways the *Lords* would prefer the Arreſter, whoſe diligence they found ſufficient, conſiſting of the foreſaid obligation Regiſtrat, and preceeding Charge of Horning, albeit the Denounciation was not execute, nor followed thereupon. Actor. *Nicolſon* elder and younger. Alter. *Hope* & *Perſon*. *Gibſon* Clerk. *Vid.* 12 *Feb.* 1622. *Young* contra *Denniſton*. 23 *March*, 1624. *Duff* contra *Kellie*. 22 *Jan.* 1630. *Hoppringle* contra *Ker*.

Cunninghame contra *Forreſter*, *Eodem die*.

THe L. of *Glengarnock* having borrowed 1000 merks from *Walter Forreſter* upon his Lands of *Boquhan*, which he Wodſet to him redeemable upon that Sum, and for more ſure payment of his Annualrent, having aſſigned to him the Teinds of certain Lands enumerat in the Contract of Wodſet: this Wodſet thereafter being deſired to be lawfully redeemed at the inſtance of Mr. *John Cunninghame*, Succeſſor to the Laird of *Glengarnock*, in his Right, upon the Conſignation of the principal Sum: The *Lords* would not ſuſtain the order of Redemption, becauſe the time of the Conſignation the Redeemer had not conſigned the prices of the Victual of the whole Teind-ſheaves of the Lands, aſſigned by the Contract to *Forreſter* for the Annualrent, ſeing the Redeemer was in poſſeſſion of the Teind-ſheaves of one of the Lands and Rooms aſſigned; albeit it was anſwered by the Redeemer, that he could not, nor ought to conſign no more but the principal Sum, becauſe the Bolls whereto the Teinds extended were not ſpecially ſet down, neither was the price liquidat, beſides he offered to prove, that *Forreſter* Defender was in poſſeſſion of a great part of the Teind-ſheaves of theſe Lands, which were aſſigned to him for his Annualrent continually, ſince the date of the Contract of Wodſet, which Teind-ſheaves poſſeſt by him far ſurmounted the ordinary Annualrent of 1000 merks, ſo that he being poſſeſſor of more than ſatisfied his Annualrent, he needed not conſign further, but his Order ought to be ſuſtained: and if he had right to any other Teinds by his Contract for by-gones, this Redemption took not away his Right, but thereafter he might purſue therefore; notwithſtanding of which Anſwer, the *Lords* found the Redemption could not be ſuſtained, untill the Defender were firſt ſatisfied of the Teinds, which he wanted; and therefore they thereafter ordained the Parties to condeſcend upon the quantities of the Teinds, which the Defender wanted, that the *Lords* might modifie the prices of the Bolls, and cauſe pay the ſame to the Defender, which being payed preſently, with the principal Sum, they would ſuſtain the Order, and no otherways; and this was done notwithſtanding of the Act of Parliament 1592, which appoints Wodſets of Victual to be lawfully redeemed by payment, or conſignation of 10 for each hundred, and that the Purſuer ſubſumed, that the Defender was payed of 10 for each hundred, by the retention and poſſeſſion of the Teinds, which extended to a greater quantity. Actor. *Hope*. Alter. *Mcgill*. *Gibſon* Clerk. *Vid.* 6 *July* 1630. *Nisbet* con. E. of *Caſſils*.

Leitch contra L. *Balnamoon*, 22 *Feb.* 1623.

IN an Action bewixt Mr. *John Leitch* and the Laird of *Balnamoon*, the *Lords* found that Obligations, wherein the payment is appointed to be made to a ſecond perſon therein named, ſubſtitute in caſe of deceaſe of the firſt perſon, where the firſt perſon lives after the Term of payment appointed by the Bond, pertains to the ſaid firſt perſon, notwithſtanding of the ſubſtitution, and that the ſame comes under his Teſtament, and pertains to his Executors, and that the ſecond perſon hath no right thereto by vertue of that clauſe.

of Substitution, albeit the first person should never alter that clause of the Bond in his life-time. Actor. *Hope* & *Stuart.* Alter. *Nicolson* & *Nairn. Gibson* Clerk. *Vid.* 18 *January* 1625. *Watt* contra *Dobie.* 12 *Feb.* 1623. *Wallace.*

Lamb contra *Tweedie, Eodem die.*

IN an Action pursued by one *Lamb* against *Tweedie*, for payment of the prices of certain Merchandizes, furnished by the Pursuer to him for his Clothes, and Abuilziements of his Body, and others his Necessars; the particulars of which furnishing, was referred to the Defenders Oath simpliciter: The *Lords* would not sustain this Action, because the same was moved and intented for furnishing of Clothes made to the Defender being then Minor, *& in familia paterna*, his Father at the alledged time of the furnishing, and before, being in use to take off to the Defender, and to provide him of such Necessars as were contained in the Summons; so that the Pursuer could not of the Law have any competent Action against the Minor therefore, but ought to pursue his Father for the same *prout de jure*, but ordained the use of furnishing alledged made by the Father to be proven. *Scot* Clerk.

Irving contra L. *Graitney*, &c. *Eodem die.*

IN an Action of Ejection pursued by one *Irving* against old *Graitney*, his Son, and Oye; the *Lords* found it sufficient Probation to infer Sentence against old *Graitney*, albeit it was proven that the Ejection was actually committed by the Son and Oye, and not by the Goodsir, because the Witnesses proved that the Goodsir lent to his Son and Oye Horses to till the Land after the Ejection, and that he gave them Seed also to sowe the Ground after the same. *Hay* Clerk.

Lyon contra *Scot, February* 25. 1623.

SIr *Robert Scot*, eldest lawful Son to Sir *Robert Scot* of *Thirlstane*, by his Obligation given to *Mary Lyon*, obligeth him to take her to his Wife, and also obligeth him how soon he or his Heirs should succeed to his Fathers living off *Thirlstane*, to Infeft the said *Mary* in an Annualrent of 1000 merks, to be uplifted out of the saids Lands, and living off *Thirlstane*. Sir *Robert* after his Marriage with the said *Mary*, being deceast, *Mary* having Registrat the Bond against a Brother of the said umquhile Sir *Robert*, who was served Heir of Line to the Defunct, and against the Father who was served Heir of Provision to him, for the Defunct the time of the Bond, and before stood Infeft, and the Heirs gotten of his Body, in some Lands conquish'd by his Father to him, which were not of the old living of *Thirlstane*, which were by the Infeftment, in case of failzie of Heirs gotten of his own Body, provided to his Father & his Heirs, and so he succeeded to his Son in these Lands, as Heir to him by Provision; and they being charged for Implement of this Bond, the Letters were simpliciter suspended for the Heir of Line, who was ordained first by the *Lords* to be discuss'd, in respect of the tenor of the Bond, whereby the Maker oblig'd him and his Heirs, how soon they should succeed to his Fathers Lands of *Thirlstane*, then to Infeft her; and true it is, that the Father was yet on life, so that he could not succeed to these Lands, and so could not be Debitor to her; this Reason was found relevant to liberat the Heirs of Line, and thereby he was found sufficiently to be discuss'd; and thereupon Execution being sought in the second place against the Father, who was served Heir of Provision to his Son in the foresaids other Lands, the Father using this same reason of the Heirs, founded upon the tenor and quality of the Bond; that albeit he succeeded to his son in the Lands

Lands foresaids, by the Provision of the Infeftment, yet he had not succeeded to him in the Lands of *Thirlstane*, wherein his Son was never Infeft, but whereof himself was ever Heretor, and to which his Son could pretend no Right, and so he could not be oblig'd; for it were a dangerous example to authorize a Bond given by the Son, thereby to bind the Father without his Consent, or any Deed done by him, to fulfill the Sons Obligation in an Act contracted by himself, without advice of the Father. This Reason was not sustained for the Father, but the Letters and Charges were ordained to have Execution against him, in respect he was Heir by Provision to his Son, and that he was Possessor of the Lands of *Thirlstane*, after he had served himself Heir of Provision to his Son, by the same manner as he possess'd the saids Lands before that Service. Actor. *Hope* & *Scot*. Alter. *Nicolson* & *Lermonth*. *Gibson* Clerk.

Sibbald, contra L *Lethentie* and L. *Clunie*, *February* 26. 1623.

THe Laird of *Clunie* holding the Lands of *Clunie* of the Bishop of *Dunkel*, Dispons the same by two Charters to the Laird of *Lethentie*; the one to be holden of himself, the other of the Superior, and he is Infeft to be holden of *Clunie*; thereafter they are both at the Horn, and remain year and day thereat, whereby *Lethenties* Liferent holden of *Clunie* of the saids Lands of *Clunie* falls in the Laird of *Clunies* hands his Superior, and the same falls in the Bishops hands as *Clunies* Superior, by *Clunies* Liferent, thorow his Rebellion year and day. The Gift of *Clunies* Escheat, after his lying at the Horn year and day, is gifted by the King to Mr. *Patrick Sibbald*, who obtained a general Declarator, and thereafter seeks and pursues for a special Declarator, to have the Liferent-right of these Lands Adjudged, to pertain to him by the simple Escheat, as coming under the same, as a Casuality belonging to the King, in respect *Clunies* Vassal, *viz*. *Lethenties* Liferent falling to *Clunie*, *Clunies* Rebellion made *Lethenties* Liferent to pertain to the King, as a part of the Casuality of *Clunies* simple Escheat; and so he contended, that *Clunies* Superior could not pretend right to the same, as falling to him by *Clunies* Rebellion year and day. The *Lords* found, that *Lethenties* Liferent of these Lands, which, by his being year and day at the Horn, fell in *Clunies* hands who was his Superior; but *Clunies* Rebellion fell not to the King, as a part and Casuality of the simple Escheat; but found, that in respect *Clunie* himself was year and day at the Horn, by the space of three Months before his Vassal *Lethenties* Rebellion year and day expired, that therefore by *Clunies* being year and day at the Horn before *Lethentie* his Vassal, the Liferent of the Lands pertained to the Bishop, and was acquired to him before it could be acclaimed as a Casuality of *Clunies* single Escheat, and after *Clunies* Liferent fell to the Bishop, whatever could accresce to *Clunie* by the continuing & remaining of *Clunies* Vassal, when year and day ran, and so when it was by the expiring of the year acquired to *Clunie*, the same accresced to the Bishop, in whose hands *Clunies* Liferent had fallen before, and consequently the Bishop having confirmed the said *Lethenties* Right of the Lands after his Lifetent, and *Clunies* was acquired to him by their foresaid Rebellion, albeit the said Confirmation was done after the Gift granted to *Sibbald* by the King of *Clunies* Escheat, and after the general Declarator recovered thereupon, yet being before any special Declarator obtained by the Kings Donatar, the same was found by the *Lords* sufficient, to exclude the Kings Donatar from all right to that Liferent acclaimed, as it would have excluded *Clunies* self, if he had sought the same. Actor. *Hope* & *Mcgill*. Alter. *Lermonth* & *Stuart*. *Hay* Clerk. *Vid*. 23 *Jan*. 1624. *Meldrum*. 8 *March* 1628. L. *Wedderburn*, 9 *March* 1624. *William Dowglas*.

L. *Randisuird* contra his Tennent, *Feb. penult.* 1623.

Randisuird setting a Tack to one of his Tennents of certain Lands, for the space of 9 years after his entry, which by the Tack was appointed to be at *Martinmass* 1622, pursues by way of Action the Tacksman to enter to the Room, and labour the same, which Action is intented in *January* 1623, after the Term of entry appointed by the Tack: The Defender compears and alledges, that this Action is a Novelty, and ought not to be sustained; for albeit the Tack was set to him off the Room, yet he ought not to be compelled to enter thereto, or labour the same, but at his own pleasure; for if he should never enter nor labour, or if he should suffer the same to ly lee for Grass, it was alike to the Pursuer; for he could have no Action upon the Tack against the Defender, but for the Tack-duty, which the Pursuer could not ask, but after the terms of payment of the Tack being past, at which time the Defender should answer him, as Reason and Law required. The *Lords* repelled this Alledgiance, and sustained the Action against the Tennent to cause him enter to the occupation, and labouring of the Room, that thereby the Defender might enter and plenish the same with Goods and Corns, whereby the Ground might be more answerable to the Master for payment of the duty of the Tack. Actor. *Mowat.* Alter. *Oliphant.* Clerk.

Haliburton contra L. *Murthill's* Debitors, *Eodem die.*

IN an Action pursued by Mr. *George Haliburton* against the Debitors of the Laird of *Murthill*, who was Debitor to Mr. *George*, for making arrested Goods forth-coming, wherein compeared *George Thomson*, as another Creditor to the Laird of *Murthill*, who had arrested the same Debt acclaimed before *Haliburtons* Arrestment, and who had also long before him intented Action to make the same forth-coming, and so was long anterior to him in diligence. The *Lords* preferred Mr. *George Haliburton* to *Thomson*, notwithstanding of *Thomsons* first Diligence, because *Halyburton* was Donatar to *Murthills* Escheat, and had intented Declarator thereupon, which Titles he conjoyned, and so he being both Donatar and Creditor, he was found to be answered, and not the other; albeit it was alledged by *Thomson*, that the two Titles ought not to be conjoined, to be sustained in his prejudice, and that the Gift of Escheat could not be derogative to his diligence, and to establish the right to the Donatar, who was alledged to be Creditor, as said is, seing he was anterior in Diligence, as said is, which is only respected in these and the like Cases when they occur, and the Gift of Escheat ought no more to be reguarded, being but lately acquired since the intenting, and during the dependance of this Excipients Action; which Alledgiance was repelled, and the Gift conjoined with the Pursuers Right as a Creditor, was preferred. *Vid. 13 Dec. 1622. Thomson. 6 March 1623. Finlason. 2 March 1626. Graham. 7 March 1628. Wilson.*

In this same Action no respect was had to an Alledgiance, proponed for *Halyburton* against *Thomsons* Pursuit, where he alledged that the Bond made to *Thomson* was Heretable, and so no Arrestment could be made thereupon while it had been made Moveable by a preceeding Charge against the Party obliged to make payment, seing in the Bond it was provided, that notwithstanding it was Heretable, yet the Creditor might ask payment at any Term when he pleased, and so as he might seek Execution, so he might arrest, which was a part of the Execution, as Poynding is. Actor. *per se.* Alter. *Monat. Gibson* Clerk.

L. *Essilmonth*

L. *Esfilmonth* contra L. *Buckie*, *Eodem die*.

IN an Action betwixt L. *Esfilmonth* and L. *Buckie*. The *Lords* found that a *Gift* of Escheat given and conceived *specifice* in these words, *viz.* of all which pertained to the Rebel the time of his Rebellion could extend to nothing which the Rebel had after the precise time, when he was denounced to the Horn, or which he acquired after Horning, but only extended to the Goods, which actually pertained to him at the very time of the denunciation; and where Gifts of Escheat bore this clause, *viz.* of all Goods which the Rebel should acquire after his Rebellion, that such clauses ought not to be sustained in any sort, neither that it ought to be restricted or sustained for all Goods, which he should acquire within a year after the Gift, for the which the *Lords* refused to allow these Gifts. Actor. *Nicolson* & *Lermonth*. Alter. *Hope* & *Lantie*. *Hay* Clerk. *Vid.* 25 *July* 1623. betwixt these Parties. 25 *Nov.* 1626. E. *Kinghorn* contra *Wood*.

Master of *Fedburgh* contra *Elliot*, *Eodem die*.

IN an Action pursued by the Master of *Fedburgh* against one *Elliot*, for the the violent Profites of certain Rooms, which were not *per expressum* contained in the Decreet of Removing, but libelled in this Action of violence to be parts and pertinents thereof. The Defender compeared and alledged them to be pertinents of his proper Lands, Heretably pertaining to him, and both the Parties alledging Possession as pertinents. The *Lords* found, that Witnesses should be examined for either of the Parties, to prove how they and their Authors posseft these Rooms controverted, whether as pertinents of the Pursuers Lands, contained in his Decreet of Removing, or as the Defenders proper Lands, and after the Witnesses were examined for either Party, they would consider what was expedient. Actor. *Hope*. Alter. *Nicolson*. *Gibson* Clerk. This was thereafter altered.

Paip contra L. *Wolmet*, *Eodem die*.

IN an Action of Suspension betwixt Mr. *John Paip* and the L. of *Wolmet*, for payment of a Pension of divers Loads of Coals given to Mr. *John Paip*. The *Lords* found, that the granter of the Pension, nor his Heirs were not obliged to carry the Coals to the dwelling-house of the Pensioner, where the Pension bore not the same *specifice*; but that it was sufficient to the granter of the Pension, and his Successors, adebted therein, to deliver the same at the Coal-hill to the Pensioner, to be transported upon his own Charges, where he pleased to carry the same; and that sicklike in other Pensions of that nature and quality, as of Victual, that the Pensioner ought to carry the same from the Barn-door and Ground of the Land upon his own Expenses, and that the granter is not oblig'd in the said Carriage, except the Pension be so expresly granted, and no otherways. Actor. *M'gill*. Alter. *Hay* Clerk.

Irving contra *Forbes*, *Eodem die*.

IN an Action pursued by *Irving*, who was Heretable Proprietar and Coportioner of a Land, which had a Moss belonging to the whole Land, against one *Forbes*, who was Infeft by a base Infeftment in another part of the same Land, with liberty of the said Moss, to be holden of the Annailzier, and under Reversion; To hear it found, that his liberty of the Moss should be restricted to the proportion of the Land wherein he was Infeft, and that he had no liberty in the said Moss, but effeirand to the Land, as it answered in proportion, as a part compared with the whole Land. The *Lords* sustained this Process against this Wodsetter, albeit the Heretor who was standing Infeft holden of the Superior, and who granted the Wodset under Reversion only, was not called to the Pursuit, to which they found no ne-

ceſſity to call him; but the *Lords* found and declared, that what ſhould be done betwixt theſe Parties in this Proceſs, ſhould not prejudge him. Actor. Alter. *Baird.* *Scot Clerk.*

Hamilton contra *Drummond*, *March* 1. 1623.

IN an Action purſued by *Hamilton* againſt the Heir of umquhile Sir *Alexander Drummond* of *Meidhope*, to make arreſted Farms pertaining to the Heir forth-coming, the Arreſtment being execute after *Whitſunday* in that year in the which the Farms were arreſted, and deſired to be made forth-coming, and the Land being appryſed from the Heir after the Arreſtment, but before the Term of *Martinmaſs* that ſame year; The *Lords* found the ſaid Arreſtment after *Whitſunday*, affected the half Farms of that year only, and that the Compryſing deduced before *Martinmaſs* affected the other half Farms, *viz.* for the *Martinmaſs* Term ſubſequent, to the Compryſers uſe. Actor. *Aiton.* Alter. *Hope.* *Gibſon* Clerk. *Vid.* 19 *Novemb.* 1623. *Ker* contra *Paterſon*, and the Caſes there. 28 *July* 1625. *Scot* contra *Suitie.* 16 *February* 1633. *Harper* contra *Cockburn.*

Williamſon contra *Law*, *Eodem die.*

IN an Action purſued by *James Williamſon* againſt Mr. *Archibald Law*, who was made Aſſigney to an Obligation made to one *William Hannage* and *Dickſon* his Spouſe by Mr. *Robert Williamſon*, and certain others his Cautioners, containing the Sum of 2000 merks; which Aſſignation the ſaid *James Williamſon*, Heir and Executor to the ſaid Mr. *Robert*, deſired by his Summons to be aſſigned back again by the ſaid Mr. *Archibald Law* to him, as being made in favours and to the uſe of the ſaid Mr. *Robert* himſelf, who had only borrowed the ſaid Mr. *Archibald Laws* name in truſt to his own behove, he being his Siſters-ſon, on whom he might have repoſed and concredited the ſame. The Defender compeared in this Cauſe, and defended contentiouſly, that this Aſſignation which was filled up with his name at the deſire of the ſaid Mr. *Robert*, who as the Defender alledged, had freely given the ſame to him; likewiſe it was regiſtrat in the Books of Council, bearing his Name, and Letters raiſed thereupon before the deceaſe of the ſaid Mr. *Robert*; and therefore could not by any preſumption be taken away from him, upon pretext of borrowing his Name and Truſt, the tryal whereof ought only to be taken by Writ or the Defenders Oath, and that the Writ perfected could not be deſtroyed, nor otherways taken away. The *Lords* examined in this Cauſe certain perſons Witneſſes, who knew of the Truſt, albeit they were not inſert in the Aſſignation, which they did *ex officio*; and by their Declaration, albeit the Aſſigney was ſolemnly examined, and denyed the Truſt, and took upon his Conſcience, that the Aſſignation was made to himſelf, and to his own proper uſe, by the free Gift of the ſame, procured to him by the ſaid Mr. *Williamſon* his Mother-brother, and albeit the ſame was regiſtrat in Mr. *Roberts* time, and ſo was made the Aſſigneys Evident in his own time, yet they found the ſame to be done in Truſt, and therefore ordained the Defender, to make retroceſſion of the ſaid Aſſignation, in favours of the ſaid Purſuer repreſenting the ſaid Mr. *Robert*. Actor. Alter. *Ruſſel.* *Scot* Clerk. *Vid.* 27. *July* 1624. Lady *Stanypeth.*

Wood contra *March* 4. 1623.

WOod of *Craig* having obtained a Decreet againſt the Executors of one *Ker*, who was his Debitor, and having put them to the Horn, thereafter purſues one *William* who was Cautioner for the Executors in the Confirmed Teſtament, to make the Goods Confirmed forth-coming, for ſatisfaction of the Debt contained in his ſentence. The Defender who was Cautioner

Cautioner compearing, proponed an exception, that the whole Goods of the Testament was exhausted by lawful sentences, recovered *debito tempore* by true Creditors. The *Lords* found this exception could not be received, being now proponed by the Cautioner, seing in the Action whereupon the Pursuer had recovered sentence against the Executors, the same was proponed by them, and admitted to their probation, and the term circumduced against them for not proving thereof; and therefore that the same ought not to be admitted again to the Cautioners probation; and this was found, albeit the Cautioners were not called, nor compeared in that Process, where the same was proponed by the Executors; and albeit he alledged, that what was done there ought not to prejudge him, he not being then Party, and that their omission ought to burden none but themselves, and ought not to take the benefite of this lawful defence from him, which was repelled, as said is. Actor. *Nairn* & *Mowat.* *Gibson* Clerk. *Vid*: 9 *July*, 1623. *Arnot* contra *Home* of *Manderstoun*.

Stevinson contra *Stevinson*, *Eodem die*.

IN an Action of Removing pursued by one *Stevinson* contra *Stevinson*, the Pursuers Title being a Seasin as Heir to his Father, by vertue of a Precept of *Clare constat* granted to him by the Superiour, after the Term before which the warning was made to remove. The *Lords* would not sustain that Title, nor Action founded thereupon, because he was not seased, nor the Precept directed nor granted at the time of the making of the Warning, and found that the same could not be drawn back to the warning, especially against a Party Defender, who compeared, and clad himself with a right to the Lands in his own person. Actor. Alter. *Kinross*. *Scot* Clerk.

E: *Linlithgow* contra *Sharp*. *Eodem die*.

IN an Action of Compt and Reckoning betwixt the E: of *Linlithgow* and Mr. *John Sharp*; The *Lords* sustained an obligation granted for repayment of Tailzied Moneys, according to the species of Money granted to be received by the obligation, and found that the party obliged ought to repay the same, according to the prices, as that sort of Moneys was worth, and gave the time when the obligation was pursued, but defalcation. Actor. *Nicolson* younger. Alter. *per se* & *Stuart*. *Gibson* Clerk.

Hamilton contra *Sharp*, *March* 6. 1623.

MR. *David Sharp* Parson of *Kilbride* ratifies to *Robert Hamilton* of *New-house* his Tack, which the said *Robert* had of the Teind-sheaves of some Lands within that Paroch, set to him by his Predecessors long before, and binds and obliges him to do no deed in prejudice of his former Tacks: Thereafter the said Mr. *David* sets a posterior Tack to another, whereupon *Hamilton* of *New-house* conveens Mr. *David Sharp* to refound to him the worth of the Teind-sheaves set by the foresaid posterior Tack, of all the years since, being 12 or 13 years, seing after the Tack set by the said Mr. *David*, his Tacksman had possest the said Teinds contained in his Tack, which of before were possest by the Pursuer by vertue of his said prior Tack, ratified as said is. The *Lords* sustained this Action, notwithstanding that the Defender compeared, and alledged, that the foresaid posterior Tack could never be a ground, which of the Law could have prejudged the Pursuers Rights, seing the said prior Right would have ever carried the Pursuer to the Right of the Tack, and would have made him to been preferred in the right of the Teinds to the posterior Tacksman; and if he had wanted his possession, or that the posterior Tacksman had attained to the pos-

session, it was the Pursuers own default, who might have lawfully maintained his own possession, or had a competent action against any who came betwixt him and his possession; neither could the want of his possession, and the posterior Tacksmans attaining of the possession, produce this action of warrandice against the Defender, seing he was never disturbed by order of Law by the setting of the said last Tack, by vertue whereof the Teinds were not evicted from the Pursuer, nor any action ever moved against him, which took away his Right, so that the want of his possession, not flowing from any ground tryed by Law, but being in his own default, could not produce this action of warrandice, where there was no distress declared by sentence preceeding; which alledgiance was repelled by the *Lords*. Actor. *Hamilton*. Alter. *Nicolson*. *Scot* Clerk. *Vid*: 19 *Decemb*: 1632. *Maxwell* contra E: *Nithsdale*.

Stevinson contra *Stevinson*, *Eodem die*.

THe above-written Action mentioned in the preceeding Page, *Stevinson* contra *Stevinson*, where the *Lords* found that the Seasin could not be drawn back. It was Replyed for the Pursuer, that the Defender could not quarrel the Title, because he was his Tutor, who of the Law was holden to have obtained the Pursuer in due time Seased as Heir to his Predecessor. Duplyed by the Defender, that he was not bound to serve the Pupill Heir, to evict the Lands against himself; moreover, the Precept and Seasin, which was the Title of the Removing, is procured many years after the expiring of the years of the Tutory, & after his Pupillarity, so that whatever fault is therein, cannot be impute against the Defender, who was not holden to answer for any deeds done thereafter; & if any had been omitted within the time of his Tutory, which is not granted, he had against him of the Law, *Actionem tutelæ*. The *Lords* found the Defender being once Tutor, could not quarrel the Pursuers right, albeit the Tutory was expired, and albeit he defended himself with a right in his own person acquired before he was Tutor, *partibus ut supra*. *Vid*. 6 *Decemb*: 1621. Lo: *Bargenie* contra *Stuart*.

Finlason contra *Johnston*, *Eodem die*.

IN an Action of *Robert Finlason* contra *David Johnston*; The *Lords* found that any person might Comprise upon a Heretable Bond, where the Bond gave liberty to the Creditor to ask the Money without requisition, albeit there was no preceeding Charge used against the Party to pay the Sum, thereby to make it moveable, except the Clause of the Bond made expres mention, that a Charge should preceed; for the Bond bearing that the Sum should be payed when the Party pleased to seek the same, without requisition, and providing that execution of Horning and Poynding should pass thereupon, as it was lawful to poynd the Debitors moveable Goods therepon, without any other preceeding Charge, so it was lawful to Comprise, & that the deducing of the Comprising was enough to declare the parties will, that he made the same moveable, seing the Bond bore no Clause for any preceeding Charge to be used. Actor. *Nicolson* & *Cunninghame*. Alter. *Hope* & *Belshes*. *Gibson* Clerk. *Vid*: *penult*. *Febr* 1623. *Halyburton*. 20 *July* 1622. *Cranston*. 2 *March* 1624. *Colthird* contra *Paterson*.

Lo. *Bargenie* contra his Sons, *March* 7. 1623.

LOrd *Bargenie* being obliged in his Contract of Marriage with *Josias Stuarts* Daughter, to Infeft the Bairns of that Marriage in his Lands, and Inhibition being served thereupon; the Lord *Bargenie* having thereafter for certain Sums borrowed from Sir *John Hamilton* of *Lettrick*, and some others, Infeft them in his Lands, mentioned in the Contract of Marriage; The said

ſaid Lord *Bargenie*, and the ſaids Creditors concurring with him, purſues his own Sons gotten in that Marriage, for Production, Reduction, and Improbation of that Inhibition, and to hear and ſee it found that the ſaid Contract was made in his Minority, and to his enorm hurt and Læſion, and therefore ought to be reduced; which purſuit was moved with the concurſe of the ſaids Creditors, to the effect that the ſecurity made to them by the ſaid Lo. *Bargeny*, for their juſt Debt, might be found a lawful Title and Right to them, and that thereby he might be made an able perſon, to give them ſatisfaction and ſecurity for the ſame; in this Proceſs, Horning being produced againſt *Bargenies* ſelf, whereby he was debarred *ab agendo*. It was alledged, that the Principal party being debarred, who had the only intereſt to purſue this action of reſtitution, the Proceſs behoved to ceaſe, in reſpect the reſt of the Purſuers were but purſuers by conſequence, whoſe intereſt could not ſuſtain the purſuit, founded upon the right of the principal party, with whom he only concurres, his intereſt being taken away, as ſaid is, and he being that perſon who only might ſeek reſtitution, as was deſired. The *Lords* repelled the alledgiance, and found the Creditors foreſaids might purſue this Action, to the effect foreſaid, notwithſtanding that the principal Purſuer was debarred by Horning. The *Lords* alſo in this Proceſs, after the Horning was taken up, ſuſtained this Action, for reduction of the Contract of Marriage, in ſo far as concerned the Fee appointed to be given to the Heir of that Marriage, in reſpect it was a Fee of the whole Lands, which being granted by the Father, being Minor, to his enorm Læſion, could not be ſuſtained. Actor. *Hope* & *Nicolſon*. Alter. *Nicolſon* younger, & *Ruſſel*. *Gibſon* Clerk. *Vid*: 4 *July*, 1632. *Donaldſon* contra *Hamilton*.

In this ſame Proceſs, The *Lords* ſuſtained the Action, albeit it was moved by the Father againſt his own Sons, being Pupills, whom by the Law he ought to defend, being in his Government and Adminiſtration, and againſt whom it was alledged, he could move no Action within the ſpace of their Pupillarity, during the which he ought to have defended them, as their Adminiſtrator and Tutor; which alledgiance was alſo repelled, in reſpect the Tutor is not ſecluded from his juſt and lawful Purſuit, competent againſt the Pupill, ſeing before the intenting of his Action, the Pupills were furniſhed by lawful Authority, and Sentence of a lawful Judge, with Tutors to defend them, choſen and given to them at the ſuit and deſire of their Goodfir, on the Mothers ſide; which Act of Tutory was produced, and the Proceſs therefore ſuſtained, *partibus ut ſupra*.

K. Advocat contra *Moriſon*, *March* 8. 1623.

IN a Purſuit at the King's Advocat's inſtance, againſt one *Moriſon* in *Dumblain*, to hear him decerned to be puniſhed, as an Uſurer, for taking of more than ten for the hundred, conform to the Act of Parliament; becauſe the Contract, which was given to the Defender, for the ſecurity of his Money, which was lent by him to *Douglaſs* of *Mains*, who provided him to a Victual Annualrent, and Prices therein liquidat, far exceeding ten for ilk hundreth, which was recovered by *Moriſon*, and payment made thereof, to him by *Mains*; this Purſuit was ſuſtained, and the Defender found to have incurred the Pain ſtatuted againſt Uſurers, notwithſtanding that it was alledged for him, that what he had received, and was payed to him of the Victual, and Price thereof, the ſame was decerned in his Favours, by Decreet, and Sentence given *in foro* againſt the Laird of *Mains* his Debtor, whereby the *Lords* found his Letters orderly proceeded againſt this Party, for payment of the Prices of the Victual conditioned in his Decreet, ſo that

he having a Decreet of the Soveraign Judge for his warrand, the same should not be a Snare to make him to be punished as an Usurer, especially seing in that same Process the Party proponed a Reason of Suspension, founded upon this same Act of Parliament, whereby he desired to be freed of payment, of any greater Profit than ten for the hundred, and which was then Repelled by the *Lords*, and so ought not now to be produced in this Action against him. This allegeance was Repelled by the *Lords*, and the Pursuit sustained. Actor. *per se.* Alter. *Kinross. Gibson* Clerk.

Muirhead contra *Muirheads* Creditors, *March* 9. 1623.

James Muirhead in *Hamilton*, Debitor to Umquhile *William Muirhead* Burges of *Edinburgh*, in a Sum of Money, Suspends upon double Poynding, as being charged by two Creditors of the said *William Muirhead*, *viz.* on the one part by *James Hope*, and Mr. *William* his Assigney, who for the Debt owing to the said *James Hope*, by the said Umquhile *William*, had conveened the neareſt of Kin of the said Umquhile *William*, who by the Law would be his Executors, and upon whose Renouncing to be Executors, he had obtained Decreet against them *cognitionis causa*, decerning the Bonds to be Registrat, that Execution might pass thereupon *contra bona jacentia*; And thereafter he had obtained himself decerned Executor to the said *William Muirhead*, to the effect he might be payed of his Debt in the first place, which was sustained by the Commissars, and thereupon he intents Action against this Suspender. And sick-like the Suspender was charged by *William Dick* Burges of *Edinburgh*, another Creditor of the said Umquhile *William Muirhead*, who was anterior in Debt, and Term of Payment to the said *James Hope*; Likeas his Bond was registrat against the said *William Muirhead*, in his own time, and before his decease, & the same Sum controverted, was arrested at his Instance, in this Suspenders hands, and sensyne the registrat Obligation tranferred in the Person of *Hope*, Executor decerned to the said Umquhile *William*, whereby he alledged, that he ought to be preferred, both in respect of the Anteriority of his Debt, and greater diligence, to *Hope*. The *Lords* preferred *Hope* to *Dick*, in respect that *Hope* had recovered the first Sentence against the Persons, who of the Law represented *Muirhead*, their common Debitor, and that he had done Diligence also, by obtaining himself decerned Executor to him, which gave him *jus prælationis* for his Debt, seing the Decreet and Arrestment used against *Muirhead* in his own time by *Dick* ceased, nothing being done thereupon, before his Decease, and so the Decreet of Registration obtained, while he lived, not being transferred, while after *Hopes* Decreet of Registration, and that *Hope* was decerned Executor, made *Hopes* Diligence to be greater than his, and so to be preferred to *Dick*. Actor. *Hope*. Alter. *Stuart. Scot* Clerk.

Dougall contra *Henderson*, *March* 11. 1623.

IN an Action betwixt *Dougall* and *Henderson*, an Obligation being granted to a Woman, and to her Husband, to be payed to them; The Husband living a long space after the Decease of the Wife, and thereafter the Husband dieing. The *Lords* sustained an Act of Registration pursued at the Instance of the Wifes Executors, for Registration of this Obligation, albeit it was objected, that the Sum pertained, and was *in bonis mariti*, and so that his Executors, behoved only to have that Action of Registration competent to them, and if the Wife, or her Executors had any Right to the Money, or any Part thereof, contained in the Bond, the Husbands Executors should be answerable to them therefore, which Reason was not found relevant. But the *Lords* declared, that Execution should only pass at the instance of the Wifes

Wifes Executors for an half of the Sums only belonging to the Wife. *Hay* Clerk. *Vid. Feb.* 14. 1622. *Beſſie Stevin*, and *July* 7. 1625. *Falconer*, Relict of Captain *Wiſhart*.

Baillies of *Duns* contra *Mudie's* Creditors, *March* 13. 1623.

THe Baillies of *Duns*, which is but a Burgh of Barrony, being charged to take *Robert Mudy*, who was Rebel at the Horn, and having Suſpended upon this Reaſon, *viz.* That they being but Baillies of a Burgh of Barrony, they ought not to be compelled to execute ſuch Charges, if any ſhould be direct againſt them, in reſpect their Juriſdiction and Authority extended only to execute *Decreets*, and Acts of their own Courts, and that their Power might go no further, and that it is againſt equity to urge them, to do that which their Power will not anſwer. The *Lords* found, that Baillies of Burghs of Barrony ought not to be compelled, and ſo ought not to be charged with ſuch Charges, as to take the King's Rebels, but all ſuch Charges ſhould be direct to Officers, and Magiſtrats of greater Power and Authority, than to Baillies of Barronies, either where there was Erection of Burghs of Barronies, or where there was no Burgh, and therefore found the Reaſon relevant, albeit it was alledged againſt the Reaſon of the Chargers, that they had ever been in uſe before, to execute ſuch Charges, for apprehending of *Rebels*, which uſe was not reſpected by the *Lords*; And therefore they ſuſpended the Charge againſt them *ſimpliciter*. *Vid. Feb.* 12. 1624. L. *Langton*. *July* 20. 1624. *Bell* contra. Baillie of *Duns*.

Fithie contra *Carmichael*, *March* 20. 1623.

IN a Contravention, *Fithie* contra *Carmichael*, being both Burgeſſes of *Dundee*, the Fact of Contravention being, for caſting down the Purſuer to the Ground, and bruiſing him with his Knees and Elbows, without any Blood, or other Violence. The *Lords* ſuſtained the Contravention, notwithſtanding it was alledged by the Defender, that he being conveened at the Purſuers Inſtance, for the ſame Fact, before the Baillies of *Dundee*, they being Town-Burgeſſes of that Burgh, the Baillies had for that Fact committed him to Priſon, after tryal taken by them, of the manner of the Fact, and ſo he being once puniſhed therefore, he ought not to be purſued *de novo* at the Purſuers Inſtance; Therefore this alledgeance was repelled, becauſe no Satisfaction was decerned by the Baillies, to be given to the Party Complainer. Actor. *Mowat*. Alter. *Ruſſel*. *Gibſon* Clerk.

Lo. *Teſter's Heirs* contra E. *Buckleugh*, *Eodem die*.

IN an Action of Improbation purſued at the Inſtance of the Heirs of Line, of Umquhile Lo. *Teſter*, againſt the L. *Buckleugh*, for Improving certain Evidents of Lands, to the which the Purſuers were Retoured Heirs to their Predeceſſors. The *Lords* ſuſtained the Purſuers Intereſt and Action, by Production of their Retour, albeit they had not been Seaſed in the Lands, which Retour was found a Title, whereby they might purſue Improbation *per ſe*; for in this Proceſs, the Purſuers produced a Seaſin, but it being of a date poſterior to the principal Summons, The *Lords* found it could not be the Title of that Purſuit, and therefore ſuſtained the Retour for a Title; the Purſuers therewith producing a Seaſin of their Predeceſſors, of theſe Lands to whom they were Retoured therein. Actor. *Nicolſon* & *Stuart*. Alter. & *Scot*. *Hay* Clerk. *Vid. Feb.* 4. 1630. E. *Kingborn*. *March* 2. 1627. and *March* 26. 1623. betwixt thir Parties, *June* 20. 1627. L. *Touch*.

Dalgarno contra E. *Mariſhall*, *Eodem die*.

IN a Declarator purſued by *Dalgarno*, as Donatar to the Eſcheat of the E. *Mariſhall*, wherein L. *Benholm* as another Donatar compeared. The,

Lords found, that albeit the Gift was taken to the behove of the Lord *Keith*, eldest Son to the Rebel, yet that was not sufficient to stay the Declarator, except it had been alledged, that the Lord *Keith* had taken it to the use of the Rebels self; And therefore repelled that alledgance proponed by a contrare Donatar, *viz.* L. *Benholme*. Actor. *Nicolson* & *Mouat*. Alter. *Hope* & *Stuart*. *Gibson* Clerk. *Vid. June* 25. 1622. Lo. *Borthwick*.

L. *Craigie-Wallace* contra his Tennents, *March* 21. 1623.

IN an Action of Removing pursued by the L. *Craigie-Wallace* contra his Tennents, an exception being proponed, by one of the Defenders, founded upon his *Rental* set to him by the Pursuers Father, during the Excipients Life-time; whereto it being Replyed for the Pursuer, that that Rental could not furnish any ground of Defence, because the Defender had Assigned, and Disponed his Rental to another, which Disposition made the Right of the *Rental* to become extinct, aswel to the Rentallers self, as to him to whom the same was Assigned and Disponed. Duplyed for the Defender, that the Rental was not personally set to the Defender, but thereby also by a special Clause thereof, he had power to out-put and in-put Tennents, and Sub-Tennents in the Lands under him; In respect of the which Clause, he had power to dispone upon his Rental to another, being of the like degree with himself, seing that Clause behoved to import the same, so that by the Disposition, the Rental could not fall. The *Lords* found, that notwithstanding of the Clause, bearing power to in-put and out-put Tennents and Sub-Tennents, under the Rentaller, yet that he had no power by that Clause, to assign or dispone the Rental, and found the Disposition of a Rental *in totum*, or of the most part of the Land contained in a Rental, made the whole Rental to fall *in totum*, but if the *D*isposition was made of a less part than the half of the Lands contained in that Rental, such Dispositions should not make the whole Rental to fall, but only *pro tanto*, *viz.* for the part disponed, and that the Rental should stand, and subsist for the rest of the Lands, which were not disponed, where the *D*isposition was not made of all, or the most part of the Lands therein contained. Actor. *Hope* & *Lawtie*. Alter. *Nicolson* & *Miller*. *Gibson* Clerk. *Vid. November* 13. 1622. Mr. *Thomas Nicolson*, *Item. July* 5. 1625. L. *Aiton*.

Cunningham contra E. *Glencairn*, *Eodem die*.

IN an Action pursued by the L. *Cunningham-head* Assigney to the Lo. *Kilmaers*, contra E. of *Glencairn*, upon a Contract, whereby the E. sold to the Lo. *Kilmaers* certain Lands, and obliged him to procure and deliver the Renounciations of certain Persons, who had Wodsets of the saids Lands, whereupon the Lo. *Kilmaers* Charging, and the E. Suspending, and finding Caution the time of the Suspension, the Matter lying over Suspended, he makes thereafter one Assigney to the Contract, who seeking transferring of that Suspension, and Act of Caution in him as Assigney. The *Lords* found the Suspension, and Act of Caution might be transferred, without any new Charge, being all done *inter vivos*, and that there needed no other new Charge, at the Assigneys instance, but that the Cautioner found in the Suspension stood still bound; Likeas there being a Horning produced, whereby the Lord *Kilmaers* was Rebel before the Assignation made by him, and so remaining Rebel then, as yet unrelaxed. It was alledged that he could not make an Assignation to prejudge Creditors, as this was. This alledgance was repelled, because the *Lords* considered, that this was an Assignation of an Heretable Right, which the Rebel might make, and that the Act whereupon the Alledgeance was proponed, should be understood of Moveable-Goods,

and

and therefore the *Lords* sustained the Action, at the Assigneys Instance, notwithstanding of the Cedents being then Rebel. Actor. *Dauling.* Alter. *Belshes.* *Scot* Clerk. *Vid. July* 3. 1623. *Hunter* contra *Watson. vid. Feb.* 10. 1624. *Ker. March* 8. 1639. L. *Pinkell. Decem.* 23. 1630. Mr. *Robert Hart.*

L. *Braco* contra *Ogilvy*, *March* 22. 1623.

L. *Braco* pursuing a Reduction of an Assignation made by Mr. *David Wood* to *Ogilvy* of *Carse*, of all the Corns, Goods and Gear, being and growing upon the Lands of *Carse*, the time of making the said Assignation, which was in the Moneth of *July*, the Corns being then growing, unseparat from the ground. The Reduction being upon this Reason, because the Cedent was Inhibit by the Pursuer, long before the Assignation, upon an anterior Debt, and Obligation made to him by the Cedent. The *Lords* assoilzied from the Reason *simpliciter*, because they found that an Inhibition only affects Parties Heretable Rights and Lands, that he cannot dispone thereupon, after lawful Inhibition served against him, but it affects not the Moveable Goods, so that notwithstanding thereof, the Person Inhibited may Dispone upon the same: for Letters of Arrestment, and not Inhibition affects Moveables, and Moveables are of that nature, that falling under dayly Commerce, the Dealing and Traffiquing therein, ought not to cease by simple Inhibition, without Arrestment proceeding upon a lawful Cause. *Gibson* Clerk. *Vid. July* 25. 1623. E. *Errol. March* 14. 1626. L. *Westraw. July* 2. 1625. *Perteous. January* 24. 1629. *Dickson.*

L. *Dunipace* contra his Tennents, *March* 25. 1623.

IN an Action pursued by the Laird of *Dunipace* contra his Tennents, wherein the Pursuers Seasin being quarrelled, for not being Registrat in the Clerk Registers Books, within the space of sixty dayes, after the date thereof. The *Lords* repelled that alledgeance, because they found no Person had interest, to propone that nullity, but a third Person, who had a lawful Right to the Lands standing in his person, as the words of that *Act* it self proports, *viz.* the *Act* of Parliament in *Anno* 1617. Actor. *Hope.* Alter. *Lawtie. Gibson* Clerk. The like done, *Novem.* 13. 1623. *Marshel* contra *Marshel. Item*, *March* 24. 1626. *Gray* contra Tennents of *Fernistat* and *Graham*.

L. *Hunthill* contra *Rutherfoord. Eodem die.*

IN an Action betwixt L. *Hunthill* contra *Rutherfoord*, an Infestment being given of Lands fallen by Recognition, & thereupon Decreet of Removing obtained against the Tennents, thereafter upon Resignation by him who acquired the Right of Recognition, another being Infeft in thir Lands, and pursuing Action of succeeding in the *vice*, against one who had entered to the Possession of him, against whom the said Decreet of Removing was obtained before, as said is, at the Authors Instance, who compearing, and alledging the Pursuers Right and Seasin of the Lands, to be no sufficient Right and Title, which could give him the Right to the Lands, or to produce this Action, because it depended upon the Right of Recognition, acquired by his Author, which was never declared, and no Declarator of Recognition being obtained upon the said first Infestment, the same and all other subaltern Rights depending thereupon, was not sufficient. This alledgeance was repelled, in respect of the Decreet of Removing obtained, as said is, by the Pursuers Author, and of the Pursuers Right proceeding upon Resignation of his Author, concerning the validity whereof, the Pursuer could not in this Judgement of succeeding in the *vice*, be compelled to dispute. Alter. *Belshes. Vid. March* 26. 1623. *Finlason* & *Donalson*.

Baillie contra *Nisbet*, *Eodem die.*

IN an *Action* of Suspension betwixt Sir *James Baillie* contra *Nisbet*, Sir *James* being Cautioner for the Defender, in certain Sums, and after Registration of the Bond, having payed the Sum, in the which Bond, the Principal is obliged to relieve the Cautioner of all Cost, Skaith and Damage, to be incurred by him, thorow his Cautionry; the Bond being of the nature of a Moveable Sum, and bearing no *Annual*. The *Lords* found, that the Cautioner might seek his Relief, and Charge, for payment to him of the *Annual* rent of the Principal, for all Terms since he made payment thereof to the Creditor, albeit he had not sought his Relief, & Payment thereof many years, and albeit it was a great space after the payment of the Principal Sum, without any charges of Horning, or Poynding, or other Distresses; seing the *Lords* found, that he being obliged, and the Bond registrat, and thereafter payment made, that was a sufficient Distress, without any more, to produce this *Action* of for Relief, the *Annuals* against the Party obliged. *Actor. Belshes. Alter. Nisbet. Hay* Clerk. *Vid. July* 28. 1625. *Scot* contra *Suitie*, *Jan.* 24. 1627. L. *Wauchton*. *Novem.* 15. 1627. *Patrick Black.*

Stuart contra *Scot*, *Eodem die.*

IN an *Action* *Francis Stuart* contra *Scot*, for Reduction, and Improbation. The *Lords* found, that a Witness ought to be examined *ad futuram rei memoriam*, concerning the verity of the Writs taken to be improven, in respect of the Age and Sickness of the Witness, who was desired to be examined; and this was found by the *Lords*, albeit it was alledged by the Defender, that such Examinations and Depositions are never appointed to be received by the *Lords*, in *Actions* of Improbation, as this *Action* betwixt thir Parties is, but the same is done sometimes by the *Lords*, in *Actions* of other natures, but not in Improbations, especially it ought not to be granted, where this *Action* being both Reduction and Improbation, the Party cannot crave the same, except he would pass from the Reduction, and that Litiscontestation were made in the Improbation; neither of which being done, the desire thereof ought not to be granted, the which alledgeance was repelled, and the Witnesses ordained to be examined. *Actor. Stuart* & *Craig*. Alter. *Nicolson*, *Lawtie* & *Scot*. *Gibson* Clerk.

Finlason & *Donaldson* contra *Sheriff* of *Edinburgh*, *March* 26. 1623.

MR. *John Finlason* obtains Decreet before the Sheriff of *Edinburgh*, dividing his Lands of *Killeith* from the Lands pertaining to the L. *Roslin*, and appointing Marches to be set by the Sheriff, betwixt the said Lands, the Heretable Right of the said Lands, being thereafter disponed to *James Donaldson* and *Gilbert Kirkwood*, they, and the said Mr. *John*, obtainer of the Sentence, charges the Sheriff to impute the March-Stone, conform to the Decreet; which being Suspended, Mr. *John Finlason* was debarred with Horning, and the said *James Donaldson* and *Gilbert Kirkwood* craving Execution at their instance, as succeeding to the Right of the Lands, by their Heretable Infeftment, and who consequently had the benefit of that Sentence competent to them, *hoc ipso* that they were Heretors of the Lands. The *Lords* found that no Execution could pass at their instance, upon the said Decreet, except they had been *per expressum* made Assigneys thereto, or else that they had obtained the same first transferred in their Persons, without which they could not seek these Charges, or Summar Execution, upon that Sentence. *Actor. King*. Alter. *Foulis*. *Gibson* Clerk. *July* 25. 1626. *James Stuart*. and *March* 25. 1623. L. *Hunthill*.

Lo. *Yesters* Heirs, contra the E. of *Buckelengh*, *Eodem die.*

IN an Improbation pursued at the instance of Lo. *Yesters* Heirs, against the Lo. *Buckelengh*: The *Lords* found that the Pursuer had no Interest to call the Defender, for production of any Writs, made to him by the King except the Pursuers lybelled and qualified, that their Right to the controverted Lands flowed from the King, and found it not enough, that the Pursuers being Heretably Infeft in the Lands, had therefore interest to call for Production and Improbation of any Writs, which the Defender had thereof, made to him by any other person whatsomever. Actor. *Nicolson* & *Stuart.* Alter. *Scot. Hay* Clerk. *Vid.* 18 *Decem.* 1623. L. *Monimusk.* 12 *July* 1626. *John Stuart.*

Smith contra the Baillies of *Elgin*, *March* 27. 1623.

Smith having pursued the Baillies of *Elgin*, for a Debt owing to him by for the which his Debitor being apprehended, and put in Ward by them, by Letters of Caption, they thereafter suffered him to pass out, and repair in their free and publick Streets as a free Person: The Baillies excepted, that they ought to be Assoilzied, because they having taken the Debitor conform to the Charge execute against them, he was put to Liberty by vertue of a Charge execute against them at the instance of the Debitor who had obtained Suspension of the pursuers Decreet. The *Lords* repelled this Alledgeance, in respect the Pursuer offered to prove, that before the Suspension was purchased by his Debitor, and before any Charge was given to the Baillies to put him to Libertie, the Debitor was out of Ward, and had free course by repairing to the Streets at diverse times: which Answer the *Lords* found Relevant, for the *Lords* found it was not enough for the Magistrats to Incarcerat and take the Rebel, except he were detained in Prison, and keeped therein, until he were freed by order of Law; and therefore albeit he was thereafter *ex post facto* relieved by a Warrand, yet they stood Debitors to the Party, because he was put out of Ward before they had any Warrand: neither was this respected by the *Lords* to free the Baillies, that they offered to restore him to Ward *cum omni causa*; and that any freedom he had before the Suspension, they would be answerable therefore to the Pursuer, concerning any Deed done to his prejudice during that time, whereby he might be found less *Solvendo*, than when he was put first in Ward, and so seing the Party had no prejudice, and that they should enter the Rebel *cum omni causa*, they ought not to be decerned to pay the Debt, which Alledgeance was repelled; for the *Lords* found, that the Warding is a punishment of the Debitor, from the which the Magistrats cannot relieve him at their own hand, but upon hazard of the Debt, and therefore sustained the Action. Actor. *Lawtie.* Alter. *Scot* Clerk. *Vid.* 30 *March* 1626. *Gemmel* contra Baillies of *Glasgow*, and 20 *Nov.* 1623. L. *Aytoun.*

Mr. of *Lauderdail* contra the Vassals of the Priory of *Haddingtoun*, 28 *March* 1623.

THe Priory of *Haddingtoun*, being erected in a temporal Barrony to the Mr. of *Lauderdail*, in the Parliament 16 Years, in the which Parliament also Sir *John Scot*, obtained a Ratification of his Infestment of the Lands of *Pittarchy*, which was Disponed of before by the King, to be holden of the King, by vertue of the Act of Annexation; the same Lands before the Act of Annexation, being holden of the Abbay and Priory of *Haddingtoun*. The Mr. of *Lauderdale*, intents an Action of Improbation against the Vassals of the Priory, Erected to him as said is, and amongst

mongst others against the said Sir *John*, for production to him of his Evidents of the said Lands, in the which Action the said Sir *John* compearing and defending himself, that he could not be compelled to produce at the instance of this Pursuer, in respect he was Vassal to the King by the Annexation: Likeas his Infeftment so granted to be holden, was Ratified the same time by that same Parliament, wherein the Erection was exped, and so the Pursuer was not his Superior; this Alledgeance was repelled by the *Lords*, and the Defender ordained to produce at the Pursuers instance, as was craved by the Summons, being an Action wherein the Pursuer alledged all the Writs made to him by the Priors, or since by the King of these Lands, to be false. Actor. *Hope*. Alter. *Stuart* & *Cunningham*. *Scot* Clerk. *Vid.* 25 *July* 1622. E. *Nithisdail*.

This Decision in my opinion Solves not the doubt, if Sir *John*, or such others as are in the like case, or hath been Vassals to the *Lords*, who have obtained Erection of the Benefices after Rights made, by vertue of the Act of Annexation to others, of Lands to be holden of the King; but the Doubt remains yet undetermined, for in this Decision there was a necessitie for Sir *John* to produce, seing he was called to produce his Evidents, made to him by the Priors, and sensine as false, the Pursuer who might do all that the Priors might have done, had reason to see if Sir *John* had Right to the Lands or not; but if the Writs were produced, it appears yet to remain free and unprejudged to the Excipient, to dispute in its own time and place, that he is not his Vassal, but only the Kings. *Vid.* 7 *Feb.* 1627. *John Stuart*.

The King & E. *Hume*, contra *Cranston*, 11. *June* 1623.

LItisconteſtation being made in the Action of Improbation, pursued at the *Kings* instance and the E. of *Hume*, against *Cranston* of *Moriston*, an Incident being raised, only at the E. of *Humes* instance, for proving of such points as by the Act of Litisconteſtation was admitted to his Probation, which Incident was not also raised at the Kings Advocats instance. The *Lords* notwithstanding thereof sustained the Incident, because the Advocat concurred and declared, that he insisted therein with the Partie. Actor. *Hope* & *Belshes*. Alter. *Nicolson* & *Craig*. *Vid.* 10 *Feb.* 1624 E. *Buckcleugh* contra Lo. *Yester*, and the Cases there.

Watson contra *Grinlaw*, *Eodem die*.

IN an Action betwixt *Watson* and *Grinlaw*, a witness produced for an Party who dwelled in a house within *Leith*, pertaining to the Producer, and being Tennent therein to him removable, for payment of Mail and Duty. The *Lords* found that notwithstanding, he was Tennent removable, yet he might be witness, and that this was no cause to repell him, seing he was only his Tennent within burgh of a house, and that such Tennents of houses within Burghs-Royal, might be witness against them, to whom they were Tennents, and found in this cause *Leith* to be respected as a Burgh-Royal. Actor. *Stuart*. Alter. *Lawty*. *Hay* Clerk.

E. *Marr* contra Lo. *Elpingston*, 23 *June* 1623.

IN an Improbation Pursued by the E. of *Mar*, against the Lo. *Elphingstonn*, as use is in such cases; There being a general Clause in the Summons, whereby the Defender was called to produce, by and attour the particular Evidents, especially set down in the Summons, all and whatsoever Writs and Evidents, made by such or such persons of the Lands libelled, as such Summons usually proports; and Incident being used by the Defenders, for recovering of the same Writs specially libelled, in the which Incident

the

the Defenders, who were thereby called as Havers, were also called for having all and sundry other Writs, conform to the general Clause contained in the Summons of Improbation; which general Clause of the Incident being quarrelled by the Pursuers of the principal cause of Improbation, alledging that that generality could not be sustained in that Incident, because no person could be conveened as Haver, except of some particular design'd Writ, and not of such generality, whereupon no Improbation could be led; and albeit that Clause was contained in the principal Summons of Improbation, yet that could not be a reason to sustain that general Clause in the Exhibition or Incident, seing in the Improbation he was not holden to prove any thing, but conceived his Libel *negativè*, that these was never such Evidents, and if any was, the same was false, against the relevancy of the which generality, the Party could obtrude no argument; whereas the Defender by his Incident alledges *positivè & affirmativè*, that these Evidents were false, and that they are in the Parties hands whom he conveens, which of necessity ought to compel the user of the Incident, to condescend specially what Writs these are, which he *positivè* affirms to be, and that the same are in the Defenders hands, called for by the Incident. The *Lords* found, that this Incident could not be sustained in the general Clause, albeit that Clause was as general in the principal Summons of Improbation, except the Pursuer and User of the Incident were special upon all the particular Writs, for which the Defenders were conveened in that Incident; and therefore ordained the User, to condescend specially upon each particular Writ, for the which he craved the Incident, which being specially condescended upon, the *Lords* sustained the Incident, but not for the general Clause. Actor. *Hope* & *Aiton*. Alter. *Nicolson* & *Stuart*. *Scot* Clerk.

La. *Winton* contra *Scot*, *June* 24. 1623.

IN an Action of Spuilzie of Teinds, the Lady *Winton* contra *Scot*: The *Lords* would not after Litiscontestation sustain an exception, the Defender being then compearing, who was absent in the Process when Litiscontestation was made, albeit it was the first Term of Probation, and no Witnesses then received, when he offered to propone it, tho founded upon the Act of Parliament for requiring of Teinding, and upon Teinding and intromitting conform thereto; which Exception was not received, albeit at the first Term proponed, because some part thereof consisted *in facto*, which could not instantly be verified, albeit the most part was verified instantly. Actor. *Stuart*. Alter. *Scot*. *Gibson* Clerk.

Act of Sederunt anent *Compryſings*, *Eodem die*.

A Statute was made by the *Lords*, That all Compryſings which should not in time coming be execute upon 15 days free, betwixt the day of the Denunciation and Compryſing, should be found null; and sicklike all bypast Compryſings which had that Defect, should also be found null, except only such by-past Compryſings, whereupon Charter and Seasin had followed, and which were clad with real Possession of that which was compryſed, and that nullity to be received summarly, either by Exception or Action.

L. *Drumlanrig* contra *Maxwell* of *Hills*, *Eodem die*.

IN an Action of Reduction pursued at L. *Drumlanrigs* instance against *Maxwell* of *Hills*, for Reduction of a Tack set to *Maxwell* of *Hills*, which was clad with long preceeding Possession, because it wanted the consent of the most part of the Convent of the Colledge-Kirk of *Lincluden*, to the Provostry and Benefice whereof, the Teinds contained in that Tack belonged, the Convent consisting of eight persons by the Provost, and the Tack being only subscribed by the Provost and three of the Convent. The *Lords* found it proven sufficiently, that

the Chapter consisted of eight persons by the Provost, by production of the Provisions given to eight several Prebendars of their Prebendaries by the Provost, and by production of some Feus and Rights set by the Provost, which were consented to by the saids eight Prebendars, which they found sufficient probation to verifie, that the Chapter consisted of eight persons by the Provost, and therefore that the Subscription of the most part was necessary with the Provost to that Tack controverted; and found it not necessar to show by the Foundation, that the Chapter consisted of eight persons, albeit the Defender alledged, that there was no necessity to him, to have the consent of the most part of eight, except the Foundation clearly determined that Chapter to consist of that number, for the Subscriptions of the Prebendars to some persons particular Rights, as Consenters, and the Provisions to the Prebendaries, was alledged by the Defender, to be no concluding argument to infer necessarily, that the Chapter was made up of that number, and that thereby he had a necessity to have the Subscriptions of the most part of that number to his Tack, which was clad with so long Possession, and never impugned before, except it were so constant and certain by the Foundation of the Benefice; which Alledgance was repelled by the *Lords*. Actor, *Hope & Nicolson*. Alter. *Stuart & Cunninghame*. *Gibson* Clerk. *Vid.* 14 *March* 1622, betwixt the same persons. 9 *Nov.* 1614. Mr. *Thomas Hope*.

Carmichael contra *Hay*, *June* 26. 1623.

Richard Carmichael being Heir and Executor to umquhile *James Carmichael* his Brother, to whom there was an Obligation of 2000 merks made by *William Carmichael* principal, and *George Hay* of *Monktoun* his Cautioner, pursues the said *George Hay* of *Monktoun* as Haver of the Obligation, at least who had, or hath put the same away, and the said Principal for his Interest, for production of the same, and delivery to him, as Heir or Executor to his said umquhile Brother. The Principal being absent in the Process, the Cautioner who was conveened as Haver, compeared and alledged, that he ought not to be compelled to exhibite or deliver the said Obligation, seing the Pursuer would not offer to prove, that the Defender had the Bond libelled, since the intenting of this Process. And where the Pursuer would alledge it to be sufficient to say, that he was Haver thereof at any time before, he ought to condescend how he had the same, and how the same came in his hands, and how the Pursuers self *desiit possidere*. For answer whereto the Pursuer offered to prove, that the Obligation libelled was made to his umquhile Brother, as said is, and that the same remained with him since the time of the making thereof, to the time of his decease, after whose decease *William Carmichael* principal Debitor being Tutor to this Pursuer, who then was Pupil, intrometted with the same, and delivered it to the Excipient being Cautioner, so that he ought to be answerable to him now therefore. The Defender Duplyed, seing the principal Debitor had recovered the Obligation, and had sent the same to him, it was lawful to him, who was Cautioner to take his own name out of the Bond, as is the constant use of the Country for all Cautioners, to do in the like Cases, when the Principals sends Bonds to their Cautioners to that effect, *nam instrumentum cancellatum apud Debitorem repertum, præsumit liberationem Debitoris*; and so he ought not to deliver it, nor exhibite, it being cancelled, and his Name taken out thereof; after the which taking away of his Name, he sent back the Bond again to the Principal, which was all the medling he had therewith. The *Lords* found the exception for the Cautioner relevant, and assoilzied from the Pursuit, without any Probation of the exception, in respect of the circumstances and presumption of the Law; and found it not necessar to the Defender

der, to prove the Exception anent the delivery of the Bond by the Principal, and that he sent it back again, after his own name was taken out by him; neither was it found necessar to prove, that the Bond was delivered, either to the Principal or Cautioner, by consent or allowance of the Pursuer; without whose consent the Pursuer contended, that his Bond could not be made unprofitable to him, seing the same was never satisfied, neither by Principal nor Cautioner, and that the presumption of the Law alledged by the Excipient had no place, but where the Creditor delivered his Bond to the Debitor himself, which could not be alledged in this Cause; all which was repelled by the *Lords*, seing they found the Cautioner might cancell his own Name out of the Bond, which was given to him for that effect, by him who was oblig'd for his relief, and that he might have done the same, whether the Principal had payed the Debt or not, which the Defender had no necessity to inquire anent. Actor. *Aiton & Russell.* Alter *Gibson* Clerk.

Cochran contra *Gechin, Eodem die.*

ANent a Supplication given in to the Lords by *William Cochran*, craving a Command to the Commissars of *Edinburgh* to pronounce Sentence in the Action of Divorcement betwixt him and his Wife. The *Lords* found by Tryal of the Commissars, that the inviolable custom was to stay Sentence, or advising of the Process, where there was a Reprobator against any of the Witnesses dependent un-ended: and the *Lords* found, that the Dependance of an Action of Corruption against the Witnesses used in the principal Cause, where that Action was not libelled upon some Deed of Corruption, whereof the Witnesses quarrelled had purged themselves by their Judicial Declaration, made by them when they were judicially admitted to be Witnesses, ought not to stay the advising and ending of the principal Cause, seing that Action was not of the nature of a Reprobator; for they found, that no Action could be called properly a Reprobator, but which was intented upon a Ground, resulting upon the Judicial Depositions of the Witnesses, made when they were admitted and received to be Witnesses: And likewise the *Lords* found, that a Reprobator being protested for, an Action of Corruption might be intented by any Party after Sentence, as well as before Sentence, to annull the Sentence, if the same depended upon that Probation, which should be impugned by the Reprobator, or Action of Corruption. Actor. *Nicolson.* Alter, *Hope & Stuart*, *Gibson* Clerk. *Vid. 5 March* 1624. *Gechin* contra *Cochran.*

Neilson contra Sheriff of *Galloway*, *June* 27. 1623.

IN an Action pursued by *Gilbert Neilson* against the Sheriff of *Galloway*, to hear and see it found and declared, that the Pursuer was in use, and his Predecessors of a Gate and Passage thorow the Defenders Lands unto his Paroch-Church, by the space of 30 years by-past but interruption, and that whether the saids Defenders Lands, thorow which the said Pursuer had his said Possession, was laboured for Corns, or lay Lee for Hay or Grass, by the which way they were in use to pass from their own House to the Church, as well on Horse, as on Foot, and therefore the Defender to be decerned to desist from troubling of the Pursuer, and his Men, and Tennents, in any time to come; or compelling of them to go or come, to and from the Church otherways than conform to their said by-past use of Possession. The *Lords* sustained the Action, founded upon the foresaid Use and Possession uninterrupted, to inter and constitute a Servitude, albeit there was no Writ, nor other ground libelled, to qualifie the grant of any Servitude, by the Defender or his Predecessors, to the Pursuer or his Predecessors, except only the Possession uninterrupted; but the *Lords* found, that that Possession ought to be proven to be Immemorial,

and past memory of Man, and would not sustain the offer, to prove Possession for 30 or 40 years. Actor. *Per se & Hope.* Alter. *M'gill. Gibson* Clerk.

L. *Blantyre* contra Tennents of *Glasgow*, *June* 28. 1623.

IN an Action of Spulziation of Teinds pursued at the instance of the Lord *Blantyre* contra the Tennents of *Glasgow*, where the Pursuer would not take the quantity of the Corns Spulzied to his own Oath, but took him to the quantity, as it was proven by Witnesses. The *Lords* found, that in this, and all the like cases, as they occurred, the Pursuer shall be holden, albeit he could not be compelled to swear upon the quantity of the Defenders intromission, seing it was not in *facto proprio*, and therefore that he might prove the quantity by Witnesses; yet that the Pursuer before Sentence should be holden to give his Oath *de calumnia*, or *ex credulitate*, that he believed, and was truly informed, that the quantity proven against the Defenders was true, and their intromission extended to no less than what was proven, seing it was not reasonable, that the Pursuer should have Sentence for any thing, which by their Oath they believed not to be true, though it should be proven and decerned. This was done, albeit no Defender compeared. Actor. *Lermonth.* Alter. Absent. *Scot* Clerk. *Vid:* 28 *Feb:* 1624. *Gladstanes* contra *Hamilton*, &c. 13 *Jan.* 1625. Lo. *Duffus.*

Anthonie White contra *Eodem die.*

IN an Action pursued by *Anthony White*, as Executor Dative, decerned *ad omissa*, to certain Goods and Gear, omitted by the Executor confirmed in the principal Testament of umquhile *John Young*, Sheriff-Clerk of *Edinburgh*. The *Lords* sustained this Testament Dative *ad omissa*, albeit it was alledged for the Defender against the same, that it ought not to be sustained, seing the Executor confirmed in the principal Testament, was not specially warned by the Edict, to hear and see Executors Dative decerned *ad omissa*, who ought to have been necessarly warned thereto, or else nothing could have lawfully proceeded thereupon; Which alledgeance was Repelled, because by the Edict the Executors were generally cited, to hear Executors *ad amissa* decerned; which the *Lords* sustained; albeit the Executors principally confirmed were not thereby warned; for this was sustained, because *Anthony White* was a Creditor of the Defuncts, and so the pursuit was found the more favourable. Actor. *Aiton.* Alter. *Primrose.* *Hay* Clerk. *Vid:* 14. *Feb.* 1622. *Bayne*, 26 *March*, 1634. *Stuart.*

L. *Covingtoun* contra Capt. of *Crawfurd* and E. of *Angus*, *July* 1. 1623.

CAptain of *Crawfurd* and the Earl of *Angus* having his right, charging the Laird of *Covingtoun*, to receive and enter the Captain in some Lands, wherein he was Retoured, to be holden of him by Blensh-holding; the L. of *Covingtoun* Suspended upon that reason, that he ought not to receive him, while he did to him as the Retour bore, *id quod de jure facere tenetur*; and therefore that he ought to pay him the Retoured Duty of all years that the Lands are Retoured to be in Non-entry; which the *Lords* found relevant, and therefore ordained the Charger, to pay the Suspender, before he should be holden to subscribe a Precept for his entry, the Retoured Mail, conform to the new extent, of all the Terms of the Non-entry, to the present time of the discussing of the Suspension; albeit the Charger alledged, that he should pay only to the time of the first Charge and Precept, direct out of the Chancellary, seing the Superior being in *mora* by his refusal, after the first Charge he should not seek payment, but to the time of that Charge; and if he had right to any terms duty since that Charge, he ought to pursue or poynd for the same, as accords of the Law; but he ought not to delay to give him

him a Precept, upon the pretext of the not present payment thereof, the same proceeding upon his own default; which was repelled by the *Lords*, and all the bygones, owing to this time of the discussing of the Suspension, were ordained to bepayed presently, ere the Precept should be subscribed and delivered to the Charger. Actor. *Nicolson & Hope.* Alter *Aiton.* *Hay* Clerk, *Vid: July* 29. 1624. L. *Capringtoun* contra *Keirs.* 23 *January*, 1630. *Peebles.*

Hunter contra *Watson*, *July* 3. 1623.

A Transferring being pursued at the instance of one *Hunter*, as Son and Heir to his Father, who had Contracted with one *Watson*, and upon the Contract had charged him for implement thereof, which Charges were Suspended by *Watson*, and Caution found by him at the time of the granting of the Suspension, as use is; and before the discussing of the Suspension, *Hunter* the Charger dies; this Contract, with the Act of Caution and Suspension, was desired to be transferred in the Heir of that *Hunter* who charged; which the *Lords* sustained, and found that there was no necessity of a new Charge, but that the Cautioner in the Suspension remained obliged, notwithstanding of the Chargers decease, in respect the Cautioner and Principal Suspender himself were both on life. Actor. *Haliburton.* Alter. *Russel. Gibson* Clerk. *Vid.* 21 *March*, 1623. *Cunninghame* contra E. of *Glencairn.* 23 *Decemb:* 1630. Mr. *Robert Hart.*

Brown contra *Wright*, *July* 5. 1623.

John Brown by his Obligation, having bound him to pay to *Thomas Wright* 1200 Merks, at a Term contained in the Bond, and in case of failzie at the said Term, to Infeft the said *Thomas* in certain of the said *Johns* Lands, expreſt in the said Bond; the said *John* being charged to pay the said *Thomas Wright* that Sum, Suspends upon that Clause contained in the Bond, whereby he is not simply obliged to pay that Sum, but in case of failzie at the said Term appointed for payment, he is only holden by the Bond to give the Creditor Infeftment of his Land, which he was content to do, and to give him with the Infeftment, Possession of the Land, which being done by him, must import satisfaction of the Bond, seing by the Clause foresaid, he that is Debitor hath the Election, either to pay the Sum, or to give the Infeftment; and he being willing to give the Infeftment, the Creditor cannot urge him further. The *Lords* found this reason not relevant, and that in this Bond, and in all others of the like nature, the Creditor had the election, either to seek the Money, or the fulfilling of that which was adjected to the not payment thereof at the Term, in case of failzie; For the *Lords* found these Clauses not to be alternative, whereof the Election ought to be conferred to the option of the Debitor, but were Clauses introduced in favours of the Creditors, which ought not to derogat from the force of that which was deduced principally in the Obligation.

Kirkwood contra *Belshes*, *Eodem die.*

IN an Action of Reduction pursued by *Robert Kirkwood* Writer, against *John Belshes*, for reducing of the Alienation of the Lands of *Tofts*, made to the said *John Belshes*, by *William Dowglass*, as Son and Heir of umquhile *Archibald Dowglass*, which umquhile *Archibald* was Debitor to the said *Robert Kirkwood* in a Sum of Money; whereupon the said *Robert* having served Inhibition against the said *William*, as Son and appearand Heir to the said umquhile *Archibald* his Debitor; upon the said Inhibition, he pursues Reduction of the said Alienation, as made after the said Inhibition. This Inhibition, which was the ground of the reason of Reduction, was quarrelled by the Defender, as not being lawful and sufficient to affect the Land, seing the Party inhibited was not Debitor to the Pursuer, neither was he ever

conſtitute that perſon, at the time of the executing thereof, who could repreſent the Purſuers Debitor, either by charge to enter Heir to his Debitor, or by any Summons or Purſuit againſt him for that Debt, owing by him as Heir, but was only execute againſt him as appearand Heir to his Father, which was not any ground, which may be a lawful warrand to inhibite; for Inhibitions ought not to be granted againſt appearand Heirs for their Predeceſſors Debts, and if any ſuch be granted, when they are quarrelled, they ſhould not be ſuſtained. The *Lords* repelled the alledgeance, and ſuſtained the Inhibition raiſed and execute againſt the appearand Heir of the Debitor, ſeing thereafter he had ſerved himſelf Heir to him, and had ſold the ſaids Lands. Actor. *Oliphant*, Alter. *Belſhes*, *Hay* Clerk. *Vid:* 18 *January*, 1622. *Methvin*.

Mcdowgall contra *Aitkin*, *July* 8. 1623.

Janet Stuart, Relict of *James Stuart*, called of *Jeruſalem*, by her Bond given to *John Aitkin* Litſter in *Edinburgh*, as Cautioner for her Father, is bound to pay as Cautioner foreſaid, the Sum of 500 Merks; this Bond is deſired to be reduced at the inſtance of *Andrew Mcdowgall* her ſecond Spouſe, upon this reaſon, becauſe the ſame was made by her, after ſhe was Contracted in Marriage with the ſaid *Andrew*, and after the Bonds of Marriage were Proclaimed in the Paroch Church of the *Inch*, in the Weſt-Countrey, which was the ſaid *Andrew* the Purſuer his Paroch Church, ſo that after that Contract and Proclamation, ſhe could do no deed that might prejudge her, or the Purſuer now her Husband, with whom ſhe was then Contracted, without his conſent. The *Lords* found this reaſon not a relevant cauſe, which could take away the Bond, or prejudge the Creditor of his lawful Debt, ſeing the Bond controverted was made in the Town of *Edinburgh*; where it was alledged by the Defender, that the ſaid *Janet Stuart* dwelt and remained at the making thereof, and a year before; and her privat Contract of Marriage could not prejudge the Defender, who knew not the ſame; neither ought the Proclamation of the Bonds of Marriage, albeit made before the Obligation Libelled, to prejudge him, being made only at the Paroch Church of the *Inch*, and not within the Church of *Edinburgh*, where both ſhe and the Defender then dwelt. Likeas, the Defender offered to prove, that the ſaid *Janet* by the ſpace of a moneth after the date of the Bond, gave up her Bonds of Marriage with the ſaid Purſuer, to be Proclaimed within the Church of *Edinburgh*. This alledgeance was found relevant, and admitted by the *Lords*, for eleiding of the foreſaid reaſon. *Gibſon* Clerk. *Vid:* 29 *January*, 1633. *Scot* contra *Brown*.

Sheriff of *Cavers* contra *Henderſon*, *Eodem die*.

IN an Action of Redemption purſued at the inſtance of the Sheriff of *Cavers*, againſt *Henderſon*. The *Lords* found a Reverſion null, which was Subſcribed by Nottars, for the granter of the Reverſion, and not by the Parties own hand, becauſe the ſame being made after the Act of Parliament in *October*, 1579. it had not four Witneſſes inſert therein, at the uſual Clauſe in the end, *viz. Before thir Witneſſes*: In the which Clauſe the *Lords* found there ſhould be four Witneſſes inſert, ſpecially deſigned, that the Witneſſes may be known, who were preſent at the Subſcribing of the Reverſion, or other Writ of importance; ſo that they found, that the Writ ſhould have the whole four Witneſſes names, who were preſent at the Subſcribing, inſert and deſigned in the Body of the Writ, otherways the Writ to be null; and this Reverſion was found null, albeit there was two Witneſſes inſert in the Body, who

who were specially designed, and albeit it was subscribed by other two Witnesses, by and attour the other two which were insert; and in respect the two Subscribing Witnesses were not also insert and designed in the Body of the Writ, nor yet designed by their Subscription, the said Reversion was not therefore sustained; and because the Pursuer thereafter referred the verity of the Reversion to the Parties Oath, he being yet on life, The *Lords* received the Oath of the Party to sustain the same, and to supply the foresaid nullity. Actor. *Nicolson* & *Belshes*. Alter. *Hay* Clerk. *Vid:* 17 *June*, 1625. *Kinaldie* contra *Kadie*. 3 *July*, 1634. *Hume* contra *Hume*.

Thomson contra *Edgar*, *Eodem die*.

IN a Pursuit by one *Thomson* contra *Edgar*, for making Arrested Goods forth-coming as belonging to umquhile *Clement Edgar*, Debitor to *Thomson* the Pursuer, wherein a Decreet being produced, in which umquhile *Clement Edgar* was found his Debitor, after the decease of the which Debitor, it was transferred against *Edward Edgar*, appearand Heir, and Brother, and neareſt of Kin to the said umquhile *Clement*, *cognitionis causa*, to the effect that the Creditor thereof might have execution, not against the Brother and appearand Heir foresaid, by personal execution, but contra *bona defuncti*, who was his Debitor: This Decreet being given before the *Lords*, but the Party absent, was found null summarly in this Process to make Arrested Goods forth-coming, by way of exception, because there should have been some person called *hoc nomine*, to represent the Debitor deceast, *viz.* either as Heir, or as charged to enter Heir or Executor, or renouncing to be Heir or Executor to the Defunct; neither whereof being done, but only the appearand Heir sought, which was not enough, albeit called only *cognitionis causa*: The *Lords* would not sustain the Sentence, seing in effect it was given without any Party called, and without any Defender to represent the Debitor. Actor, *Cheap*. Alter. *Nicolson*. *Gibson* Clerk. *Vid:* 8 *July*, 1625. *Stalker* contra *Nimmo*. 15 *June*, 1626. *James Stirling*.

Arnot contra *Hume* of *Manderston*, *July* 9. 1623.

Arnot having recovered Decreet against the Executors of one *Hume*, for payment of a Sum adebted by the Defunct, after he had denounced the Executor to the Horn, by vertue of that Sentence, and sought their Moveables to have Poynded them, & finding nothing, neither Moveables, nor Lands of the Executor Poyndable, or to be Compriſed: Thereafter *Arnot* pursues *Manderston*, who was Cautioner for the Executors, in the Confirmation of the Defuncts Testament, to make the Goods forth-coming, for satisfaction of this Sentence, wherein the Cautioner who was conveened, compeared, and alledged that all the Goods and Gear, contained in the Testament, was exhausted by a lawful Decreet recovered *debito tempore*, before the Pursuers Sentence, at the instance of another Creditor, for a lawful Debt of the Defuncts, to whom payment was made. This Exception was found relevant by the *Lords*; albeit the Pursuer Replyed, that it could not be admitted against the Decreet standing, obtained at his instance, against the Executors; which Reply the *Lords* respected not, seing the Cautioner could not be prejudged by that Decreet against the Executors, wherein he was neither Party called, nor conveened, and he could not by that Sentence *inter alios* be prejudged of his lawful defences, specially seing he instantly verified the same, without delay, which was found sufficient to absolve the Cautioner; For the payment made conform to the Sentence, was a fulfilling of that, whereto the Cautioner was bound, and being once done and

performed, he could not do it over again, and so thereby was freed of his Cautionry, and which was competent to him to alledge, albeit the Executor should omit the same. This Decision seems contrair to the Decision made betwixt *Wood* of *Grange*, and the Executors of *Ker*, and their Cautioner, whereof mention is made 4 *March*, 1623. and 5 *December* 1623. *Rocheid*; except that in that Decreet against the Executors in that Process, the Executors compeared, and proponed that exception, and succumbed therein, which was not here alledged by the Executors. Actor. *Nicolson*. Alter. *Belshes*. *Gibson* Clerk.

Edmiston of *Wolmet* contra *July* 10. 1623.

IN this Action of *Edmiston* of *Wolmet* contra whereof the Title of this Pursuit was a Seasin of a Tenement of Land within *Leith*, which being quarrelled by the Defender upon nullity, because it was not Registrat in the Books of the Clerk-Register, conform to the Act of Parliament in *anno* 1617. The *Lords* repelled the alledgeance, and sustained the Seasin, because it was of a Tenement within *Leith*, which albeit it was not within a Burgh-Royal, and holden Burgage, that thereby it might have the priviledge of the exception, contained in the Act of Parliament, which is conceived in favours of Burghs-Royal: Yet in respect of the consuetude and perpetual custom of giving of such Seasins by the Baillies of *Edinburgh*, and that never any was in use to be insert in the foresaid Register, and of the dangerous consequence, whereby many of the Subjects Rights would fall, if this nullity should have place. Therefore the *Lords* sustained the Seasin, but nevertheless they declared, that if the Excipient would alledge, that it was, and is the custom in *Leith* to Registrat Seasins in that Register, that they would sustain the alledgeance. *Hay* Clerk. *Vid:* 13 *Novemb:* 1623. *Marshall* contra *Marshall*.

M'kay contra L. *Skelmurlie*, *Eodem die*.

IN an Action pursued be an Highland-man called *M'kay*, against the L. of *Skelmurlie*, for payment of the Duties libelled, pertaining to the Office of the Crownry of *Arran*, wherein the Pursuer was Infeft, and which was Lybelled, to be resting and owing by the space of 30 Years, preceeding the intenting of the Cause; and were specially condescend yearly to extend to a speciall quantity acclaimed, and whereof the Pursuer alledged Possession, sundry years before the years lybelled. The *Lords* found no Action ought to be granted for the saids Duties, of the saids bypast Years acclaimed: the Pursuer having confessed in his Summons, that he wanted possession during so long a space; In respect it was a Peparative of an evil Example, to induce a Servitude upon the defenders Lands and Heretage, which might tend to evict the whole Lands; for the Pursuer acclaimed in his Summons as due to his Office, a special quantity to be yearly payed for every Horse, of each Plough of Land within the Isle, *viz.* half a Lippy of Meal, and half a Lamb; which the *Lords* found ought not to be sustained, seing albeit the Pursuer was Infeft in the Office of Crownry, yet he had neither Infestment, nor other Writ nor Constitution, which might furnish and give an Action for the special quantity acclaimed; and therefore would not sustain the Pursuit for the quantity, to be proven by Witnesses, except the Pursuer would prove the same, either by Infestment, bearing that quantity, or by some constitution, or other lawful Writ, which may prodnce Action for the same quantity, and that that Writ were shown and Produced for the Title of the Pursuit; and this was found concerning the bygone years acclaimed, but concerning that part of the Summons,

mons, whereby the Pursuer desired the Defender to be decerned in time coming to pay that quantity, it was not decided. Actor. Alter. *Scot* Clerk. *Vid.* the next day betwixt these Parties.

M'kay contra L. *Skelmurlie*. 15 *July* 1623.

IN this same Cause concerning the Office of Crownry immediatly before mentioned, the Pursuer having past from the bygone years acclaimed by his Summons, and insisting only for Payment in time coming, in respect of his Infeftment, and that his Summons bore, that conform to his Infeftment, he was in continual Possession, and his Predecessors of that Dutie libelled past memory of man. The Defender contending that that Possession tending to lay on a great Servitude upon the Defenders Lands, wherein he and his Predecessors were Infeft without all thraldom, which ought not to be prejudged by his alledged use and Possession, to be proven by Witnesses, but required a more solemn probation by Writ, as said is, specially seing by the passing from the 30 years lybelled, the Pursuer confest the desuetude of that Possession acclaimed, so that after so long confessed want of Possession, the Action should not be sustained, by alledging any preceeding Possession to be proven by Witnesses, to inferr the forsaid Servitude. The *Lords* sustained the Action for time coming, the Pursuer proving by sufficient honest, and unsuspect witnesses to be Examined in Presence of the *Lords*, that the Pursuer and his predecessors has been in continual possession, of receiving of payment of the same Duties lybelled, from the whole rest of the Heretors within the Isle of *Bute*, at the least from the most part of these Heretors of the Lands, continually past memory of man, and to the very Date and time of the intenting of this Cause: And that sicklike he Proving, that he and his predecessors were in Possession of receiving also the same duties, from the Heretors of the same Lands, for the which the Defender was conveened continually, preceeding the years lybelled, which he had past from, past memory of man before the saids years; which point, the *Lords* found the Pursuer should be holden expresly to prove, and so sustained the Action. *Vid.* 11 *March* 1634. Sheriff of *Galloway*.

Anderson contra *Anderson*, *Eodem die*.

IN an Action, *Anderson* contra *Anderson* for delivery of Writs, and Obligations to the Pursuer, as Heir to the Defunct, to whom the Obligation was made. The *Lords* found, that an Obligation made upon borrowed Money, to be payed at a Term, before which Term of payment the Creditor died, remained an Heretable Bond, and ought to be delivered as pertaining to the Heir of the Defunct, and not to his Executors, because the same contained a Clause therein, whereby the Debitor was obliged by the Bond, to give a present Infeftment of Annualrent to the Creditor, at the time of the Bond, which Clause not being conferred to be done, in case of failzie of Payment of the principal Sum, at the Term appointed, but the Debitor being obliged in the mean time, before the Term, to give the said Infeftment, albeit no Infeftment followed, yet the Bond thereby remained Heretable. Actor. *Nicolson* younger. Alter. *Nicolson* elder. *Gibson* Clerk. This appears to disagree a little from a Decision, *Wallace* contra *M'dougal*, whereof mention is made, 12 *Feb.* 1623. Except that in this case the Clause to give Infeftment is not put off till failzie of payment, but presently to be taken. *Vid.* 8. *Jan.* 1624. Collonel *Henderson*. 26. *Feb.* 1629. *Dowglas*. penult *June* 1624. *Edgar* contra *Haliday*, and the Cases following there.

Cranston contra *Hume*, *July* 18. 1623.

IN an Action for Exhibition and deliverie of a Tack, pursued at the Instance of *James Cranston* Assigney to *John Hume*, who was served general Heir to him, to whom the Tack was set, *viz.* to the E. of *Dumbar* against *John Hume* of *Slegden* as Heir of Conqueish to Sir *George Hume* of *Manderhoun*; for instructing of the Pursuers Title, the Retour was produced, whereby the said *John Hume* was Served Heir, before the Sheriff of *Roxburgh* to the Defunct, which Retour the *Lords* found null *ope exceptionis*, because it was alledged that before that Service, there was Advocation raised at the Instance of the Oye of the E. of *Dumbar*, for Advocating of the Brieves, whereby the said *John Hume* desired to be Served general Heir to him, before the Baillie of *Lauderdale*, by the which Advocation not only was the Baillie of *Lauderdale* discharged, but also the said *John Hume* purchaser of the Brieves, was discharged and Summoned, he being personally discharged to prosecute the saids Brieves, impetrat to be served before the said Baillie, as the Advocation shewen to the *Lords* bore; which the *Lords* found to make the Retour null, summarly by way of exception, albeit the Party replyed, that his Retour being a sentence standing, could not be found null, but by way of Reduction; and also that the Advocation could not be of that force; for albeit it should be here received and disputed, as in a Reduction, to anull the Retour, seing by the Advocation the Brieves to be Served, before the Baillie of *Lauderdale*, were only Advocat, and that Judge only discharged; so that the Intimation made to the party of the discharge of the particular Brieves, to be Served before that Judge, could never be of Force, to stay him to prosecute, or to intent a service before another Judge, of whom no mention is made in the Advocation, and the Party insisting therein after that discharge, cannot be found to be done *spreto mandato judicis*, seing that Command was obeyed, the Pursuer never having impetrat any such Brieves before that Judge at any time, and the Discharge cannot be further extended than it bears, nor enlarged beyond that which the Parties self sought, who craved not the Pursuer to be discharged of all Serving, of himself Heir before any other Judge, as he might have done, and would have been also granted, if there had been found any reason for the same; and so he omitting to seek the ordinary Remeid, that Advocation, as it is craved and granted, cannot be obtruded to anull his Service, especially regard being had to this, that the Advocation of Breives is not allowable, neither is there any relevant cause set down in the Advocation, whereby the Brieves could have been impeded to be Served: which Answer was repelled by the *Lords*, seing they found after that the Party was personally discharged, albeit to proceed before one Judge, yet it was not lawful for him to proceed or Serve thereafter before any other, except the Party who raised that Advocation, had been warned thereto, but the Service of the Brieves thereafter was Elusorie of the former discharge, and was deduced *spreto mandato*, and therefore null. Actor. *Ayton*, *Stuart* & *Craig*. Alter. *Hope* & *Nicolson*. *Gibson* Clerk. *Vid. July* 18. 1627.

Maxwell contra L. *Westraw*, *July* 19 1623.

IT was found by the *Lords* in an Action of Removing, pursued at the instance of *James Maxwel*, Donatar to the Forfaulture of the last Lo. *Maxwel*, and who thereby was Infeft in certain of his Lands, against the L. *Westraw*, that the tryal prescribed by the Act of Parliament in *August* 1584. Anent the forfaulted persons being in possession of the Lands, disponed by the King, by the space of five years, might be deduced, when Litiscontestation was made in the Cause; and that such Tryals and Precognitions needed not

to

to preceed the Intenting of the Action. Actor. *Hope* & *Cunningham*. Alter. *Nicolson* & *Oliphant*. *Gibson* Clerk.

Salmond contra *Lindsay*, *Eodem die*.

IN a Suspension *Salmond* contra *Duncan Lindsay*; The *Lords* found a Decreet given by the Baillies of *Leith*, against one who became Cautioner for another person, who was Arreisted by the saids Baillies, to Answer for him as Law will, to be null, summarly by way of Suspension, because the Baillies of *Leith* were but Baillies of a Burgh of Barony; and the *Lords* found, that the priviledge to Arrest or Incarcerat any person, while Caution was found to answer as Law will by them, was only Introduced in favours of Burgesses of free Burghs-Royal, whose Magistrats might only do the same, and that that priviledge was not Competent to any Burgh of Barony, or any other Magistrat, in other places, which were not Erected with the priviledges of Burghs Royal.

Sibbald contra Procurator Fiscal of St. *Andrews*, *Eodem die*.

IN an Action of Suspension, *Sibbald* contra the Procurator Fiscal of the Commissariot of St. *Andrews*. The *Lords* found, that where a man dies, leaving behind him his Wife with Child, who bears a Bairn, albeit the Bairn should live but one day, that the Fathers Testament *dative* being desired to be given up, and Confirmed upon Charges of the Procurator-Fiscal, as use is; and where there is no Testament Testamentar, although the said Testament *dative* should not be Confirmed, many years after the death of that Bairn, who once lived, it should thole and have a threefold Division, and that the deceast Bairn should not be prejudged in his own third part, nor of no other part of the Defuncts third, which might fall to him by the Law. Actor. *Aiton*. Alter Absent. *Gibson* Clerk. *Vid. ult. Jan.* 1633. *Wilson* contra *Nicolson*.

Ker contra *Foulis*, *July* 24. 1623.

IN an Action betwixt Sir *William* Ker, and Mr. *Robert Foulis*, for payment of the Mail of a Chamber within *Edinburgh*. The *Lords* found, that a Possessor of any Land, or Dwelling-House within Burgh, may remove and give over the same, aswell before the Term of *Martinmass*, as before *Whitsunday*; Likeas they found, that a Warning may be made by the Heretor, or others having right to the Land within Burgh, to remove therefrom, aswel before *Martinmass*, as before the Term of *Whitsunday*. Actor. *Stuart*. Alter. *per se*. *Hay* Clerk. *Vid. July* 7. 1626. *Guthry* contra *Guthry*.

Stuart contra *Fleming*, *Eodem die*.

IN an Action whereby *Stuart* natural Son to umquhile *James Stuart* Provost of *Glasgow*, pursued *Fleming* Relict and and Ezecutrix to his said umquhile Father, for payment of the Sum of four hundred Merks, contained in a Bond made by the Father to the Pursuer, which Bond bore, to be granted by the Father for Love and Favour of his Son, and was delivered by the Father to a third Person, to be keeped, and delivered to the Son, after the Fathers decease. The Defender compeared, and alledged Absolvitor, because that Bond was fulfilled by the Defunct, giver thereof in his own time, in so far as the Father, for the same Cause of Love and Favour, had given to his Son Infestment of an Annualrent of fifty Merks, Redeemable by payment of the like Sum contained in this Bond, *viz.* Four hundred Merks; and which Annualrent, was thereafter redeemed by the Father, and the Sum payed to the Son; all which was done after the Term contained in the Bond now lybelled; and therefore it must be esteemed an Implement of this Bond, being done after the Term of Pay-

ment, appointed thereto, and the Sum being alike, and the Causes of both the Securities one, and being done by the Father to his Son natural. This Alledgance was repelled by the *Lords*, and they found, that the posterior Security took not away the first, seing the last made had no relation to the first Security, nor mention that it was given in satisfaction and fulfilling thereof, and that the last Security was of a different nature from the first, being an Infeftment of Annualrent of fifty Merks, and that the first Bond was consigned by the Father, to the Sons use, which he might have recalled, and taken back in his own time, and not doing the same, it behoved to remain an effectual Security to the Son, seing both the Securities might subsist, which is to be considered, seing he was his natural Son only, and so might appear, not to have the benefit of both Securities, as possibly the lawful Son might have claimed. Actor. *Mowat.* Alter. *Hope.* *Scot* Clerk. *Vid. Feb.* 4. 1623. *Guild* contra *Guild. Feb.* 25. 1624. Captain *Wishart. Novem.* 13. 1624. *Wallace* of *Elderslie. March* 3. 1629. *Carmichael.*

Hay contra *Keith, July* 25, 1623.

IN an Action pursued at the Instance of *Hay* Son to the old Lady *Errol*, Assigney constitute by her, to the Duties and Farms of the Lands whereof she was Liferentrix, of the Cropt 1616, Against *Nathaniel Keith*, who having the gift of Escheat of the Tennent, Possessor of that Land, by vertue whereof, and of a general Declarator obtained thereupon, and of a special Declarator thereafter following, was conveened, as he who had intromitted with the Corns, growing upon the saids Lands, by vertue of the Escheat of the said Tennent, to make payment to the Pursuer, as Assigney to the Master of the Ground, of the Farms of that year, wherein the Tennent was addebted, seing he had meddled with the Tennents whose Corn, growing that year. The *Lords* found, that albeit the said Donatar had not intromitted with the said Cropt, & the Tennents growing Corns, the year foresaid, by his immediat Intromission of the Ground, but that any Intromission which he had, was by vertue of a special Declarator, obtained against some other Persons, who were pursued, as intrometters with a special quantity of the Rebels Corns, and against whom he had recovered Sentence, for the Prices of the Corns, so intrometted with by them, that not the less the Donatar remained obliged to pay that years Farms, to the Master of the Ground, of the readiest of that which was contained in his Sentence; in the Farms of the which Cropt, the Master was found to be preferred to the Donatar, or to any other Creditor of the Farmorers, albeit he had poynded the same; & notwithstanding, that the Master of the Ground had used, and done no diligence against the Tennent for his Farm, and there had interveened divers years thereafter, since the Cropt controverted, and before the obtaining of the Donatars Sentence, and payment by vertue thereof, *viz.* Seven or eight years, during the which space, the Master did nothing to recover payment of the Farm, which was not respected by the *Lords*; for they found, that the Cropt, and Corns growing that year, remained ever affected, and subject to the Master for that years Farms, wherein he ought to be preferred to all Creditors or Donatars. Actor. *Lermonth.* Alter. *Hope* & *Monat.* *Hay* Clerk. *Vid. Feb.* 3. 1624. betwixt thir same Parties, and *ult. March*, 1624. Sir *John Carnegy.*

E. *Nithsdale* contra *Eodem die.*

E. *Nithsdale* Infeft as Heir to his Brother pursuing Removing from certain Lands, the Defender compearing, and Alledging an Infeftment granted by the KINGS Majesty to him, proceeding upon the Forfaultry of the Pursuers Brother, and Possession conform thereto. The *Lords* repelled this

this Alledgeance, because the Pursuer Replyed, that the Forsaultry whereupon the Excipients Right depended was reduced; which Reply the *Lords* found relevant to be received in the Proces summarly, but any Reduction, to take the Defenders Right away, flowing from the Forsaultur, notwithstanding that the Defender Duplyed, that in the same Parliament wherein the Forsaultry was reduced, there was an expres Act made, that what was done in that Parliament, should not prejudge particular Parties, *viz.* The Act *Salvo Jure Cujuslibet*; and so he being a Party, having interest, and not called to that Reduction, of the Forsaulture, cannot be prejudged; which Duply was repelled. Actor. *Hope.* Alter *Belshes.* *Gibson* Clerk. *Vid. Decem.* 10. 1622. E. of *Rothes*, *Penult. June* 1627. *John Stuart*, and *Feb.* 7. 1627. *John Stuart: ult. March.* 1627. Lo. *Balmerinoch. Novem.* 27. 1621. E. *Nithsdale. July* 23. 1624. Lo. *Harris. July* 23. 1625. *Patrick Whitelaw. July* 27. 1626. *Finlason* contra *Cunningham.*

E. *Errol* contra L. *Buckie*, *Eodem die.*

IN an Action betwixt the E. *Errol* and *Buckie*, The *Lords* found, that nothing could be Compryfed, but Heretable Rights, and Writs containing Heretable Securities, or Writs which were Real Rights, as Tacks; or Writs concerning Real Securities, as Bonds to set Tacks, and that no Bond of Moveable Sums, or other Moveables might be Compryfed. Actor *Nicolson.* Alter. *Hope. Gibson* Clerk. *Vid. Feb. penult.* 1623. Betwixt the same Parties. *March* 22. 1623. L. *Braco.*

contra *Eodem die.*

IN an Action contra for Redemption of Lands, the Defender compearing, desired the Money to be exhibited before the *Lords*, that he be not frustrat thereof, and thereafter was content, that Sentence should pass. The *Lords* found the Pursuer could not be compelled to exhibite the Money, seing he had Consigned the same, conform to the Order of the Reversion, and could not be further compelled, to consign the same before the *Lords*, and to take it up where he had consigned it the time of the Order, seing the Order was not quarrelled. Actor. Alter. *Belshes. Vid: Decem*: 7. 1631. *Grierson* contra *Gordon.*

Lo. *Ramsay* contra E. *Lothian*, *Eodem die.*

IN a Declarator of Liferent, pursued at the instance of the Lord *Ramsay*, against the E. of *Lothian*, for certain Lands, holden by him of the Pursuer: The *Lords* found, that albeit the Lands whereof the Defender was Vassal to the Pursuer, was Liferented by one possessing the Liferent holden of the Superiour, and that the Defender was relaxed before year and day was expired, after the Liferenters Decease, by whose Decease the Defender alledged, that he became only effectually and profitably the Pursuers Vassal, seing he alledged, that he could not be counted his Vassal, but from the time of the Liferenters decease, yet nevertheles that his Liferent of these Lands fell, by his Rebellion year and day, albeit the Liferenter was living, and that the Profit, which might belong to the Superior, by that Rebellion, was Suspended, only so long as the Liferenter lived: Likeas, it was also found, that the giving of a Precept by the Superior to the Vassal, for Seasing of him in the Lands holden of him, specially being a Precept for Obedience of a Retour, prejudged not the Superior in the Casuality of the Vassals Liferent, belonging to him, by the Vassals being at the Horn year and day before the Precept, which Precept derogated nothing to the Superior of that Right of Liferent of the saids Lands, contained in the Precept, acquired to him by the Vassals rebellion year and day before the Precept. And

also it was found, that an Infeftment granted by the Vassal to another Person, who had acquired the Heretable Right of the Lands from him, and Possession conform thereto, upon Causes onerous, and after the Precept granted by the Superior, for Seasin of the Vassal, was not a Right, which could prejudge the Superior of his Liferent foresaid, albeit it was alledged for him, who had acquired the foresaid Right and Possession from the Vassal, that he was in *bona fide* to bruik conform to his Right, seing he saw the Precept subscribed, given to his Author, and Seasin and Possession in his Person, conform thereto, which continued so in his own Person unquarrelled, by the space of many years, whereby he was in *bona fide* to Contract with him, and ought not to be prejudged in his Right lawfully acquired, which was repelled. Actor. *Hope* & *Nicolson*. Alter. *Belshes* & *Foulis*. *Hay* Clerk. *Vid.* March 9. 1624. *Douglass*.

K. Thesaurer contra *Monteith*, *July* 29. 1623.

IN an Action betwixt the King's Thesaurer and *Robert Monteith*, for Suspending of the Charges execute against the said *Robert*, for payment of his Duties of *Eglisham*. The *Lords* found, that a Discharge granted to the said *Robert*, by one who was Chamberlain at the time of the payment of the years Duty, whereof the Terms of payment was none of them come, the time when the Discharge was granted, could not liberat him of that years Duty; and ordained him to pay the same again, notwithstanding of that Discharge, Reserving to him his Action of Repetition, against the alledged Chamberlain, giver of the Discharge, *pront de jure*. Actor. K. Adovcat. Alter. *Monat*. *Hay* Clerk.

E. *Marishal* contra *John Keith*, *Eodem die*.

IN an Action of Redemption betwixt the E. *Marishal*, and his Brother *John Keith*. The *Lords* found, that an Assignation to an Order of Redemption, which was used by umquhile E. *Marishal*, Father to the E. now Pursuer, conform to a Reversion which was personally granted to himself, and to the which Order so used by him, before his decease, the E. his Son Pursuer was made Assigney by him, albeit the Reversion was not granted to Assigneys, and upon the which Order the Assigney thereto sought Declarator. It was found, that this Assignation needs not to be Registrat, in the Clerk of Register's Books, conform to the Order prescribed anent other Writs, by the Act of Parliament, 1617. Under the which Act, the *Lords* found, that this Assignation, or the like Assignations, to Orders of Redemption, was not comprehended, and that the Act extended not to the same. Actor. *Nicolson*. Alter. *Hope*. *Gibson* Clerk. *Vid.* March 3. 1630. *Murray* contra *Myles*. *Novem.* 23. 1626. *Turnbull* contra *Scot*.

Stuart contra *Fleming*, *Eodem die*.

IN an Action betwixt *John Stuart* and *Fleming*. The *Lords* found, that a Bond bearing to pay Annualrent, albeit it had not a Clause of Infeftment, was of the nature of an Heretable Bond, and was not a Moveable Bond. *Vid. penult June*, 1624. *Edgar* contra *Halliday*.

Nicolson contra *Baillie* and *Whitlaw*, *penult July*, 1623.

IN an Action of Reduction of a Comprysing, pursued at the instance of Mr. *Thomas Nicolson* Advocat, against *Robert Baillie* and *Patrick Whitlaw*. The *Lords* found this a relevant reason of nullity against the Comprysing, *viz.* that the Compryser had continued the payment of the Debt and Sum, for which the Comprysing was deduced, unto the Term of *Martinmass* 1619, and that he had denunced the Lands to be comprysed in *September* preceeding; in respect of the which Denunciation, made before the

Term

Term of payment, the Compryſing was null, and behoved to fall; which Reaſon the *Lords* found relevant, notwithſtanding that the Defender alledged, that the Denunciation made preceeding the Term of payment, could not make the Compryſing null, ſeing the Compryſing it ſelf was not led till after the Term of *Martinmaſs* was by-paſt, no more than an Arreſtment could be null, which was execute for any Sum, whereof the Term of payment was not come, the time of the Arreſtment: Which Alledgeance was repelled by the *Lords*, ſeing they found no part of the Proceſs of Compryſing, could lawfully be deduced before the Term of Payment was by-paſt of that Sum, for which the Compryſing was led, for the Denunciation is a part of the Execution.

In this ſame Proceſs, this alſo was found a relevant Reaſon of nullity againſt the Compryſing, *viz.* that by the ſame, the Parties againſt whom the Compryſing was led, were ſummoned by the Execution thereof, to hear the Lands compryſed, before lawful ſearching and ſeeking of the Parties Moveables upon the Ground of the Lands. This Reaſon was alſo found relevant, for the *Lords* found, that the ſearching and ſeeking upon the Ground of the Lands, intended to be Compryſed, ought to be made, and ſhould preceed, before that the Party could be ſummoned to hear the Lands compryſed, and before any denunciation thereof was made; neither was it ſuſtained, nor found ſufficient, to maintain the Compryſing, that the Officer had ſearched and ſought at *Grantoun* and *Edinburgh*, and where it was moſt probable, that the Parties Goods would have been, againſt whom the Compryſing was led, if they had any; and tho the Compryſing bore, that that ſearching preceeded the Charge, and Summoning of the Party; and alſo that he had ſearched and ſought upon the Ground of the Lands compryſed, upon the Morning after the Party was ſummoned, which the Defender alledged to be ſufficient, to ſuſtain the Compryſing, the ſaid ſearching being done before the Charge, at the places foreſaid, and upon the Ground of the Lands compryſed, immediatly after the Charge, ſeing that execution of ſearching is not a material point, at the leaſt not neceſſary to preceed the Charge, if it be any time uſed before the Compryſing, and before the Act be made compleat: Which Alledgeance was repelled by the *Lords*, for they found, that the ſearching upon the Ground of the Lands intended to be compryſed, ought to preceed the Charge, and Summoning of the Party; neither was it ſufficient, albeit it was done upon the morrow after the Party was charged, and before the Compryſing, ſeing they found it ought to preceed all the Acts of the Compryſing; and this was found, albeit the *Lords* conſidered, that this kind of Execution, was but an Execution, meerly conſiſting in Formality, and not otherways material, ſeing Compryſings will not be reduced or annulled upon any contrary Reaſon, *viz.* where a Party would libel a Reaſon, that there was Goods and Gear poyndable upon the Ground of the Lands appryſed, the time when the Officer ſearched; which the *Lords* acknowledged would not be, nor is no relevant cauſe to annul Compryſings. Actor. *per ſe.* Alter. *Cunninghame. Gibſon* Clerk. *Vid.* 13 *Decemb.* 1623. L. *Ley* contra *Stuart.* 29 *January* 1624. *Hoppringle* contra *Mark Ker.* 20 *Novemb.* 1624. *Forſyth.* 1 *March* 1623. *Hamilton* of *Blair.* 19 *Novemb.* 1623 *Ker* contra *Paterſon.* 5 *Feb.* 1624. *Wood* contra *Waddel*, and the Caſes there cited.

Marſhal contra *Marſhal*, *November* 13. 1623.

IN an Action of Transferring; *Marſhal* contra *Marſhal*. The *Lords* ſuſtained a Seaſin produced, to verifie the Defender to be Heir to his Predeceſſor, which was given to him by Heſp and Staple, by the Baillies of *Kirkcaldie*, of a Tenement of Land in *Kirkcaldie*; which Seaſin the *Lords* found ſufficient,

to prove the Defender Heir, albeit that it was alledged, that it could not prove wanting an Adminicle, being only the Assertion of a Nottar, and no Retour, nor other Warrand produced for giving thereof. And where it was Answered by the Pursuer, that *Kirkcaldie* was the Kings free Burgh, and that the Form in all Burghs was to give Seasins, after this manner, without any other Adminicle. The Defender Duplyed, That albeit *Kirkcaldie* had the priviledge of the Kings free Burghs-Royal, yet they hold not their Lands, nor the Town, of the King's *Majesty* in Burgage; but they hold the same of the *Prince*, as Lord of *Dumfermling*; so that Seasin of the Lands, so holden, could not be given without some Warrand or Adminicle, albeit the King granted to them the liberty of a Burgh, which altered not the holding of their Town and Lands; which Alledgance and Duply was repelled, in respect the said Seasin was the Defenders own Deed, whereupon he himself had taken Instruments, and so could not oppose to the same; and for the same Reason they repelled this other Alledgance, whereby the Defender quarrelled the Seasin upon nullity, for not being Registrat in the Clerk of Registers Books, because that Alledgance was not competent, but to a third Party, who had a sufficient Right in his own person, as is expresst in the Act of Parliament *anno* 1617, which is the ground of the Alledgance, far less could the Excipient impugn his own Right. The same decided. *Vid.* 25 *March* 1623. L. *Dunipace* contra his Tennents. 10 *July* 1623. L. *Wolmet.* 20 *January* 1625. *Elphingston.*

In this same Process, the *Lords* found an Obligation of 100 pound null, which was subscribed by a Nottar and four Witnesses, because it was not subscribed by two Nottars, and found any Writ bearing 100 pound, and above to be a matter of importance, and would not suffer the Party, to restrinsh the Obligation to any less quantity, inferior to the Sum therein expressed. Actor. *Lermonth.* Alter. *Aiton. Scot* Clerk. *Vid. ult January* 1623. *Fotheringhame* contra *Watson.* 19 *Decemb.* 1629. *Elliot* contra *Morton.*

Hamilton contra *Dick, November* 19. 1623.

SIr *George Hamilton* of *Blaikburn* for Debt owing to him by one *Ramsay*, is made Assigney by the said Debitor, in and to the Duties of certain Lands, addebted to him by one *Dick*, Tennent and Possessor of the same Lands of the Cropt 1621; and upon that Assignation, pursues *Dick* Tennent for payment thereof: In the which Process compears one *Bruce*, who was Heretor of the same Lands, and produces his Heretable Right, and alledges, that conform thereto, he should be payed by the Tennent of the Duties of the Lands, and not *Ramsay*, nor the Pursuer his Assigney, seing *Ramsay* had never any Right to the Lands, and so could not have the Duties thereof, and he not having Right, he could not make any effectual Right to the Pursuer, nor to any other. The *Lords* repelled the Alledgance, and found, that the Duties of the Lands of the Cropt 1621 controverted, should be payed to the Pursuer, Assigney constitute thereto by *Ramsay*, albeit *Ramsay* had no Right to the Land, but that the Right remained in the person of *Bruce* the Excipient, because *Ramsay* was in possession and use of uplifting of the Duties of the saids Lands, by the space of nine or ten years, preceeding this year controverted, from this same Tennent Defender; and so his possession could not be interrupted, but by a Warning, or some other such lawful Deed; which not being done, the Tennent ought to pay him or his Assigney, the year libelled, as he was in use to pay the years preceeding, and the Excipient who was Heretor, might interrupt the said possession when he found time, but untill that time, *Ramsays* possession ought to be

continued.

continued. This was found by the *Lords*, notwithstanding that *Bruce* the Heretor alledged, that one who had no Right could not be answered: And where it was Obtruded, that the possession un-interrupted ought to be continued; he Answered, that that might militate in favours of *Ramsay* against the Tennent, if the question were betwixt them; but now the Heretor claiming the Tenement and Land to be his, and proponing this Alledgance, it was competent to oppon the want of a Right to *Ramsay*, and to his Assigney, which was repelled, and *Ramsays* possession un-interrupted was continued. Actor. *Hope*. Alter. *Aiton*. *Hay* Clerk. *Vid.* 20 *Nov.* 1623. betwixt these Parties. 8 *March* 1624. *William Monipenny*.

Ker contra *Colthird* and *Paterson*, *Eodem die*.

IN an Action betwixt *Ker* contra *Colthird* and *Paterson*; The *Lords* found that an Arrestment might be used for a Debt contained in an Obligation made to him who Arrested, whereof the term of payment was not come, at the time of the making of the Arrestment; and also found that where two Parties contending upon priority of Diligence, and for the benefite of Prelation in their Debt, that seing they both had done all Diligence, which lawfully and possibly every one of them might have done, and nothing omitted; that albeit the one Party was sometime before the other in diligence, yet that therefore he should not be preferred to the other, for his whole Debt, but that it should be proportionably divided. Actor. *Hope*. Alter, *Scot* Clerk. *Vid.* 1 *March*, 1623. L. *Blair*. 26 *Feb.* 1633. *Rutherford*. 5 *Feb.* 1624. *Wood* contra *Waddel*. 21 *Feb.* 1624. *Brown* contra L. *Johnstoun*. 23 *March*, 1624. *Brown* contra *Haliburton*.

L. *Aiton* contra *Aitkin*, *Novemb.* 20. 1623.

THE L. of *Aiton* being obliged by Bond to enter Mr. *Alex. Hume* in Ward, who was taken with Caption at the instance of *George Aithin*, and this Bond bearing, that either he should enter him at a certain day contained in the Bond, or else to pay the Sum, for which he was denounced, & taken, whereupon *Aiton* being charged to pay the Sum for not entry of the Rebel, he Suspended upon this reason, that at the day appointed for entering the Rebel, he and the said *Aitkin*, to whom he was Debitor, were trysting among themselves, anent a Transaction for the Debt, which put the Defender in *bona fide*, not to keep the precise day of the Bond, and how soon he knew that they had not agreed, he within four or five days after the day appointed by the Bond, offered to enter the Rebel, at which time he was always in als good estate as he was at the day contained in the Bond, & at the time of the granting thereof, which ought to be found sufficient to purge the failzie, and to liberat the Suspender, seing the Charger could not qualifie any prejudice sustained by him, by not keeping of the precise day of the Bond; Likeas, he yet offered to enter him in the same estate he was in, at the time of the giving of the Bond, *& cum omni causa*. The *Lords* found the Letters orderly proceeded, notwithstanding of this reason, because the Rebel was not entered at the precise day contained in the Bond. Actor. *Hope & Belshes*. Alter. *Nicolson & Forbes*. *Gibson* Clerk. *Vid.* 27 *March*, 1623. *Smith* contra Baillies of *Elgine*.

Hamilton contra *Dick*, *Eodem die*.

IN the foresaid Cause of Sir *George Hamilton*, mentioned 19 *Novemb.* 1623. The *Lords* found, that a Rebel, albeit standing at the Horn, might make one of his Creditors Assigney to a Debt owing to him, for satisfaction of a Debt owing to the Assigney, and for payment whereof he had been Denounced Rebel before the Assignation, and that such Assignations made by

persons, albeit Rebels at the making thereof, was not null, albeit this nullity was alledged by *Bruce* Defender in this Cause, and another Creditor to the Rebel; in respect that the Horning alledged and produced, to verifie that the maker of the Assignation was Rebel at the making thereof, was not execute at the instance of the Proponer of this nullity, but at the instance of a third person, who was not Party, nor compeared in this Process, and that he was not then denounced at the instance of that Excipient. Likeas they found, that the making of the forefaid Assignation, being done and made to that Creditor, who had denounced him before the making thereof, came not under the Statute of Dyvourry, as if thereby the Cedent, who was a common Debitor, both to the Assigney and to the Excipient, had made Election, and preferred the one Creditor to the other, and so that thereby the Assignation should be found null, as was desired by the Excipient; which was repelled by the *Lords*, seing they found that this Assignation, being made for satisfaction of a preceeding just Debt, for the which Execution was used before, was not a voluntar Election of the common Debitor, but ought to be reputed as a deed done of necessity, and so was sustained against the Excipient; the Parties compearing *ut supra*.

Logan contra L. *Kinblethmont*, *Novemb.* 21. 1623.

THe Goodman of *Kinblethmont*, being obliged by Contract of Marriage betwixt his Daughter and Mr. *John Hamilton*, to pay to the said Mr. *John* the Sum of 4000 Merks in Tother, to the effect that the same, and as much to be furnished by the said Mr. *John*, might be imployed upon Bond to the said Mr. *John* and his Spouse, and to the Heirs to be begotten betwixt them; and *Logan* as Assigney made by the said Mr. *John* and his Spouse to that same Sum, which was obliged to have been payed by *Kinblethmont*, as said is, for satisfying of a Debt owing to the Assigney by the said Mr. *John*, charges *Kinblethmont* for payment thereof, who suspending upon this reason, *viz.* that he was not obliged to pay the Sum, but to the effect it might be employed upon Land to his Son in Law and Daughter, and to their Heirs, with the like Sum to be furnished by the Cedent, as said is; and therefore he could not be holden to pay it to the Charger, for satisfying of the Cedents Debt, being otherways destinat, by the tenor of the Clause of the Contract, which constitute him Debitor therein. This reason was found relevant; for the *Lords* found, that the Assigney could not charge the Suspender to pay the Sum to any other effect, than according as he was obliged in the Contract, seing the Cedent could not ask the same himself, but to that use: And this was found relevant, albeit it was Answered by the Assigney, Charger, that he was made Assigney both by the Husband and the Wife, who had the only interest to seek the employment, and who might have discharged the same, being conceived in their favours: For if the Sum were imployed conform to the Contract, the Husband might uplift the same, and was Master thereof; and so seing he might uplift the same, if it had been laid upon Land, he might als effectually make Assignation thereof; which was repelled by the *Lords*, seing the tenor of the parties Obligation, who was only obliged to pay for a special end destinat by him, could not be altered without his own consent, who was so obliged. Actor. *Lawtie*. Alter. *Gibson* Clerk. *Vid.* 23 *March*, 1624. *Hamilton* contra *Livingston*. 10 *July*, 1628. *Cant* contra *Edgar*. 20 *March*, 1633. *White*. 28 *June*, 1637. *Galbraith*. 29 *Jan.* 1639. *Gradum*.

This same cause being brought in upon 17 *Jan.* 1627. before the *Lords*, to be disputed

disputed betwixt the same Parties, and they heard upon this same reason *de novo*; The *Lords* over again found, as it is here set down.

E. *Melrose* contra L. *Bass*; *Novemb*: 25. 1623.

A Feu was reduced at the instance of the Earl of *Melrose* against the L. of *Bass*, for not payment of the Feu-duty by the space of two years, albeit the Feu-Charter contained no irritant Clause, but the reason only founded upon the Act of Parliament, 1597. Which reason was sustained, and Sentence given thereupon, but no Party compearing in the Cause. *Scot* Clerk.

This day it was controverted amongst the *Lords*, if a Seasin given to a Party, of Land within Burgh, as Heir to his Predecessor, by the Baillie and Clerk, by Hesp and Staple, as use is in Burgh, should verifie the person so seased, to be Heir to his Predecessor *activè*, without any preceeding Warrand, and Service of Court, cognoscing him to be Heir; the cause of the doubt was, because such Seasins could not be of another nature than Seasins, which proceed upon Precepts of *Clare constat*, which are granted by other Superiors, and which proves not *activè* for the Receivers, but *Passivè* against them; but it was not doubted, but that the foresaids Seasins in Burgh gave the Party right to the Land; only it was controverted, if it was sufficient to furnish him Action, as Heir to that Predecessor in other Causes; but it were of a dangerous consequence, not to find them to prove *activè*, as well as *Passivè*. *Via*: 13 *Novemb*: 1623. *Marshal* contra *Marshal*.

E. *Melrose* contra *Ker*, *Eodem die*.

WHere Parties Excambs Lands, either of these Lands, *hinc inde* Excambed, remains really affected to return to the Party, from whom the Lands received in Permutation are Evicted, conform to the proportion of the Eviction in which the party distrest hath recourse to his own Lands, given in Excambion for the other *pro tanto*; in which recourse he is preferred to all other persons, who hath either Compriſed the Lands, and thereupon are Infeft therein, or who hath acquired any other real right thereof from him, who received the same in Excambion, albeit these Rights preceed the Eviction from the other Party who exchanged; and this follows of its own nature in Contracts of Excambion, which of themselves are real, albeit that no other real Security provided such recourse to the Parties, but the first Contract bearing the Excambion, which to produce that effect, are not respected as personal Securities, but are real, as said is, and gives the right of the prelation to the Excambers, before all other parties, thereafter acquiring right to these Lands from any of the Parties. This was so found in this Process, albeit the Charter and Seasin, which followed in that matter upon the Contract of Excambion, be an expres Clause provided to either Party their recourse in case of Eviction; yet the *Lords* were all of that mind, that albeit their had been no more but the Contract, it would have produced the same effect, without the said Clause.

Shaw contra *Maxwell*, *Novemb*: 28. 1623.

IN an Action betwixt *Shaw* and *Maxwell*, for payment of a Sum contained in an Accompt of Merchant-furnishing, which was Subscribed by the Woman to whom the furnishing was made, and by a Cautioner for her. The *Lords* sustained this Action against the Cautioner, albeit the Woman who was the Principal had an Husband the time of the furnishing, and at the time of the subscribing of the Compt by her, who had not subscribed the same; and the Cautioner was found to stand effectually obliged, albeit the Principal was not so bound, the Compt not being Subscribed by her Husband;

band; And albeit the Cautioner could not purſue the Principal for his relief, for the ſame reaſon. Actor. Alter. *Belſhes.* *Gibſon* Clerk.

Rig contra *Mckenzie*, *Eodem die.*

IN an Action purſued by *William Rig* Baillie of *Edinburgh*, againſt the eldeſt Son of Mr. *John Mckenzie* Parſon of *Dingwall*, who was conveened, as behaving himſelf as Heir to his Father, by intromiſſion with his Fathers Heirſhip-goods: It being alledged that he could not be conveened *hoc nomine*, ſeing his Father was not a perſon of that quality, who could have an Heir, and conſequently he could not be conveened as Intrometter with his Heirſhip, and ſo to make him Heir to a perſon, who could not have an Heir, ſeing his umquhile Father was neither Prelate, Baron, nor Burgeſs, which were the three degrees of all the Subjects, who might have Heirs. This alledgance was repelled, ſeing the Defunct was Parſon of *Dingwall*; for the *Lords* found, that Parſons provided to the like Benefices, albeit they were not of the degree of Prelats, yet that they might alſe lawfully have Heirs, as perſons who were Infeft in any ſmall Annualrent, or in any ſmall piece of Land Heretably, and who being comprehended under the name of Barons, or Free-holders, had Heirs, as alſo as Burgeſſes, who albeit but mean Craftsmen, and of mean ſubſtance, yet they alſo had Heirs. Actor, *Pearſon.* Alter. *Mowat.* *Gibſon* Clerk.

Craig contra his Tennent and *Wilſon*, *Eodem die.*

MR. *Robert Craig* having recovered a Decreet of Removing againſt an Tennent, founded upon a Seaſin after compryſing: The Tennent Suſpended upon double diſtreſs againſt Mr. *Robert* on the one part, and againſt one *Wilſon* on the other part, wherein *Wilſon* compeared and alledged, that he would not Suffer *Craig* to remove the Suſpender, In reſpect he had Compryſed the Land, and was long Inſeſt therein before Mr. *Roberts* Right; ſo that the Land pertained to him, which was found relevant by the *Lords*, albeit that *Craig* Anſwered, that ſeing he had done no diligence upon his Infeftment, although anterior, nor made warning thereupon, nor yet had recovered any Poſſeſſion of the Land, and that he could not alledge the Suſpender to be his Tennent, by payment of Mail and Duty, he ought not to be heard, to ſtay the Execution of his Sentence, and when ever he ſhould purſue upon his anterior Right, he ſhould anſwer thereto in its own time. This was repelled, and the Prior Right ſuſtained, and the Parties ordained to diſpute upon their Rights, as if Sentence had not been given; after which *Craig* Anſwered to the ſaid prior Right, that the ſame could not be reſpected, becauſe the ſame was founded upon a Compryſing, which in effect was become extinct, in ſo far as ſince the deducing thereof, and ſince the Seaſin paſt thereupon, he had received a part of the Sum, for the which the Compryſing was deduced; this Alledgance was repelled, becauſe the *Lords* found, that the receiving Payment of a part of the Sum, was not enough to make the Compryſing to fall; except the whole had been payed, but that the Compryſing ſtood while the whole Debt were ſatiffied, and becauſe there was ſome Term of probation aſſigned in this Proceſs, which proceeded upon the compearance of this *Wilſon*. The *Lords* ordained him, to find Caution for the violent profites, ſicklike as if he had been party in the firſt Removing, ſeing by his compearance, he ſtayed the Execution of the Decreet of removing already obtained. Actor. *Craig*. Alter. *Gibſon* Clerk.

contra

contra *Decemb.* 3. 1623.

IN a Pursuit for Spuilzie of Goods, an Exception being admitted against that Action, Founded upon the poynding of the Goods lybelled, and the Exception being found proven: The *Lords* ordained the Defender to deliver to the Pursuer, the superplus of the prices of the saids Spuilzied goods, to the which the same was Compryled more than the Debt, for the which the same was so Compryled, seing the poynding bore all the goods to have been delivered by the Messengers, and Officer Compryfers, to the party Defender, at whose instance the same was Compryfed, and so that of reason he ought to render back the over-plus, himself being payed. And this was ordained to be done in this same *Proces* of Spuilzie, and would not find any necessity to put the Pursuer to seek the same, by any new *Proces* from the Defender. Actor. *Cunningham.* Alter. *Belshes.* *Gibson* Clerk.

Herris contra *Glendinning*, *Eodem die.*

ONe *Janet Herris*, having certain Lands disponed to her by *Glendinning* of *Parton*, by his Charter of Alienation made to her of the same, and having served Inhibition thereupon, no Seasin being taken of the Lands, for the space of Fifteen years after the Charter, and after Seasin she pursuing Removing, the pursuit was elieded, becaus after the Charter, and before the Seasin, *Parton* who was her Author, was Rebel, and remained so, before she took Seasin, year and day at the Horn, whereby his Liferent of these Lands fell in the King's hands; Likeas the said Liferent being given to a Donatar, Declarator was obtained thereupon, and the Donatar acquired Possession before the Seasin, which was found relevant to exclude the Pursuers Right, seing the Charter made to her, albeit before the Rebellion, and albeit Inhibition was execute against her Author, altho before his Rebellion, yet the same remained in the naked terms of a personal Obligation, so long as Seasin was not taken thereupon, and gave not the Pursuer any Real Right to the Land before the Seasin, betwixt the which, and the Charter, her Authors Rebellion interveening, who was not effectually denuded, by the naked Charter, but who remained in the Real Right of the Land, gave Right thereof to the King for his Life-time, and she had only personal Action against himself and his Heirs; for in this case, the King's Donatar was in as good estate as any other person, who had acquired a Real Right of the Land, after the Pursuers Charter, and before her Seasin, and who would have been preferred to the Pursuer, and the Inhibition preceeding, could not derogat from the Kings Right, acquired by the Rebellion. Actor. *Cunningham.* Alter. *Belshes.* *Gibson* Clerk. *Vid. Novem.* 27. 1621. E. *Nithsdale.*

Paton contra *Stuart*, *December* 4. 1623.

IN an Action of double Poynding betwixt *Paton* and *Stuart.* The *Lords* found a Charter and Seasin produced for the one party, whereby he desired to be answered, and obeyed, to be null, albeit it was clad with present Possession, and divers other years, preceeding the year controverted, becaus the same was granted, to be holden of the Superior, and not confirmed; which nullity was admitted in that same Judgment summarly, without necessity of Reduction; and albeit the Charter and Seasin proceeded upon a Contract, wherein the Disponer was obliged to give the Buyer Infestment, either to be holden of himself, or of the Superior, in respect the Charter and Seasin used in Proces, was given to be holden of the Superior. Actor. *Foulis.* Alter. *Scot* Clerk. *Vid. Decem.* 5. 1623. betwixt thir parties.

Gechan contra *Hay* and *Davidson*, *Eodem die.*

AN Assignation made by a Woman called *Gechan* to *Paul Hay* and *Davidson*, of some Money owing to her, and in the Assignation she interdicts her self to the same two Assigneys, this Interdiction was reduced, and the Woman loosed, upon this Reason, because it was against equity and reason, that the two Assigneys should have taken their Cedent interdicted to them, there being no preceeding just cause, which could produce that effect, or for the which, the Woman ought, after that sort to interdict her self to them, who acquiring the foresaid Assignation, ought not to have insert also an Interdiction in the body of that same Writ, which are of so far different natures, and not compatible to subsist together, she being a Woman, who trusting to them, subscribed the Writs, knowing and supposing no other thing to be insert, but the Assignation, and there never being of before, or then, any Treaty of Interdiction, and she never receiving any good deed for the same, nor no Cognition, or Tryal taken before any Judge, that she was a person that needed Interdictors, which ought to have preceeded; whereas she was and is *rei suæ satis provida*, and so the same being *contra bonos mores* to bind her after that manner, who ought to be loosed, The *Lords* found the Reason relevant, and therefore reduced, and that it needed no probation, that she was *rei suæ provida*, seing the contrary was not alledged. Actor. *Mcgill.* Alter: absent. *Scot* Clerk. *Vid. December* 5. 1626. L. *Knockhill* & *July* 4. 1635. L. *Monimusk*, *Decem.* 20. 1622. *Campbel* contra L. *Glenurchy*, & *Decem.* 11. 1622. *Seaton* contra Creditors of *Acheson.* & *July* 29. 1624. L. of *Collington*, *July* 7. 1625. L *Innerweeck.*

Paton contra *Stuart*, *December* 5. 1623.

IN the Action mentioned in the afore-said page of *Paton* contra *Stuart*, the Party producer of the Charter, and Seasin being given to be holden of the Superior, being secluded by the *Lords* Interlocutor, from his Right, as being null, for want of Confirmation; he Replyed, that the same was Confirmed by the Superior, likeas the Superior had allowed of his Right, by making payment to him, of that Annualrent, whereof he had acquired the Charter and Seasin, which was alse sufficient as a Confirmation; this was also repelled, because the other party in that cause had Comprysed for a lawful Cause, from the giver of this Charter, and disponer of the Annualrent, the givers Right, which being Comprysed, albeit after the Charter and Seasin, yet being before the Confirmation, was a just Impediment, which made the Confirmation unprofitable, and was a midd interveening deed, which stayed the same, to be drawn back to the time of the Charter; likeas any Possession acquired from the Superior, before the Comprising, would never be of the force of a Confirmation, to make the Deed, which was null, to become valid, against a third Party, who had Comprysed; which the *Lords* found relevant. *Vid. Jan.* 23. 1624: *Andrew Meldrum*, *July* 17. 1634. L. *Johnston*, contra E. *Queensberry.*

Scot contra *Livingston*, *Eodem die.*

IN an Action betwixt *Scot* contra *Livingston*, the Defender being conveened, as universal Intromissatrix, for a Debt owing by the Defunct, her Husband, it being Alledged, that there was Executors nominat in the Defuncts Testament, who conform thereto intrometted. This was repelled, because the Executor was not Confirmed; likeas the *Lords* found, that the Qualification against the Defender, of her intromission with a mean quantity of the Defuncts Goods, *viz.* the sowing of five bolls of Corn, and the

the slaying and eating of four or five Sheep, and the Retention of other thirty Sheep, which she had yet extant, was not sufficient, to constitute her universal Intromissatrix, and so to pay the whole Debt, but only sustained the same to that effect, *viz.* to make the saids particulars forth-coming, wherewith she should be proven to have intrometted. This was found, because it was thought hard that so small quantity of intromission, should bring on the whole burden of the Defuncts Debts on her, and to make her as universal Intromissatrix to answer for all, albeit her intromission was with Goods, which was not necessar, there being no fraud on her part. Actor. *Lantie*. Alter. *Cockburn*. *Gibson* Clerk. *Vid*: 12 *Jan*: 1633. *Bruce*. 5 *Feb*: 1623. *Shaw* contra *effect*, and the cases there.

Rocheid contra his Debitors Executor, *Eodem die*.

Rocheid having obtained sentence against the Executor of a Defunct, who was his Debitor, and having denounced him thereupon to the Horn, and discust him, by seeking his Lands and Goods, and finding none Poyndable, or to be Compriled, Intents an Action thereafter against L. *Manderston*, who was Cautioner for the Executor in the Testament, to make the Goods Confirmed forth-coming; In the which Proces the Executor being also called for his interest, and deceasing after the Cause was reasoned, The *Lords* found no necessity, to Summon any person to represent the Executor, or to transfer the Proces, but that it might be sustained against the Cautioner, without citation of the Executor, whom the *Lords* found no necessar party, he being discust before, as said is: And it being Alledged, that the whole Goods of the Testament were exhausted, by a sentence obtained at another Creditors instance against the Executors, who had made payment thereof, which absorbed the whole Goods thereby Confirmed, and that before this Pursuers sentence. It was Replyed, That the payment cannot be sustained in prejudice of this Pursuer, who had cited the Executor before the making of payment, so that the Executor could not after his citation, be found in *bona fide*, to have payed all to one Creditor, but he ought to have suspended upon double distress, that the Pursuer as a Creditor might come in *pro rata* for his Debt, seing he was by the citation execute before making of payment, certiorat that he was a Creditor, and so ought not to have voluntarly done any things, or to pay to his prejudice. The Excipient Duplyed, That the Pursuer had past from that citation in Proces, so that he cannot be repute to have done fraudulently, in paying the other Creditor. The *Lords* sustained the exception of payment, and found that a citation preceeding, which was past from, was no impediment to stay the payment; and that it was no such Certioration to the Executor, which might astrict him to know the Pursuer to be a Creditor, the said citation being past from, which passing from, rendered the parties and Proces in that same estate, as if he had not been Summoned at his instance. Actor. Alter. *Beisnes*. *Gibson* Clerk. *vid*: 9 *July*, 1623. *Arnot*, and the cases there.

Fothringhame contra *Fothringhames* Relict, *Decemb*: 6. 1623.

IN an Action pursued at the instance of *Fothringhame*, as Heir to umquhile *Alexander Fothringhame*, Uncle to the L. of *Pourie*, against the Relict of the said umquhile *Alexander*, and against certain others, who were conveened at the Heirs instance, for production of certain Heretable Bonds and Obligations, made to the Defunct by certain persons his Debitors, enumerat in the Summons. The *Lords* found, that the Debitors needed not to be Summoned in that Action of Exhibition, who were makers of the Bonds, but sustained the Proces without their citation, seing there was no Executi-

on craved against them by that Pursuit, and that the Relict, and others havers, were conveened for production of these Bonds, which were in the Defuncts possession the time of his Decease, as his own proper Writs, and were thereafter intromett with by the Relict, or by the other Defendere, who albeit they were strangers, might be also conveened for production, without calling of the makers of the Obligation. Actor. *Hope, Aiton & Craig.* Alter. *Nicolson & Oliphant.* *Gibson* Clerk.

contra *Carmichael, Eodem die.*

IN an Action pursued at the instance of contra *Carmichael* of *Pottisham*, to find Caution to pay the Duties contained in the Tack, set to him of an quarter of the Lands of or else to Remove from the Lands, as if he had no Tack, conform to the order usual in such causes. The *Lords* found, that albeit the Defender found no caution to pay the Duty, yet that the conclusion of the Summons ought not to be granted, *viz.* to decern him to remove therefrom, because the Defender alledged, that he bruiked the Pursuers third part of the Lands, contained in the Tack lybelled, with the two part pertaining to the Earl of *Linlithgow pro indiviso*, so that he could not know the third part thereof to remove therefrom: This Alledgeance was found relevant, allbeit the Pursuer Replyed that the Defender ought not to be heard, to make that a pretence of his not Removing, seing he had become his Tennent in his third part, and taken Tack from him thereof, and payed him Duty therefore, and so could obtrude nothing against his Removing therefrom, being his own deed, which he could not misken; Especially seing he clothes not himself with any other Right to the said third part, nor with any Right to the other two parts: And therefore with the more reason, he ought to give again the Land, which he received from the Pursuer by vertue of the Tack, and that it was not necessary to him to Alledge, or prove against his own Tennent, that the third was severally known from the two parts, which he should dispute when he had to do with the Heretor, or any other except his own Tennent, notwithstanding of the which Answer, the Exception was sustained, and the Defender assoilzied from the Removing. *Hay* Clerk. *Vid.* 18. *Decem.* 1628. L. *Johnston.*

Collonel *Hendersons* Bairns, *contra* Debitors, *Decem.* 9. 1623.

COllonel *Henderson* dying in *Flanders* at the Seige of *Bergen op-Some*, before his decease in his Testament, he Instituts his Bairns his Universal Heirs, and divides his money amongst them, which moneys were employed in *Scotland*, and lent out to divers his Debitors, upon Heretable Bonds; which Bonds were left by him in the hands of *James Murray*, who had employed the moneys, and to whom the trust of handling and employing thereof was committed, by the said Collonel; after his decease, his Bairns institute Heirs by his Testament, and which by the Law of that Province is allowed, Pursues here in *Scotland*, the Havers and the Debitors for production of the Bonds and Registration thereof: In the which Action, the *Lords* found, that albeit by the Laws and custom of the conntrey, where the Testator died, the Defunct might institute all his Bairns Heirs, and divide his Heretage amongst them, yet that that Testament could not be valuable, but for the Goods and Heretage which was within that Province, where the Testator made his Testament; and could not extend to any Goods and Gear, which were within another Kingdom or Territory, where the Goods would not fall under that division and Testament of the Defunct, by the Law of the Kingdom, within the which the goods and Lands lay; but

but the saids goods ought to be asked by that person, who would be found to have right thereto, by the Law of the Kingdom within the which they were, and not the Law of any other Kingdom, neither could any other Countrey Law have place in *Scotland*, for any thing being within *Scotland*, but the proper Law of the Countrey it self: And therefore found that none of the Defuncts Bairns could pursue for their Obligations, the same being Heretable, but only the Heir, and who should be Retoured and Served Heir, after the Laws and Custom of *Scotland*. Actor. *Hope*, *Stuart* & *Baird*. Alter. *Nicolson* & *Ayton*. *Gibson* Clerk. *Vid.* 16. *Feb*, 1627. *Lawson* contra *Kello*. *March* 11. 1624. *July* 3. 1634. *Melvil* contra *Drummond*.

Notandum: Annate of Benefices pertains to the Executors of the Defunct, and may be evicted for the deceased Beneficed person his Debt by his Creditors, albeit it useth not to be Confirmed, nor comes under the Defuncts Testament; sicklike the Ministers satisfaction for reparation of the Manse, which is payed by the next Intrant, pays the Defuncts Debt, albeit usually it be not Confirmed. *Vid.* 17 *Dec.* 1623. Relict of the Minister of *Livingston*. 28 *March*, 1628. *Fletcher*.

Item, There are some singular cases in our Decisions, which only agrees with the Civil Law, anent Cautioners; whereas generally our Practique disagrees therefrom; for where by the Civil Law Cautioners could not be conveened, while the Principal were discust, by the consuetude of this Kingdom, the Creditor might at his own option pursue either the Cautioner or Principal at his pleasure, and may conveen the Cautioner, albeit he should never seek the Principal; but their case differs, and holds not with the general Rule, *viz.* where one is Cautioner for a Tutor, in which case, the Cautioner for a Tutor cannot be conveened, while the Tutor himself be discust. Secondly, where any is Cautioner for an Executor at the time of the Confirmation of a Testament, to make the Goods Confirmed forth-coming, in which case the Cautioner cannot be conveened, while the Executor be fully discust; which discussing of him must not only be personally, by Denouncing of him Rebel, but also by discussing of his Moveables by Poynding, and of his Lands or Heretable Goods by Compriseing; till all which be lawfully done, the Cautioner cannot be conveened. The like holds also in one who is Cautioner for a Factor to Merchants, as was found 8 *July*, 1626. betwixt *Smith* contra for which, look the day foresaid. *Item*, In Cautionry, for making of Arrested Goods forth-coming, which are found when Arrestments are loosed, *vide* 21 *June*, 1626. L. *Lochinvarr*. *vide*: 21 *Novemb*: 1627. *Rollock* contra *Corsbies*. And generally when a Cautioner is found for any *cui incumbit necessitas officii gerendi*. Sicklike a Cautioner found in a Suspension of a sentence for Poynding of the Ground, cannot be charged, while the ground be first discust: As was done 18 *Febr* 1623. betwixt *Drysdale* contra *Blaikburn*, as is there to be found, & 8 *July*, 1626.

Irwine contra *December* 10. 1623.

ONe *Irwine* being Infeft, conform to a Contract of Marriage, by her Husband, in certain Lands to be holden of himself, and thereafter she coming in actual Possession of the same really, by labouring thereof, by the space of many years after her Husbands decease; thereafter marrieth a second Husband, in whose time her Husband with her consent, as was alledged by the Defender, put the said Liferenters Son, who was Fiar of the same Land, in Possession thereof, who became and remained in the Possession thereof for the space of two years, and which Son sells the same Lands to a Stranger, who also receives the Possession from the Son Disponer thereof, and continues in Possession thereof, by the space of seven or eight years, the Wife and her Husband living together all this time; after which the Liferenters second Husband foresaid dies, and the Relict pursues the

Acquirer of the Right from her Son as said is, to remove from the Land by vertue of her Liferent-right and Infeftment foresaid: Which Action was not sustained, for the *Lords* found this Alledgeance, proponed upon the Defenders Right, acquired from her Son, who was Heretably Infeft in the Lands, albeit after her Liferent, clad with Possession foresaid, relevant, to elied this Removing, in respect the Defender offered to prove, that the Son Fiar was in Possession, put therein by the Husband, with his Wifes consent who was Liferenter, and that his being in Possession, and Infeft, put the Defender in *bona fide* to buy from him, and so was in *bona fide* to defend against this Removing; neither was it respected that the Pursuer replyed, that there was no Deed done by her, to take away the Right of her Liferent; for albeit she consented to the Deed done by her said second Husband, in putting her Son in Possession, yet that was not a reason to take her Right from her, but that she might lawfully acclaim the same, whenever her Husband died, she being in real Possession of before, as said is. The Exception was found relevant against the Removing, and the Consent ordained to be proven by the Womans Oath, but prejudice to her, to pursue Declarator upon her Right, as accords of Law. Actor. *Aiton* & *Davidson*. Alter. *Hope* & *Burnet*. *Gibson* Clerk.

Dowglass and others contra *Belshes*, *Eodem die*.

IN an Action betwixt *Dowglass* and others contra *Belshes*, wherein divers Creditors contending with the Assigney, made by the Donatar to the Escheat of him, who was their common Debitor, the Creditors were preferred to the Donatars Assigney, albeit the Donatars Assigney was also a Creditor; because the Creditors proponed an Alledgeance of simulation, offering to prove, that the Gift of Escheat and Declarator, was taken upon the Rebels own Moyen and Expenses, *&c.* and so the Assignation being of an Escheat null, for the cause of the simulation cannot prejudge the Creditors, who before the Assignation had affected the Goods controverted with *Arrestments* at their instances, at which time of the Arrestments making, there was no Assignation; and so the Cause ought to be respected, as it was at the time of the Arrestment; which being then disputed betwixt them and the Donatar, the simulation would have been found relevant; and albeit sensyne the Assigney being a Creditor, hath received Assignation, and so Replyeth, that whatever fraud or colluſion betwixt the Rebel and the Donatar hath been used, yet cannot be obtruded to him who is a true Creditor, as they are, and he not partaker of the fraud, and so that he ought to be preferred, having lawfully purchased the Kings Right. Notwithstanding of the which Reply, the Exception was admitted; for the *Lords* found, the subsequent Assignation could not prejudge the preceeding lawful Diligence, used by the Creditors before the Assignation, but that the Cause behoved to be considered and dispute now, as it might have been betwixt the Creditors and the Donatars self, the time of the Arrestment, at which time the Alledgeance would then have been admitted against the Donatar, and so ought to be so discust against the Assigney. Actor. *Nicolson* younger. Alter. *Lamb*. *Gibson* Clerk. *Vid.* 5 *July* 1622. E. of *Tullibardin*, 26 *July* 1628. *Rule* contra L. *Haltoun*.

Cunninghame contra *Austine*. 11 *Decemb.* 1623.

IN an Action of Removing betwixt *Cunninghame* contra *Austine*. The *Lords* found an Exception relevant, founded upon an Heretable Infeftment granted to the Excipient of the Lands libelled, proceeding upon a Compryſing, and would not astrict the Defender, to produce the Compryſing

Compryſing to diſpute thereupon in this Judgment of Removing, but found the Exception, bearing the Defender to be Heretably Infeft, relevant; albeit it was Replyed by the Purſuer, that the Compryſing, which is the ground of the Infeftment, will appear null, if the ſame were produced, ſeing it is deduced upon an Heretable Bond, never made Moveable by Requiſition or any preceeding Charge, whereas the Compryſing could not be deduced, except the Sum had been firſt made Movable: Which Reply the *Lords* would not diſcuſs in that place, nor urge the Defender to produce the Compryſing. Actor. *Cunninghame*. Alter. *Ruſſel*. Clerk.

E. *Wigtoun* contra Parochioners of *Stobo*, *Eodem die*.

IN an Action of Spuilzie at the inſtance of the Earl of *Wigtoun* againſt the Parochioners of *Stobo*. The *Lords* found, that a Sub-tack ſet by a principal Tackſman, there being years to run both of the principal Tack and Sub-tack, the years to run of the Sub-tack, could not defend the Sub-tackſman being Defender, in this Proceſs of Spuilzie, where the principal Tack was reduced before; albeit that the Defender alledged, that he was not called to the Reduction of the Tack, as he contended, that he ought to have been, being at the time of the Reduction, of before, and ſenſyne, in real Poſſeſſion of the Teinds libelled, and not being called, the Sub-tack behoved to liberate him from the Spuilzie, he being *bona fide* Poſſeſſor; notwithſtanding whereof, the Alledgeance was repelled in reſpect of the Reply, founded upon the Reduction of the principal Tack, to the Reduction whereof the *Lords* found no neceſſity to call the Sub-tackſman, and that he could not be in *bona fide*, in reſpect of the Inhibition libelled, which interrupted his Poſſeſſion. Actor. *Hope*. Alter. *Cunninghame*. *Gibſon* Clerk.

La. *Collingtoun* and her Son contra *Ker*, *Eodem die*.

IN an Action of the Lady *Collingtoun* and *Walter Henderſon* her Son, againſt Sir *John Ker*, for Reduction of a Back-tack, Set to the ſaid Sir *John* by the Purſuers, who by Contract having acquired from the ſaid Sir *John* a Wodſet of ſome Lands, Redeemable upon 16000 merks, by the ſame Contract he Sets the Lands back again in Tack for payment of 1600 merks yearly, with a Clauſe irritant, that if the Duty of the Tack was not payed, the Tack ſhould expire: Whereupon Declarator and Reduction being purſued againſt the ſaid Sir *John*, he compeared and alledged, that no Declarator ought to be granted, to reduce the ſaid Back-tack, upon the ſaid failzie, and Clauſe irritant, becauſe that deſire tended, by ſuſtaining that Clauſe of the Contract anent the failzie, to give the Purſuers by vertue thereof, Poſſeſſion of the Land, and of the Rent thereof, during the not Redemption, which was in effect as much, as to allow of Contracts of Uſury, againſt the Act of *Parliament anno* 1597, and to permit more Annual to be taken than ten for each hundred; it being of verity that the Sum, whereupon the Land is Wodſet, is only 16000 merks, and the Rent of the Land, whereof the uſe by this Action will be adjudged to the Purſuer, is worth fifty Chalders of Victual yearly, which ought not to be ſuſtained. Likeas, he offered to find reſponſal Cautioners, to pay the Purſuers the duty of the Tack, of all by-gone years unpayed, and in time-coming yearly, during the not Redemption. This Alledgeance was repelled, becauſe the *Lords* found Contracts of this kind, bearing Failzies upon Clauſes irritant, were not Uſury, neither came under the Act of *Parliament*; and alſo the offer was reſuſed. Actor. *Nicolſon*. Alter. *Hope*. *Gibſon* Clerk.

Crombie contra *December* 12. 1623.

IN an Action betwixt *Crombie* contra The *Lords* found, that an Action and Summons of Reduction might be sought to be transferred against the appearand Heir, and in the appearand Heir of him against whom the Reduction was intented, because as the Reduction might be at the beginning pursued against the appearand Heir, so might it be transferred *pari ratione* in the appearand Heir of the Defender in the Reduction, he dying after the intenting of the Action, albeit he was neither Heir, nor charged to enter Heir. *Hay* Clerk.

Cowper contra *Kinloch*, *Eodem die.*

IN a Reduction at the instance of *Andrew Cowper* against *Kinloch*. The *Lords* found, that the Statute of Dyvoury, extended not to by-past Dees, done by Dyvours to their Creditors, which were authorized by Decreets, before the said Statute. Actor. *Hope* & *Nicolson* younger. Alter. *Stuart* & *Mowat*. *Scot* Clerk.

L. *Ley* contra *Stuart*, *Decemb.* 13. 1623.

IN an Action betwixt L. *Ley* contra *Alexander Stuart* and *Forsyth* of *Dyk*: The *Lords* sustained a Comprising, which was quarrelled, and alledged to be null, because it bore not, that the Officer searched & sought for the Moveable Goods pertaining to the Party, whose Lands were Comprised, at his dwelling place, and that the searching upon the Ground of the Lands Comprised, was not enough, except that Execution had been also used at the dwelling place of the Party, as said is, albeit he dwelt off the Ground of the Lands Comprised; which Alledgance was repelled, for the *Lords* found it not necessary to seek at the dwelling place, which was not upon the ground of the Lands Comprised, but distant therefrom. This was proponed as an Objection against the Comprising, and not used in an Action of Reduction intented upon that ground. Actor. *Hope* & *Mowat*. Alter. *Nicolson* younger. *Scot* Clerk. *Vid:* 30 *July*, 1623. Mr. *Thomas Nicolson*, & 29 *January*, 1624. *Hoppringle* contra *Mark Ker*. 11 *July*, 1629. *Moncrief*.

Nota, A Sentence of Comprising will not have all the Executions and the Acts of the Process *specifice* insert in the Sentence, as they were execute and done punctually in all circumstances, but only will make a compendious relation thereof: As for example, the same will not make mention, if the Party was Summoned personally, or at his dwelling place, but only that the Officer cited him lawfully; and therefore Comprisings when they are questioned by Reductions, the whole Process and Executions, and Warrands thereof are called to be produced, which will largely proport the manner and form of all the particular proceeding therein.

E. *Galloway* contra *Vauns*, *Decemb:* 17. 1623:

IN an Action betwixt the Earl of *Galloway* contra *Vauns*. The *Lords* sustained a Charge of Horning execute by vertue of Letters raised before the Term of payment, contained in the Bond, whereupon the saids Letters were raised, seing the Letters bore, to charge the party obliged to make payment, when the Term of payment was by-past; and that no Charge was execute upon the saids Letters, and by vertue thereof while the Term was by past, albeit the Letters were raised before the Term, and therefore they repelled the Alledgeance, whereby the Horning and Letters were impugned for that reason. Actor. *Neilson*. Alter. *Belshes*. *Scot* Clerk. *Vid:* 5 *Feb:* 1624. *Wood* contra *Walwood*. 8 *July*, 1626. *Fowlis*.

Relict

Relict of the Minister of *Livingstone*, contra Parochioners, *Eodem die.*

IN an Action of the Relict and Bairns of umquhile Minister of *Livingstone*, whereby the Charges given at their instances, for payment of a years Stipends after the decease of the Minister, conform to the order taken by the Church in favours of the Relict and Bairns of the Minister, last deceased, were suspended. The *Lords* found, that no such Charges, neither for that year after the Ministers decease, nor for any part of his Stipend owing of Terms preceeding his decease, and which might belong to them, albeit Executors Confirmed to him, ought to be sustained, nor so summarly granted, and that there was no warrand to direct such Letters and Charges of Horning, but that they ought to pursue therefore by ordinary Pursuit. *Gibson* Clerk. *Vid:* 9 *Decemb:* 1623. Annat of Benefices. 19 *July* 1626. *Minister* of *Peterhead.*

Mowat contra *Mowat*, *Decemb:* 18. 1623.

IT was controverted this day in an Action betwixt *Mowat* contra *Mowat*, if a Decreet given against a party, as lawfully charged to enter Heir, should hinder the same party, being charged at another parties instance, to enter Heir, and so pursued *hoc nomine*, to Renounce to be Heir. In this Process, seing many of the *Lords* contended, that so long as the other Decreet stood given against him, as charged to enter Heir, it would ever prove against him in all Processes betwixt other Parties, and that he could never be heard to renounce to be Heir, while that Decreet be reduced; of which opinion others were not, for then there needed not another Charge to enter Heir, to be used by any Party, but that other Decreet *inter alios* would serve him, without a Charge at their instance, which is not allowable: But this point was not decided this day, albeit it hath been decided before both, *pro & contra*, as it was then affirmed by some of the *Lords*. *Vid.* 20 *July*, 1626. *Harvie* contra *Baron.*

L. *Monymusk* contra *Forbes*, *Eodem die.*

IN an Action betwixt L. *Monymusk* contra *Forbes* of *Barns*, for Reduction of the Defenders Infeftment of a Fishing, *&c.* The *Lords* found, that the Pursuer, by vertue of his Right to his Fishing, which was a distinct Fishing from the Defenders Fishing, and different there-from; and which Right proceeded from the *Abbot* of *Aberbrothick*, and so from an Ecclesiastick Person, could not be heard, neither had interest to pursue the Defender for Production, or Reduction of the Rights of his Fishing made to him, which proceeded from the King, they being distinct Fishings, and the Right thereof flowing from sundry Authors. And in the same Process, an Exception founded upon a Right clad with fourty years Possession, uninterrupted, was sustained to induce Prescription against the Pursuer, albeit the time of the beginning of that Possession, when it was first apprehended, the Right would not then have maintained the Defender, if he had been Challenged or Pursued then, by this Pursuer or his Author. Actor. *Hope* & *Lermonth.* Alter. *Nicolson. Scot* Clerk. *Vid. March* 26. 1623. Lo. *Yester*, *July* 12. & 14. 1626. *John Stuart.*

Hume of *Goodscroft* contra *Aikman's* Creditor, *Decem.* 20. 1623.

IN an Action of Suspension raised at the Instance of Mr. *David Hume* of *Goodscroft*, against *James Aikmans* Creditor, which Creditor had arrested a sum of Money owing by the said Mr. *David*, to the said *James Aikman*, and was decerned, to be made furthcoming for satisfying of a Debt owing by the said *James*, to the said Creditor. The *Lords* found, albeit the Bond containing the Debt owing by Mr. *David*, to the said *James*,

was an Heretable Bond, and that he was thereby obliged to pay yearly Annual, ay and while the re-payment, yet that the said Mr. *David* was not holden to pay Annualrent, from the time that it was arrested in his hand, by the said *James Aikmans* Creditor, seing the Arrestment was an probable cause to him, wherefore he could not be *in tuto*, if he had payed the same to his Principle Creditor, *viz. Aikman*; neither could he pay the same to the Arrester, without a Sentence, and so his Retention of the Sum being necessar to him for his own Surety, excused him from Annual paying, since the Arrestment, and this was found; albeit it was Alledged, that he ought either to have payed the Principal Sum, or consigned the same; or else he could not be freed of the Annualrent, being subject thereto by his Bond; this Cause was ordained thereafter to be further heard, and this Interlocutor was stayed. Here it may be questioned, if Sums debtful by Heretable Bonds be arrestable, which has not been here disputed, for answer whereto, *Vid.* K. *Charles* Parliament 3. Session first, Chap. 4.

Bannatyn contra *Murray*, *December* 23. 1623.

IN an Action of Declarator of the L. *Drumelziars* Liferent-Escheat, pursued at the instance of *John Bannatyn* Servitor to the Lo. *Tester*, compeared *John Murray* of *Halmyre*, who was Donatar of before to this same Liferent, and who thereupon had obtained general Declarator, and had intentit also special Declarator; in respect whereof he Alledged, that the Liferent being once lawfully declared at his Instance, no Declarator thereupon could again be sought by the Pursuer, upon this late Gift, granted since his Sentence. It was Replyed by the Pursuer, that the Excipients Gift, and Declarator was null, because it was simulatly taken by the Excipient to the Rebels use, in so far as the same was granted in *Anno* 1618. Since the which time, the Rebel has continually remained in Possession of his Lands, Goods and Gear peaceably, as he did before the Gift, without any Diligence done by the Excipient, upon his Gift and Declarator, to recover Possession, or put the Rebel therefrom: Likeas the Donatar not only has suffered the Rebel, to retain the said Possession, but has taken himself from him a Wodset of some of his Lands, and consented to the Tacks of some other of his Lands, Set by the Rebel to his Tennents, since the date of his Gift, and has suffered the Rebel to apply the Money, received for the saids Wodsets to his own use; which manifestly detects the simulation. The Defender Duplyed, that the Donatars oversight to suffer the Rebel to possess (if that were granted) will not cause his Right fall, for the alledged Simulation is not relevant, except it were *positivè* offered to be proven, that the Gift and Declarator, were procured and exped upon the Rebels own Charges, and that it were proven *per membra curiæ*, and the illative deeds alledged, cannot make simulation, for the consenting to Tacks, set by the Rebel, or accepting of Wodsets, is not relevant, seing he might have consented, either to Tack, or Wodset granted by the Rebel, for respect born by the Donatar, to the receiver of these Gifts, and the accepting of his own Wodsets, which had a longer Indurance than the Right of Liferent, competent by the Gift, cannot make the Gift simulat, and to fall; and if these Deeds were of force to prejudge his Gift, yet the most that the same could work, were to make it null, for the Liferent of these Lands, to the Setting whereof by the Rebel, the Defender consented, and whereof the Defenders self took Wodset, but thereby the Gift cannot fall *in totum*, but may subsist in his Person, for all the rest of the Rebels Lands, especially seing he was both Cautioner to diverse Creditors, for the Rebel, in Sums of Money, at the time of the

the Gift, and then also had acquired the Heretable Right of some Lands from him, and sensyne has acquired the Heretable Right of some other Lands; for further Security whereof, he having taken the said Gift, no reason were, that either he should be hurt in the Liferent of the Lands, whereof he has acquired the Heretable Right, or in the Sums, wherein he was bound for the Rebel; but he ought to keep the Liferent, while he be relieved thereof, and this alledged Simulation can never be objected by this Pursuer, because his Name is only borrowed to the behove of the Lo. *Yester*, who accepted from the Excipient, an Assignation of his Right, to a part of the said Rebels Liferent Escheat, for Sums conditioned to be payed by him, to the Excipient therefore, by the which Acceptation, he has approven the Right, to be Lawfully established in his Person. The *Lords* sustained the Right of the Rebels Liferent, in the Person of the Excipient, for the Lands acquired by him, from the Rebel, Heretably and Irredeemably, either before his purchasing of the Gift of the Rebels Liferent, or sensyne, wherein they found, that he ought not to be prejudged, by any Deed of Simulation, or other alledged for the Pursuer against the same *pro tanto*, *viz.* for any irredeemable Lands, acquired by him from the Rebel; but as for the Lands acquired by him, since his Gift, which were under Reversion to the Rebel, or set in Tack by the Rebel, and consented to by him, and for all other the Rebels Lands, by and attour these, which the Excipient had acquired irredeemably. The *Lords* would not sustain the Excipients Gift, but preferred the Pursuer the second Donatar therein, albeit the Excipient was Cautioner for the Rebel, the time of the purchasing of his Gift for his relief, whereof they found, that the Excipient ought not to possess the Liferent of the rest of the Rebels Lands, in respect of the Reply, which they admitted against the same, *viz.* the Retention of the Rebels Possession, and the Excipients consenting to the Tacks, and Wodsets sensyne, Set by the Rebel, and his permitting of the Rebel, to apply the Moneys acquired therefore, to the Rebels own use; which ought to have been imployed, either for the relief of the Excipient, or of some other the Rebels Creditors; by the which the Excipient had so prejudged himself, that he ought not to retain the Liferent for his relief of these Burdens, whereof he might have relieved himself before, if he had not consented, as said is, and so defrauded either the Fisk, or any other Creditor, he colluding thereby with the Rebel, and consequently admitted the Reply to the Pursuers Probation. Actor. *Nicolson* & *Stuart*. Alter. *Hope* & *Cunningham*. *Hay* Clerk. *Vid. Decem.* 15. 1626. L. *Foulis* March 22. 1628. *Andrew Meldrum*.

Shaw contra *Gray*, *January* 7. 1624.

IN an Action betwixt *Shaw* and *Gray*, for Reduction of a Bond, made by a Woman called *Shaw*, to whom the Pursuer was Brother and Heir, given to the said *Umphra Gray* Defender, containing the payment to him of 600 Merks, the reason being, that the Bond was made *in lecto ægritudinis*. The *Lords* found, that Reason relevant, *viz.* That the Bond was made by the Party thereby obliged, she at the date thereof being diseased of a sickness, whereof she never convalescit, but whereof she died, about the space of seven weeks thereafter; which Reason was sustained, albeit the Defender alledged, that the same ought not to strick upon Bonds made for payment of Moveable Sums, which might be made upon Death-Bed, and that the Municipal Law, whereupon the Reason was founded, was only to restrain Parties to make Alienations of their Lands, and Heretable Rights, in prejudice of their Heirs, upon their Death-Beds; and also alledged, that in this case, this Bond cannot be repute, done *in lecto ægritudinis*, in respect

that the Party, Maker of the Bond, at the date thereof, and by the space of six Weeks thereafter, was of good Health, to administer her lawful Affairs, and in that same estate for Sickness as she was in by the space of an whole year of before, *viz.* that albeit she keeped the House for the indisposition of her Body, having a Lent-sickness of Hydropsie all that time, yet she lay not Bed fast, but rose dayly, and put on her own Clothes, and went up and down the House: Which Alledgeance was repelled, seing the Party alledged not, that she came out to Kirk and Mercat, or at least did other Deeds of Health, equivalent to such out-coming; and found, that the Law struck as well upon Movable Bonds, as upon Deeds done in Heretage; for upon the Movable Bonds, the Heretage might be comprysed, and so the Heir thereby prejudged; and albeit it was a Lent-sickness, *& non morbus sonticus*, the reason was found relevant; and because the Party to whom the Bond was given, was an Apothecary, who alledged, that the Bond was made to him for Drogs, and satisfaction of his Cure, ministrate by him, during the whole space of her being in Sickness. The *Lords* found, that they would sustain the Bond *pro tanto viz* for the prices of his Medicines, as should be proven to have been furnished to her by him, and also for such further Sum, as in the end of the Cause should be modified by the *Lords*, for satisfaction of his pains, and for his Art. Actor. *Hope* & *Oliphant*. Alter. *Nicolson* younger & *Russel*. *Hay* Clerk. *Vid.* 1 *Feb.* 1622. *Robson*. 13 *July* 1632. *Pollock*. & 16 *Feb.* 1628. *John Byres*. The like done 21 *January* 1621. *Pride* contra *Thomson*. 24 *Feb.* 1624. *Donaldson* contra *Davidson*. 7 *July* 2629. *Maxwell* contra *Fairlie*.

Bairns of Collonel *Henderson* contra *Murray*, *January* 8. 1624.

IN an Action betwixt the Bairns of umquhile Collonel *Henderson* contra *James Murray*, a Bond being made for payment of a Sum of Money, with yearly Annualrent therefore, after an Heretable manner to the Collonel, and he dying before the first Term appointed for payment of the Annualrent, for the Bond was made, and the Money lent out at *Whitsunday* 1622, and the first Terms payment of the Annualrent was by the Bond appointed to be at *Martinmass* thereafter, the same year 1622, for the profite of the Money of the Term and Space decurring betwixt *Whitsunday*, at which time the Money was Lent, and the said Term of *Martinmass* subsequent, before the which Term of *Martinmaß* the Collonel died, to wit, in the Month of *Augusß* preceeding; It being questioned betwixt the Parties, to whom the said Terms Annualrent pertained, whether to the Collonels Heir, or his Executor. The *Lords* found, that the same pertained to the Heir, and was not due to the Executor, seing the Collonel died, before he could crave the Annual, it could not at the time of his decease be repute *in bonis ejus*, and consequently could not pertain to his Executor. Actor. *Hope* & *Baird*. Alter. *Morison*. *Gibson* Clerk. The like Decision *in terminis* was done 19 *January* 1627, in an Action betwixt the Executor of Sir *Michael Elphingston* and *Cunninghame* of *Corshill*. *Vid. penult June* 1624. *Edgar* contra *Halyday*. Item, *Smith* contra *Sandersons* Relict, *eodem die*. 15 *July* 1623. *Anderson* contra *Anderson*. 12 *February* 1623. *Wallace*.

L. *Innerweek* contra *Wilkie*, *January* 10. 1624.

IN an Action pursued by the L. *Innerweek* contra *John Wilkie* and the Lady *Bothwell*, wherein *John Wilkie* being called for delivery to the Laird of *Innerweek* of a certain quantity of Wool, which was arrested by him in the Lady *Bothwells* hands, being her Wool, and to be made forthcoming by her to him, for satisfaction of a Debt, which was owing by her to

to him, and whereof the Term of payment was not come at the time of the *Arrestment*, after the which *Arrestment* the said *John Wilkie* had bought the said Wool from the Lady *Bothwell*, and received the same from her, and therefore he was desired to render the same or the prices thereof, as it was worth at the time of his buying and receiving thereof. The *Lords* found, that this *Arrestment*, albeit it was only made in the Lady *Bothwells* own hands, and no ways known to the Buyer, nor intimate to him, yet did so affect the Wool really at the instance, and to the behove of the *Arrester*, that after the laying on of the same, none could profitably bargain, or do any Deed which might frustrate the effect of the *Arrestment*, and prejudge him of Execution thereupon; and therefore sustained the *Action* against *John Wilkie*, albeit he was a third person, to whom the *Arrestment* was never known, and albeit he was in *bona fide & probabili ignorantia*, to have contracted with the Lady *Bothwell* for that Wool, which they found could not derogate from the Pursuers *Arrestment*, and also sustained the *Action*, for the prices which that Wool was then worth, at the Defenders buying thereof, and would not restrict the Pursuit to such prices, for the which the Defender bought the Wool, but permitted the Pursuer to prove the prices according to the worth thereof; thereafter the Pursuer past from all greater prices, except such as were agreed upon by the Defender, to be payed for the Wool at the time of the buying thereof. *Actor, Stuart.* Alter. *Belshes.* *Scot* Clerk.

M^c^math contra *Poure*, *Eodem die.*

IN an *Action* betwixt *M^c^math* contra *Poure*, a Commission being given by the *Lords* to four Judges, whereof two were chosen by each one of the Parties, to hear the Compts betwixt the saids Parties, and thereafter to report to the *Lords* their Proceedings, the Commission not bearing to be given to them conjunctly, but only that it was given to the saids four Judges, two nominate for the one, and the other two nominate for the other; and the Report being returned to the *Lords*, subscribed only by three of the Judges, and not by the fourth, the Report was sustained and found sufficient; for it was no reason that the Commission and Report should be elusory, if any one of the four, either of himself, or at the desire of the Party, should refuse his concourse and consent: The four Judges were four Merchants. *Actor, Stuart.* Alter, *Lermonth & Sandilands.* *Hay* Clerk.

L. *Drumlanrig* contra Baillies of *Hawick*, *January* 15. 1624.

THE Laird of *Drumlanrig* having obtained Decreet before the Secret Council against the Baillies of *Hawick*, then being in Office, and the Clerk, decerning them, as having no Right by vertue of their Infeftment to impose any Taxes upon their Neighbours by their *Acts* of Court, to desist from doing of the same in time coming, and that Decreet being transferred in the Laird of *Drumlanrigs* person, as succeeding to his Right, who recovered the Sentence, Charges the Baillies, against whom the Decreet was first given, after the expiring of their Office, and after that new Baillies were placed, and their Clerk, to obey the Decreet, which was suspended. In the discussing of the which Suspension, the *Lords* found, that the said Decreet of Secret Council might have Execution, seing the same was transferred as said is, by Letters of Horning, and summar Charges, without any other transferring, or longer Process against the Baillies, and next succeeding Magistrats, or any others bearing Office before them, they being an University, and the first Sentence being given against the Defenders therein as Baillies; For albeit their Office ceased by the new yearly Election, whereby they could not be further charged as representing the Body of the Town,

yet it was not reason that the execution and force of their Sentence should be frustrate; but the *Lords* found the succeeding Magistrats stands subject to obey the same, and that the said Sentence ought also to have execution against the same persons, against whom it was first given or transferred, *ad hunc effectum, viz.* to cause themselves desist and obey the Sentence, but not to take the burden for the Body of the Town; and also found, that the Clerk was not a Member, to be repute of the Council, or as a Magistrat, against whom any Charges could be execute upon such Decreets given against the Magistrats; and therefore suspended the Letters and Charges execute against him, and in respect the said Decreet was given by the *Lords* of Secret Council against the Party then compearand; the *Lords* of Session would not discuss the nullity, alledged against the same by way of Suspension, *viz.* that it was given by the *Lords* of Secret Council, who were not Judges competent thereto. *Scot* Clerk.

Viscount of *Annand* contra *Scot*, *Eodem die*.

IN an Action of Reduction, pursued at the instance of the Viscount of *Annand*, as Donatar to the Liferent-Escheat of *Simon Scot* of *Bonnitoun*, and Donatar also to the Non-entry of the same Lands of *Bonnitoun*, against *Sir William Scot* of *Harden*, who for the particular Goods contained in a special Declarator, obtained by him against the said *Simon*, whose single Escheat was in the person of the said Sir *William*, had comprysed the Heretable Right of the saids Lands, and was thereupon Infeft in the same. This Comprysing was desired to be declared extinct, the reason whereof was libelled, and founded upon the Act of Parliament, *anno* 1621, concerning Comprysings *viz.* because the Compryser had intromitted with the Duties of the Lands comprysed, since whose Comprysing the quantity of the Profites and Duties of the Lands comprysed, extended to more then would satisfie the Sums, for the which the Comprysing was deduced, and Annualrents thereof, and other Debursings and Charges appointed to be repayed by the said Act of Parliament. In this Process, this Reason was found relevant, and the *Lords* found, that the Compryser ought to compt for the Profites of the Lands intromitted with by him of the years preceeding the Act of Parliament, as well as of the years sensine; and which Decision they found they would keep in all Comprysings, where the Legal Reversion was not expired before that Act of Parliament, when the like Question occurred; and they Repelled the Exception proponed for the Defender, whereby he Alledged, that he ought not to compt for any year preceeding the Act, seing *fructus erant bona fide percepti & consumpti*, and wherewith he had medled by vertue of a lawful Right then standing, and conform to the Law and Custom of the whole Kingdom, ought not now to be drawn under this Act of Parliament, which as all other Laws, only *extenduntur ad futura*. This was repelled, likewise the *Lords* found, that the Probation of the yearly Avail of the Lands, seing the same was not set out to Tennents, but ever keeped in the Heretors, and also in the Compryser's hands in the Mainsing, might be proven, what the same were worth, and might pay so much yearly Duty, and that other Lands adjacent of the like quality payed as much yearly, to be proven by Gentlemen in the Country, Neighbours to the Lands, and who should be *testes omni exceptione majores*, and men Landed. Actor. *Neilson* & *Burnet*. Alter. *Nicolson* younger & *Stuart*. *Gibson* Clerk. *Vid.* 1 *July* 1624. L. *Rankilor*. 3 *March* 1629. *Herris* contra *Stuart*. 13 *January* 1630. *Lessils* contra *Wallace*. 9 *March* 1631. Lady *Huttonhall*.

Ker contra *Dickson*, *Eodem die*.

IN an Action betwixt *Mark Ker* contra *Dickson*, for suspending of Charges execute upon a Contract, whereby the one Party was oblig'd to enter

the

the other to poſſeſſion of Lands, and which was Suſpended upon a Reaſon admitted to the Suſpenders probation, bearing, that he had entered him to the actual poſſeſſion of the ſame. The *Lords* found, that all ſuch Reaſons of Suſpenſion in time coming, conſiſting *in facto*, and which of the Law may be proven by Witneſſes, ſhall be proven at a Term, which the *Lords* will only aſſign to prove the ſame, and that they will grant no moe Terms, nor further dyets of diligence againſt the Witneſſes Summoned at the ſaid Term, albeit they compear not to Depone; but will conclude the Cauſe at the ſaid firſt Term, without further protracting of the Proceſs. Actor. *Nicolſon* & *Oliphant*. Alter.

Memath contra L. *Ochiltrie*, &c. *Jan*: 21. 1624.

James M^c^math and ſome other Merchants, having furniſhed to my Lord *Ochiltrie* certain Sums of Money, which he bound him to pay to them at the Terms contained in the Bond, and for their ſecurity of payment, in caſe of failzie of payment, and in warrandice thereof, he gave them Charter and Seaſin of the Lands of *Saltoun*; upon the which Charter and Seaſin, they having conveen'd the Tennents of the ſaids Lands for payment of their Duties. The *Lords* found that the Tennents could not be conveened for payment, by vertue of the foreſaid Charter and Seaſin, which was given in warrandice, as ſaid is, untill the time that the Purſuers had obtained Declarator, upon the failzie of payment againſt the Principal Party their Debitor: for it was not pertinent to theſe Defenders to diſpute, neither could they know if the Purſuers were payed or not, or if there was a failzie, or if the Party had made payment, and ſo had purged the failzie; for that Diſpute was only proper to the Debitor, who Contracted with the Purſuers, and not to thir Defenders. Actor. *Stuart*. Alter. *Neilſon*. *Hay* Clerk.

L. *Carnouſie* contra *Eodem die*.

IN an Action purſued by L. *Carnouſie* againſt wherein *Carnouſie*, as Executor to L. *Barns* his Brother, and as having Licence granted to him by the Commiſſar of *Aberdene*, to purſue for a particular Debt owing to the Defunct, which particular debt was left out of the principal Confirmed Teſtament, and came to the Purſuers knowledge ſince the Confirmation. The *Lords* ſuſtained the Purſuit founded upon the Licence to purſue, given by the Commiſſar, albeit there was a Principal Confirm'd Teſtament, wherein the Purſuer was Confirmed Executor. And albeit it was not eeked to the Teſtament Confirmed, and found that it was not neceſſary to eek to the Confirm'd Teſtament the particular Debt Libelled, ſeing it was uncertain, if the Purſuer ſhould recover the ſame, or not; but that the Licence gave ſufficient intereſt to purſue, without eeking the ſame; but ordained the Purſuer to find Caution to Confirm, and make the ſame forthcoming to the Defuncts Creditors, or any having intereſt, in caſe he recover the ſame. Actor. *King*. Alter. *Lawtie*. *Gibſon* Clerk. *Vid*: 14 *Decemb*: 1621: *Halliday*.

Drummond contra *Drummond*, *Jan*: 22. 1624.

IN an Action betwixt *Drummond* contra *Drummond*, one *Drummond* in his Teſtament leaves the Sum of 1000 pounds in Legacy to a Legatar, to be payed out of another particular Sum owing to the Defunct, which Sum, out of which it was left to be payed, was Heretable; and thereupon the Executor who was conveened for payment thereof, defending himſelf, that he ought not to pay it, being deſtinat out of an Heretable Sum, which was not Teſtable. The *Lords* found, that albeit the Legacy could not receive effect, by payment out of that Sum particularly, yet nevertheleſs that the Legacy remained good, to affect the Defuncts other Moveables

with the payment thereof, if he had as many as might satisfie the same, and therefore admitted to the Pursuer to prove, that there was no moe Moveables left by the Defunct, and intrometted with by the Executor, then might satisfie the foresaid Legacy. Actor. *Craig.* Alter. *Rollock.*

Lermonth contra *Alexander*, *Eodem die.*

IN an Action betwixt *Lermonth* contra *Alexander*, the Pursuer having conveened *Alexander* Defender, maker of a Bond, obliging him to pay a Sum to the Pursuer, and Mr. *Robert Lermonth*, in whose hands the Bond was put, for delivery of the Bond foresaid to him, seing he Libelled, that it was put in the said Depositars hands, to have been given to the Pursuer. The Defender compearing, and alledging that the Bond (after it was exhibited by the Depositar) ought not to be delivered to the Pursuer, seing it had never become his Evident. And where it was set down in the Summons, that it was depositat to be delivered to him, the depositating thereof for such an effect, or the conditions whereupon it was depositat, ought to be proven, either by Writ, or by the Oath of the Party, maker of the Bond, and the same ought not to be sustained, or found relevant to be proven by the Oath of the Depositar, whose Declaration in a matter, especially of great importance, ought no more to be admitted, to make an Evident of that moment to pertain to a party, to whom the same otherways would not appertain, than a matter of that weight of the Law could be admissable to be proven by Witnesses. This Alledgance was repelled, and the *Lords* found, that the condition, whereupon the Bond was depositat, might be proven by the Oath of the Depositar, whose Declaration, upon his Oath, they found sufficient to infer Sentence according to the conditions, as should be deponed by him therein. Actor. *Hope.* Alter. *Stuart.* Mr. *Robert Lermonth* present. *Scot* Clerk. *Vid:* 25 *Novem:* 1631. *Lawder* contra *Dowglass*, *penult June*, 1625. *Crawfurd* contra *Vallance*. 4 *March*, 1631. *Hay* contra *Mcmichel.* 14 *Feb:* 1629. *Farquhar* contra *Wallace*, & 5 *March*, 1624. *Hay* contra *Wright.* 22 *Feb.* 1627. *Williamson* contra *Tennent.*

Stevinson contra L. *Craigmiller*, *Jan:* 23. 1624.

STevinson having Compriſed the Lands of *Pepper-miln*, pertaining to *Patrick Edgar*, for a Debt owing to him by the said *Patrick*; he charges the L: of *Craigmiller* Superior, and of whom the Lands are holden, to Infeft him therein, who Suspends upon this reason, *viz.* that the said *Patrick* being addebted to *Clement Edgar* a certain Sum, conform to his Regiſtrat Bond, the said *Clement* had made the L. *Craigmiller* Assigney to that Bond and Decreet, who upon the same, as Assigney, had Compriſed the saids Lands that same day of this Chargers Compriſing, and which was also allowed by the *Lords* that same day, and so the property was consolidat with the Superiority; and he being equal in diligence, ought to be preferred, and ought not to be compelled to receive this Charger. This Reason was not found relevant, for the *Lords* found this Compriſing null, seing it was deduced by the L. *Craigmiller*, as Assigney, by *Clement Edgar*, which *Clement* was deceaſed before the Denounciation of the Compriſing; and the said Assignation not being intimat in the Defuncts time, before he died, the *Lords* found, that no Execution could summarly be used, at the Assigneys instance after his deceaſe, by vertue of an Assignation, not intimat in the Cedents lifetime, except that the Decreet, whereto he was constitute Assigney, had been first transferred, which ought to have preceeded the Compriſing, even as the Assigney could not after the Cedents deceaſe, charge by Letters of Horning the Debitor, where the Decreet Assigned was not transferred,

red, nor the Assignation intimat to the Debitor in the Cedents lifetime; and this nullity was received, and admitted by way of Objection in the Suspension, to take away the Comprising standing, albeit that a part consisted *in facto, viz.* that *Clement Edgar* the Cedent was deceased before the Comprisings; but the *Lords* ordained the same to be instantly proven, and would not assign a Term thereto. *Scot* Clerk. *Vid:* 27 *Jan:* & 3 *Feb:* 1624. betwixt these same Parties, and the cases cited there.

Memorran contra *Black*, *Eodem die.*

Black being obliged to pay yearly a certain Duty to *Memorran of Glaspen*, conform to a Tack past by way of Contract betwixt them thereanent: And the said *Black* Tacksman being pursued for payment thereof; The *Lords* found the Tack sufficient to bind the Tacksman, albeit it was quarrelled by him as null, because it was a matter of great importance, which although it was Subscribed by two Nottars for him, yet ought to be considered, as if it were Subscribed only by one (*quo casu* it would have been null) seing the same was not Subscribed by the two Nottars at one time, as it ought, if it had been lawfully done, but at diverse times, *viz.* by the one Nottar, and before his Witnesses at one time; and by the other Nottar, and before diverse Witnesses, others than the first, upon another day thereafter; which Alledgance, after the *Lords* inclined to sustain the same, was repelled, because the Pursuer Replyed, and offered to prove that the Tacksman had entered by vertue of the Tack, to the possession of the Lands contained in the Tack, which he proved by Instrument, and in respect thereof the Tack was sustained. Actor Alter. *Lawtie.* Clerk. *Vid.* 16 *November*, 1624. Mr. *Thomas Hope*: 20 *March*, 1633. *Craig* contra *Cowie*, and the cases there.

Donatar of *Meldrum*'s Liferent-Escheat, contra his Superior, *Eodem die.*

Andrew Meldrum being Heretor of the Lands of *Old-ley*, holden by him of another Superior, by Contract Dispones the Lands to *John Meldrum*, and obliges him to give to the said *John* two Infeftments, one to be holden of himself, and the other to be holden of his Superior; likeas, he Subscribes and gives him a Charter of the Lands to be holden of himself, whereupon, and by vertue whereof, he is Seased, and als at the same time subscribes a Procuratry of Resignation in favours of *John*, for resigning of the Lands in the Superiors hands, by vertue whereof *John* might resign, and procure himself Infeft, to be holden of the Superior when he pleased; *John* being at the Horn after the Seasin taken by him, by vertue of the base Charter; and remaining thereat year and day, *Andrew* his Superior, by vertue of that base holding, dispones his Liferent of these Lands to a Donatar, who obtains Declarator thereupon; thereafter upon the foresaid Procuratry of Resignation made by *Andrew*, Resignation is made in the Superiours hands, and *John* Infeft to be holden of the Superior; after the which publick Infeftment he remained year and day Rebel; the Superior claims the right of his Liferent, which he contended should pertain to him, and that *Andrew* his Right behoved to cease to that Liferent, how soon *John* his Vassal was entered by *Andrew* his Superior, seing the Infeftment given by the Superior, extinguished the base Infeftment holden of *Andrew*; which ceased by the publick Right; which being granted, behoved to cause that Casuality of the Vassals Rebellion, to pertain to the Superior of that Vassal; and *Andrew* ceasing to be his Superior, he could not bruik the Casuality of the Superiority, which only behoved to go and pertain to him who was the Superior, specially seing the Procuratry of Resignation being

the said *Andrews* own Deed, albeit Seasin was not taken thereupon, nor Resignation made, conform thereto, long thereafter, and long after the Vassals remaining Rebel, attour the space of year and day; yet he was so denuded thereby, that he could claim no casuality of the Vassals Rebellion, being absolutly denuded, by his own Resignation, at least, if any Right he had to that Liferent, as of Lands holden by that base holding of him, it could last nor endure no longer, neither to himself, nor to his Donatar, who could be repute in no better case than himself, but for these years during the which the Rebel remained his Vassal, and while the said base holding subsisted; but as for the years after the Rebel was Seased, by the publick holding, how soon year and day expired, after that publick holding, the Liferent of all years thereafter, ought to pertain to the Superior. The *Lords* found, that the Casuality of the Liferent falling, whileas the Rebel stood Vassal, by the base holding of the immediat Superior, and being gifted to a Donatar, and declared before Seasin, or Resignation was made, for giving of the publick Infeftment, albeit the Procuratory granted by that immediat Superior, preceeded the falling of that Casuality, pertained to the said *Andrew*, and his Donatar, and ceased not by the subsequent publick Right, and that the Superior, by the publick Right, acquired no Right to the said Liferent; but that it remained with the Donatar of the immediat Superior, for all the years during that Vassals Life time, who was Rebel. Actor. *Nicolson.* Alter. *Hope* & *Mouat. Gibson* Clerk. *Vid. July* 3. 1624. E. of *Annandale* contra *Johnston*, where it is found that the publick Infeftment extinguished the prior base Infeftment. *vid. Decem.* 4. & 5. 1623. *Paton* contra *Stuart. Feb.* 26. 1623. L. *Cluny* contra L. *Lethindy. March* 8. 1628. L. of *Wedderburn. Decem.* 4. 1635. *L. Craigiver.*

Stevinson contra L. *Craig-miller*, *January* 27. 1624.

IN the Action *Stevinson* contra *Craig-miller*, whereof mention is made in the other Process, *January* 23. The *Lords* found, that a Ratification made by *Patrick Edgar*, who was Debitor to *Clement*, of the Assignation made by *Clement* to *Craig miller* of the Debt, and Decreet thereupon, recovered by *Clement*, against *Patrick*, was not equivalent to an Intimation, and was not als sufficient, as if the same had been Intimate by *Craig-miller* to *Patrick* the Debitor; and therefore found the Comprysing deduced by *Craig-miller* against *Patrick*, after *Clements* decease, who was his Cedent, to be null, notwithstanding of the Ratification foresaid; and albeit the said Ratification was made by *Patrick* in *Clements* lifetime, before his decease: for the *Lords* found, that Intimations ought to be Legally made by a Nottar, before Witnesses, which as it was most solemn, and requisit so to be done, so these were the most probable means to eschew Falset; for being otherways done, by such privy Ratifications, being deeds only done amongst the Parties selves, might have the greater suspition of Falset or Simulation, and had the more difficult means of tryal and discovery of the same. *Vid. Novem. ult.* 1622. La. *Winton* contra *Murray. vid. March* 14. 1626 *Nisbit.* & *March ult.* 1624. L. *Dunipace*, where Treating is sustained as an Intimation. *vid. supra, Jan.* 23. & *infra. Feb.* 3. 1624. and the Cases there cited.

Inglis contra *Drummond*, *Eodem die.*

IN an Action of Adjudication pursued at the Instance of *Alexander Inglis*, against *Drummond*, who was the Party called, as charged to enter Heir to his Debitor, and who had Renounced to be Heir. The *Lords* sustained the Action of Adjudication, albeit it was Alledged, that Adjudication could not

not be sustained, but where first there was a Sentence preceeding, declaring the Debt, for which the Adjudication was sought, which this Pursuer had not, seing by having pursued the Defender for Registration of the Bond, he was Assoilzied, because he renounced to be Heir, and so the Bond should have been Registrat *cognitionis causa*, which is not done: This Alledgance was repelled, because in that Absolvitor, the Pursuer protested, that he might have Action *contra hæreditatem jacentem*, which Protestation was admitted in that same Absolvitor by the *Lords*, and being admitted, The *Lords* found it sufficient to produce this Action, and that there was no necessity to seek any other Decreet of Registration *cognitionis causa*, but sustained the Process upon that Protestation admitted. Actor. *Kinross*. Alter. *Gibson* Clerk.

Hoppringle contra *Ker*. *January* 29. 1624.

IN an Action betwixt *Hoppringle* contra *Mark Ker*, and L. *Borthwick*. The *Lords* found, that where Superiority of Lands are Comprysed from the Superior, in these Comprysings, there is no necessity to use any Execution of searching and seeking, but that these Comprysings shall be sustained, although that Execution be not used, seing it is not probable, that the Superior could have any Goods upon that Land, whereof he was naked Superior only, and whereof the Property pertained to another; and also they found, that in all other Comprysings of the Property of Lands, where diverse Lands were Compriſed, notwithstanding that the diverse Lands were valued in one Barrony, or Tennandry, yet that the Execution of searching of the Moveable Goods, should be used upon the Ground of every Land, Denounced to be Compriſed; and that where the foresaid Union was, it was not sufficient, to search at the principal Place, and upon the Ground of that Land, to the which the rest of the Lands Compriſed, were United, and where the Seasin was appointed to be taken, but that the searching should be at all the Lands, otherways the Compriſing to be null. Actor. *Hope*. Alter. *Nicolson*, & *Oliphant*. *Gibson* Clerk, *Vid. December* 13. 1623. L. *Lee* contra *Stuart*. *penult. July* 1623. Mr. *Thomas Nicolson*.

Grinlaw contra *Adamson*, *Penult January* 1624.

IN an Action of Suspension, of a Decreet of Removing, betwixt *Grinlaw* contra *Adamson*. The *Lords* found, that the Decreet of Removing was not satisfied and fulfilled, by any Instrument of Obedience, bearing, that the Party against whom the Sentence of Removing was obtained, had Removed himself, and his Family, from the Lands decerned, except that he had also really delivered to the Obtainer of the Sentence *vacuam possessionem*; For the Party decerned, his own Removing and colluding with another, who entered to the Land, at the instant time of his Removing, was not effectual obedience, but elusory; neither was it necessar, that the Obtainer of the Sentence should be put to seek Action of Intrusion or Succeeding in the *vice* against him, who entered to the Land at the Removing of the other, seing the *Lords* found, that the Party decerned, ought to deliver the Possession of the saids Houses, void of any Occupyar, and Possessor thereof. Actor. *Cunningham*: Alter. *Nicolson*. *Gibson* Clerk.

Douglas contra *Weddell*, *Eodem die*.

IN an Action betwixt *James Douglas* contra *Weddell*, and the E. of *Morton*. The *Lords* found, that a Depositar, in whose hands Money was Consigned, for Redemption of Land, was not holden to pay Profite for any consigned Money, albeit the Party, against whom the Redemption was to be used, and to whose use the Money was consigned, offered

both at the time of the Order and Consignation, and also at the calling of this Action, which was Intented by him, against the Depositar and the Party Consigner, for his Interest, for the delivery to him of the Money, with the profite thereof, to Renounce and give over the Land, desired to be Redeemed; and albeit also, that the Reason Lybelled, for the which he craved the Depositar to be decerned to pay Profite, was, because he instantly, at the very time of the alledged Consignation, gave back the Money again to the Party Consigner, who had made use thereof continually sensine; neither whereof was respected, to sustain the Action against the Depositar, for paying of Profite, but he was Assoilzied therefrom. Actor. *Hope & Oliphant.* Alter. *King. Scot* Clerk.

L. *Carnousie* contra *Keith*, *Eodem die.*

BEtwixt the L. of *Carnousie* and *Keith*, for payment of certain Duties of Lands, contained in a Bond, the Right to the which Duties, mentioned in the said Bond, was established in the Person of *Carnousie*, by Comprising from the L. *Philorth*, to whom the Duties by that Bond are oblist to be payed. The *Lords* found, that these Duties, which consisted in Services, to have been yearly payed, as leading of Hay yearly, and of the Corns in Harvest, and Shearing, and Leading of Muck, and other Services of that nature, if they were not yearly required to be done, by the Person, who was subject to do the same, that the Person so addebted, is not after the Interveening of other subsequent years, holden to pay any prices for the Duties, which were not required, *debito tempore*, to be performed yearly, conform to the Bond, and therefore would not sustain the Pursuit for these Services, the same being pursued long after the years, for which the Services were acclaimed. Actori *King.* Alter *Mouat, Gibson* Clerk. *Vid. Feb.* 16. 1627. Lo. *Semple. January* 4. 1643. *Hamilton.*

Stevinson contra L. *Craig-miller*, *February* 3. 1624.

IN the Action betwixt *Stevinson* and *Craig-miller*, whereof mention is made the 23. and 27. *January*. The *Lords* found, that an Assigney to a Sentence obtained by him, who was Cedent before the making of the Assignation, might by vertue of that Assignation, the same being Intimate by the Assigney, to the Debitor, against whom the Cedent had obtained the said Sentence, in the Cedents own Life-time, execute the said Sentence, by Letters of Horning, Poynding, or Comprising, at the Assigneys own Instance, (the said Assignation being Intimat, before the Cedents decease, to the Debitor, as said is) and that the Assigney had no necessity, to Transfer the said Sentence, before he could deduce Execution, but that he might lawfully Charge, *&c.* upon the said Assignation so intimate, without any transferring, or other Action. *Partibus ut supra.*

Hayes contra *Keith*, *Eodem die.*

IN an Action pursued at the instance of *Hayes* Bairns to the umquhile Lady *Errol* against *Nathaniel Keith*, for payment to them of the Duty and Farm of the Lands of *Ardstakies*, of the Cropt 1616, which Lands pertained to the Lady *Errol* in Liferent, and to the Farm thereof addebted to her the said year 1616, by *Hay* her Tennent, and Tacksman to her of the saids Lands, she had made the saids Pursuers Assigneys, and for payment of the which Farms, the saids Assigneys conveened in this Pursuit the said *Nathaniel Keith*, as he who having obtained the Gift of Escheat of the foresaid Tennent, and Declarator thereon; and having obtained Sentence against the L. *Gight*, for payment particularly to him as Donatar, of a certain quantity of Corns and Goods, intrometted with by *Gight*, being upon the Ground

Ground the said Cropt, for the which the Farms were acclaimed, the principal Tennent being deceased at that time of his Intromission, and consequently the Defender being conveened, as having received payment of the prices of the Corns of that Cropt, to pay that Year and Cropts Farm to the Master of the Ground, and his Assigneys. The *Lords* found, that the Master of the Ground had Right to pursue this Defender for that years Farm, albeit he was not immediat Intrometter with the Corns of that Cropt, and albeit he intrometted only with the prices, by vertue of a special Declarator, obtained by him as Donatar against that person, who was immediat Intrometter; and found, that the Master of the Ground had this Action competent to him, as well against the receiver of the prices of the Corns and Goods being upon the Ground that Cropt, whereof the Farms were acclaimed, as against the immediate Intrometter with the Corns and Goods of the same Cropt, either of which the Master hath liberty and right to pursue in his option; and found no necessity, that the Master should be holden to pursue the Tennent, or his Heirs or Executors, before that the Intrometter in the second place could be conveened; but that the Master might pursue any of them as he pleased, ay and while he were satisfied, seing whatever was growing upon the Ground that year, whereof the Farms was sought, was Hypothecat for that years Farm to the Master *primo loco*; whom the *Lords* preferred to the Kings Donatar; albeit the Donatar alledged, that many of the Goods contained in his special Declarator, could not be Hypothecate for that years Farm to the Master, because, albeit they were, and remained upon the Tennents Ground, possest by him that year, yet the same behoved to pertain to the Donatar, by reason of the Tennents Rebellion, and being at the Horn year and day before that Cropt libelled, whereof the Farms was sought, at the time of the which Rebellion the Rebel had the same Goods in his possession, and the remaining of the same still upon the Ground the foresaid year controverted, could not prejudge the King of his Right acquired thereto before, neither ought the same to be repeated from him, who had obtained payment by vertue of a Sentence of special Declarator, which ought to maintain him, and ought not to be drawn now in question, after it was execute and taken effect by obedience, especially after so long time, *viz.* eight years interveening after the Cropt controverted, during the which time the Master hath done no diligence to pursue for his Farms, and whose negligence so long cannot produce this Action, to cause the Kings Donatar restore that which he hath recovered by his long and lawful diligence; which Exception was Repelled, in respect that the Goods excepted upon were in the Tennents possession upon the Ground, that year and time when the Masters Farm might have been craved; and found, that the prevention and diligence done by the Excipient, could not derogate from the priviledge of Hypothecation, competent to the Master by the Law.

In this same Process, the *Lords* found, that the Tennents Corns and Goods of that Cropt, whereof the Farm was addebted to the Master, being poynded, or lawfully intrometted with by the Tennents Creditor, could not be repeated from the Creditor by the Master, if the Creditor left als many Corns and Goods beside upon the Ground as would satisfie the Masters Farm; but the Creditor is holden to say, and prove, that there were as many Goods extant upon the Ground, as might satisfie the Farm at the Term of *Candlemass*, at which time the Master may by the Law seek his Farm; for whatever was extant before *Candlemass*, it was not sufficient, except it had been also extant at *Candlemass*, being before that time the Master cannot poynd for his Farms, nor exact the same, albeit he might at

any time before stay the taking away of the Corns, while he got Security for his Farm. And the *Lords* found it not enough, to liberate the Creditor, Poynding and Intromitting, as said is, his qualifying that he left as much Insight within the Tennents House, as might satisfie the Masters Farm; but found it necessary to him to say, that he left as many Corns or other Goods, upon the Ground of the Lands out-with, and beside the Insight of the House, as might satisfie the Masters Farm. Actor. *Nicolson & Aiton.* Alter. *Hope & Mowat. Hay* Clerk. This Decision was thereafter stopped by the *Lords. Vid. 29 June* 1642. L. *Polwart. ult. March* 1624. Sir *John Carnagie* contra L. *Dun. 25 July* 1623, betwixt the same Parties. 15 *January* 1625. Mr. *Lewis Stuart*, 29 *March* 1639. D. *Margaret Hay.*

Wood contra *Waddel, February* 5. 1624.

IN an Action betwixt *Wood* contra *Waddel* and *Wallace.* The *Lords* found, that Actions intented, and Summons raised for payment of Sums, or doing of any other Deed, whereof the Pursuers Term of payment, and doing thereof was not come, the time of the raising of the Summons, ought not to be sustained, nor respected as good and lawful diligence, and that any Sentence following upon such intented Actions, albeit the Term be by-past, before the pronouncing of the Sentence, is null, and ought not to be profitable to the Obtainer thereof: And in payment of Farms, albeit the same cannot be uplifted before *Candlemass*, in respect that that time is by perpetual Consuetude, granted to the Tennent to thresh out the Corns, for payment of the Master, and preparing of Seed to the Ground, before which time the Tennent cannot conveniently be prepared, nor ready to satisfie the Farms; yet the *Lords* found, seing the legal Terms of payment, are *Whitsunday* and *Martinmass*, that both these Terms being by-past, Pursuit may be moved for payment thereof, so that the Sentence decern not the payment to be made, till *Candlemass* be by-past. Actor. *Nicolson* younger. Alter. *Dowglas. Hay* Clerk. *Vid.* 17 *December* 1623. Earl of *Galloway* contra *Vans.* 19 *November* 1623. *Ker* contra *Colthird.* 1 *March* 1623. L. *Blair.* 8 *February* 1662. *Pat. Lesly.* 21 *Feb.* 1624. *Brown. penult July* 1623. *Nicolson.* 26 *June* 1628. L. *Edington.* 3 *July* 1628. *Scot.* 8 *July* 1626. *George Foulis*, and the Cases there.

Baron of *Burghtoun* contra Town of the *Cannongate, Eodem die.*

IN an Action pursued at the instance of the Baron of *Burghtoun* against the Town of *Cannongate*, for Production and Improbation of an Evident made to them of the freedom of Burgh, by the particular Abbots of *Holy-rood-house* enumerate especially in the Summons, wherein was also contained a general Clause, whereby they were called to produce all Writs thereof, made to them by whatsoever Abbot of *Holy-rood-house*; which general Clause being quarrelled by the Defenders as irrelevant, and which ought not to be sustained, except the Pursuer would condescend specially upon the name of the Abbot, maker of the Evident, whereof the Production was craved. This Alledgeance was Repelled, and the *Lords* sustained the general Clause; and found it not necessary to compell the Pursuer to condescend specially upon the name of the Abbot; and declared, that in all Actions of the like nature, *viz.* in Improbations of Writs made by Abbots, Bishops, or other the like Church-men, it should be sufficient to the Pursuers, in these Cases, to call for Production and Improbation of Writs made by whatsoever Church-men Titulars, and provided to that Benefice of that Subject which was controverted, and that there should

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be no neceſſity to ſet down in the principal Summons the names of the Church-men ſpecially, but that the general Clauſe ſhould ſuffice, bearing, all Writs made by whatſoever Titular of the Benefice, *viz.* by whatſoever Abbot, or Biſhop, of that Abbacy, or Biſhoprick, to be falſe, *&c.* Actor, *Nicolſon* elder & *Aiton.* Alter. *Lermonth* & *Oliphant.* *Scot* Clerk.

Gordon contra *Mcheugh*, *February* 6. 1624.

IN an Action betwixt *Gordon* contra *Mcheugh*. The *Lords* found a Decreet given by the Commiſſar of *Wigton*, Decerning a Party to pay the prices of certain Victual, which he was oblig'd to deliver to the Purſuer of that Cauſe, to be null by way of Objection in the Suſpenſion then diſcuſſing betwixt the Parties, becauſe the ſame was in a matter Civil, *viz.* for prices of Victual, which was not proper to an Eccleſiaſtick Juriſdiction, and that it was ſupplyed by alledging, that albeit of its own nature it was civil, yet ſeing it was referred to the Defenders Oath, in that reſpect the Commiſſar was a Judge competent: The *Lords*, nevertheleſs that it was referred to the Defenders Oath, found it null, becauſe the Decreet was for a greater Sum than whereon the Commiſſar could decern, the matter being Civil, to wit, extending to 120 merks; for the *Lords* found, that the Commiſſars in matters which were not Eccleſiaſtick, could not be Judges to admit any Probation, but the Defenders Oath, except in matters which exceeded not the value of 40 pound, within the which quantity they might receive Probation by Witneſſes, and otherways, albeit the Subject was not in a matter Eccleſiaſtick; and if the matter were not Eccleſiaſtick, and exceeded 40 pound, they might alſo be Judges thereto, the ſame being referred to the Defenders Oath, if the Subject exceeded not 100 merks; but if it exceeded 100 merks, and was Civil, albeit referred to Oath, the Commiſſars were not Judges thereto; for if they were admitted to judge upon Civil Matters exceeding 100 merks, they might upon pretext of referring of Matters to the Defenders Oaths, draw all Actions in before them, which were abſurd. Actor. *Belſhes.* Alter. *Cunninghame.* *Vid.* 19 *July* 1625. *Ker* contra *Ker.*

In this ſame above-written Proceſs, the *Lords* found the Commiſſars Decreet null, becauſe it was given in time of the Harveſt Vacance, and the Decreet bore not, that it was given by vertue of a Diſpenſation; and the *Lords* would not ſuſtain the Anſwer, made by the Party, whereby he alledged, that the Commiſſar had diſpenſation, ſeing they found that the Decreet ought to have made mention and proported the ſame, and ſo not bearing the diſpenſation, being given in *Auguſt*, was found null for that Cauſe. *Vid.* 6 *July* 1624. *Richardſon* contra *Hay.*

Sandilands contra *Robertſon*, *February* 7. 1624.

IN an Action betwixt *Sandilands* and *Robertſon*, for ſuſpending and reducing of a Decreet given againſt him by the Sheriff of *Edinburgh*, whereby the Reducer of that Decreet was ordained by the ſaid Sheriff, to pay an Un-law of 50 pound, for not compearance before them, being cited for a *Blood* committed by him. This Decreet for the Sheriffs Un-law foreſaid, was given *in pœnam contumaciæ*, there being no other cauſe of the Sentence, but only given in abſence, and for the Parties not compearance, without any Probation of the Fact, or Tryal by an Aſſiſe. The *Lords* found, that the Sheriff cannot impoſe an Un-law of 50 pound, except the Fact had been tryed againſt the Party Committer by an Aſſiſe, and that nevertheleſs his abſence was the reaſon, for the which Tryal could not be taken by an Aſſiſe; for an Aſſiſe cannot be admitted, but where the Party is preſent.

The *Lords* found that his Contumacy could not excuse him from some penalty, in which the Judge might Unlaw him for his absence, which they found ought not to extend to als great an Unlaw, as if it had proceeded upon tryal of the Fact, but that it ought to be moderat, and therefore they modified the same to an Unlaw of ten pounds. Actor. Alter. *Miller. Vid:* 16 *March*, 1622. L. *Cluny.*

K. Advocat and Lo. *Yester* contra Lo. *Buckcleugh*, *Feb:* 10. 1624.

IN an Action of Improbation pursued at the Kings Advocats instance, and the Lo. *Yester*, against the Lo. *Buckcleugh*; an Incident being used at the Lo. *Buckcleughs* instance, for proving of an Exception admitted to his probation, against the Improbation. The *Lords* found, that the Incident could not be sustained, because the Advocat, at whose instance the principal cause of Improbation was pursued, was not Summoned in the Incident, seing they found that no Incident could be granted in any Case, except where all the Pursuers in the principal Cause, wherein Incidents are to be used, ought *specificè* to be Summoned in these Incidents: And this was found, albeit it was Alledged for the party user of the Incident, that where the principal parties pursuers are warned *apud acta* in the Principal Process, by the Act of Litis-contestation, in that case they needed no other Citation in the Incident, they being warned by the Act for the Term assigned to the Defender, for proving of his Exception, and for proving whereof now the Incident is used; and als that it was Alledged, that seing the direct and Principal Party was Summoned by the Incident, the same ought not to be rejected for not Summoning of the King's Advocat, who was not a Principal Party, and who could neither tine nor win thereby, but who was only Party for his interest, *ratione officii*; which Alledgances were repelled. Actor. *Nicolson* & *Stuart.* Alter. *Hope* & *Scot.* *Hay* Clerk. *Vid:* 12 *Feb:* 1624. E. *Marr.* 11 *June*, 1623, E. *Hume.*

L. *Edmiston* contra E. *Lothian*, *Eodem die.*

IN an Action betwixt the Laird of *Edmiston*, as Assigney constitute by Sir *John Ker* to a Contract for payment of Sums of Money therein contained, against the Earl of *Lothian*: This Assignation being quarrelled by the E. of *Lothian*, as null by the Act of Parliament, 1592. because it was made by a Rebel then, and as yet remaining Rebel, to the Defenders prejudice, who is the Cedents Creditor. This Alledgeance was repelled, because the Contract Assigned was an Heretable Contract, and so came not under that Act of Parliament. Actor. *Nicolson.* Alter. *Hope* & *Belshes.* *Gibson* Clerk. *Vid:* 21 *March*, 1623. *Cunninghame* contra E. *Glencairn.*

E. *Marr* contra Lo. *Kildrimmie*, *Feb:* 12. 1624.

IN an Action betwixt the Earl of *Marr* and Lo. *Kildrimmie*, for Reduction and Improbation of Writs made to the Lord *Elphingston*, of the Lordship of *Kildrimmie*, wherein an Incident being used by the Defender, and Litis-contestation made therein, admitting the same to the Lo. *Elphingstons* probation; this Incident was not further sustained, but the Term Circumduced, because by the Letters of Diligence written by the Clerk upon the Act, no power was given to Summon the King's Advocat, at whose instance the Principal Summons in the Principal Cause was raised, and who being Pursuer therein, was found by the *Lords* to be a necessary party, who ought to have been warned to all the Dyets of the Incident; and albeit the Kings Advocat was Summoned, and Execute against by the Indorsation of the Diligence, and Execution thereof; yet seing the Letters bore no warrand to Summon him, the Execution could not be lawful, as wanting a warrand, & was not sustained, but holden as if he had not been Summoned. Actor.

Hope

Hope & *Aiton*. Alter. *Nicolson* & *Stuart*. *Scot* Clerk. *Vid.* 11 *June*, 1623.
E. *Hume* contra *Cranston*. 10 *Feb.* 1624. Lo. *Tester* contra L. *Buckcleugh*.

L. *Langtoun* contra Baillies of *Dunce*, *Eodem die*.

THE E. of *Langtoun* pursuing the Baillies of *Dunce*, for dimitting of his Debitor, whom upon Charges of Caption they had apprehended and put in Ward, and thereafter had let him go free. The *Lords* assoilzied them from the Pursuit, because the Town of *Dunce* was but a Burgh of Barony, who had not that power nor authority, whereby they might be compelled to take Rebels; and as they could not be compelled to take them, so being taken by them, they had no necessity to detain them, but might dimit them; And albeit the Letters of Caption gave command to all Magistrats, both in Burgh and Land, to Execute the Letters, and so it might appear that the Charge should extend to them, who were Magistrats to Land, if they were not of a Burgh-Royal. The *Lords* found, that that Clause of the Letters, to charge Magistrats to Burghs, ought to be understood of Royal Burghs, and that to charge Magistrats to Land, ought to be understood of Sheriffs and Stewarts, and sick-like Magistrats, and ought not to extend, nor be understood of Burghs of Barony, and Magistrats thereof. Actor. *Belshes*. Alter. *Nisbet*. *Gibson* Clerk. *Vid:* 13 *March*, 1623. Baillies of *Dunce* contra *Mudie*. 20 *July*, 1624. *Bell* contra *eosdem*.

Sinclar contra *Sinclar*, *Feb.* 13. 1624.

ONe *Sinclar* in *Orknay* pursues another *Sinclar* for payment of a Sum contained in a Bond; against the which the Defender alledged, that he could not be subject, but in the equal half of the Sum contained in the Bond, in respect that by the expres tenor thereof, the Defender, and another person therein named, are obliged conjunctly to pay the Sum, which imports, that every one of the two are allanerly subject to pay the equal half; and albeit that the other person named in the Bond with the Defender, hath not Subscribed the Bond; yet seing the Bond is drawn up and conceived of that tenor, that they are bound therein conjunctly, the Defenders Subscription cannot bind him to any greater quantity, then as is expresst and set down in the Tenor and Body of the Bond. This Alledgance was repelled, and the Action sustained for the whole Sum against the Defender, who only Subscribed the Bond, albeit the Tenor bore two to be bound; which if it had been Subscribed by both, the Sum would have divided equally; but being Subscribed by one only, the Subscriber was bound for all, and who should have sought and provided for his relief of the other half when he Subscribed the Bond. Actor. *Baird*. Alter. *Gibson* Clerk. *Vid.* 13 *Novem*. 1622. *Forbes*.

contra *Eodem die*.

IN an Action for Poynding of the Ground of a Tenement of Land, which was holden of the Baron of *Burghton*, conform to an Infeftment of an Annualrent, granted to the Pursuer by the Heretor of the Tenement, to be holden of the Granter; after the which Infeftment of the Annualrent, the Heretor of the Land, Granter thereof, resigns the Lands in the Superiors hands for Infeftment Heretably, to be given thereof to the Defender, and who upon the Superiors Precept is Infeft, and by vertue of this publick Infeftment the Defender compeared, and would have excluded the Pursuers Action, founded upon the base Infeftment; to the which he Alledged he should be preferred, in respect of the Act of Parliament, seing that conform to his Publick Infeftment, he Alledged he had acquired a years possession of the Land. This Alledgance was repelled, and the base Infeftment of the Annualrent preferred to the publick Infeftment of the Property, because it

was more than a year since the date of any of the two Infeftments; for the Pursuers Infeftment of the Annualrent was in *January*, 1623. and the Defenders Infeftment of the Property was in *April* thereafter, the same year, and that immediatly after that first Term subsequent to both their Infeftments, which was *Whitsunday*, and before the which first Term, the Annualrenter, who is Pursuer, could have no Action to seek the Annualrent before the Term was past; she immediatly after the said Term intented this Action, whereby she had done all lawful Diligence, to make her Right publick; and before the which Diligence so done by her, the Defender could not possibly apprehend any possession, which might so authorize his Right, or lawfully acquire possession, there being no Terms interveening before the Pursuers Diligence and Summons, as said is, which could derogat from his anterior Right, and what Possession he had, if any was, since the Summons, the same ought not to be respected. Actor. *Paip.* Alter. *Hay* Clerk. *Vid:* 2 *July*, 1625. L. *Raploch.* 22 *July*, 1626. The names blank.

L. *Durie* contra Lo. *Ramsay*, *Feb:* 17. 1624.

IN an Action pursued at the instance of *Robert Durie*, sometime of that Ilk, against the Lord *Ramsay*, for payment of certain Sums of Money resting, owing of the price of the Lands of *Scots-Craig*, sold by the Pursuer to the Lord *Ramsay*; which albeit by the Contract of Alienation were discharged, and granted to be payed, yet were truly owing, and were not payed; and also for payment of ten for each hundred of the saids Sums yearly, since the Term at which the Principal Sums resting should have been payed. The *Lords* sustained the Action for the saids Profits, albeit it was alledged, that the Defender should not be decerned to pay any Profit, seing the Contract obliged him not to pay any Profit or Annual, *& quod usuræ non debentur nisi ex pacto.* Likeas the Money was Arrested in his hands by the Pursuers Creditors, which put him in *bona fide* not to pay the Principal Sum, and so with reason ought to free him from profit, seing he was ever ready to pay the Principal Sum, if he had been freed of the Arrestment. The *Lords* repelled this Alledgance, and found the Defender ought to pay the Principal Sum, with the Profits thereof continually since the Term appointed for payment thereof, notwithstanding of the Arrestment, in respect that the Defender hath bruiked the Lands continually since the Alienation of the same to him, and als hath retained the Money, which was the price thereof, in his own hands; and it is against Reason and Conscience, both to retain the Money, without paying Annual therefore, and to bruik also the whole Profits of the Lands. Actor. *Nicolson.* Alter. *Aiton.* *Gibson* Clerk. *Vid:* 20 *July*, 1626. L. *Clunie* contra *Ogilvie.* 7 *Feb.* 1628. *Hume.*

Maxwells contra *Mcbrair*, *Eodem die.*

IN an Action pursued by *Maxwells*, who were Infeft in certain Lands upon a Retour as Heirs to their Father, against *Robert Mcbrair*, for the Mails and Duties of the Lands, both since the date of the Retour and Infeftments, and also of certain other years preceeding the Retour, since the decease of their Father, to whom they were Served and Retoured as Heirs. The *Lords* sustained the Action upon the said Seasin, proceeding upon a Retour, for the years also since the decease of their said Predecessor, and before the Retour; albeit it was alledged for the Defenders, that they could not pursue for these years, seing there was no Right standing in their person to the same of these years. Which Alledgeance was Repelled, in respect the Right proceeded upon a Retour, which was sufficient to sustain the Pursuit for

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these years, seing there was no other Party compearand, to alledge any Right thereto in the person of any other; and for these years, albeit they might be in Non-entry, yet being in Feu Lands, the Superior could have no Right but to the retoured Duty, and not the full Mails, before Declarator: Actor, *Belshes*. Alter. *Cunninghame*. *Gibson* Clerk.

L. *Elphingston* contra E. *Mar*, *Eodem die*.

IN an Action of Improbation, pursued at the instance of the Lord *Elphingston* against the Earl of *Mar*. The *Lords* found, that Services, whereby persons were Served Heirs to their Predecessors in Lands, ought not to be decerned to make no Faith for non-production, where the Party is only called in that Process, and neither the Director of the Chancellary, who is presumed to have the Service, and to keep the same for the Warrand of the Retour, nor the Judge before whom the Service was deduced are called; for the *Lords* found, that no Certification ought to be granted against the Service, except either the Director of the Chancellary, or the Judge and Clerk, before whom the Service was deduced, had been called with the Party to produce the same: And also the *Lords* found, that Retours of elder Dates, before the year 1550, ought not to be decerned to make no Faith for non-production, where the principal Service, sealed by the Assisers, is produced, albeit the same be not extant at the Chancellary, nor extracted out of the same. Actor. *Nicolson* elder & *Stuart*. Alter. *Hope* & *Aiton*. *Scot* Clerk. *Vid.* 20 *March* 1633. E. of *Airth*.

Thomson contra *Law*, *Eodem die*.

John Thomson being provided to the Office of Procurator-Fiscal of the Commissariot of *Glasgow*, by *John* Arch-Bishop of *Glasgow*, during all the days of his Life-time; he is thereafter deprived from that Office, by *James* Arch-Bishop of *Glasgow*, and Mr. *James Law* provided thereto, who served in the Office for the space of three or four years; after the which, the said *John* obtains a Sentence against the said *James* Arch-Bishop, and also against the said Mr. *James Law*, reducing the said Deprivation *ab initio*; after the which, he pursues Mr. *James Law* for the Profites of the Office, these years wherein Mr. *James* bruiked the Office before the Reduction; from the which Pursuit, the *Lords* assoilzied the Defender, because the Defender was provided to the Office for these years, and served therein *bona fide*, and so ought to have the Casualities thereof for his Service, the Pursuer neither having served in these years, nor having made any interruption to the Defender, but being all that time silent; and albeit that Deprivation was reduced *ab initio*, yet the *Lords* found it not enough to produce this Action, seing that Reduction was not intented till after the years libelled, for the which the Defender was conveened, in the which years he had served *bona fide*, as said is; which the *Lords* found sufficient to elied this Pursuit: Actor. Alter. *Nairn*. *Hay* Clerk.

L. *Coulter* contra *Forbes*, *February* 18. 1624.

IN an Action betwixt the L. *Coulter* contra L. *Balbigno*, for Declarator of *Balbigno*'s Liferent, and *John Forbes* Son and Heir of umquhile Mr. *Duncan Forbes* compeared, as claiming the Right of the said Liferent to pertain to him, seing his Father was Donatar thereto, and had obtained Declarator thereupon, at his instance, before his decease, and so he as Son and appearand Heir, had Right to the same, and consequently to impede all Declarator at any other persons instance; and the Pursuer contending, that the appearand Heir could have no Right to that Liferent, the Donatar being deceast, but that the same would pertain to his Executors. The *Lords*

found, that the said Liferent-Right, and Gift, and Declarator thereof, pertained to the Heir of the Donatar, and not to his Executors, except for the by-gone years owing to the Donatar before his decease, which would appertain to his Executors. Actor. *Burnet*. Alter *Baird*. *Scot* Clerk.

Ferne contra Captain *Wisharts* Heir, *Eodem die*.

IN an Action betwixt the Heir of umquhile Captain *Wishart*, and one *Ferne*, whereby a Bond was desired to be Registrat, at the Instance of *Ferne*, against the Heir foresaid, which Bond was made to the said *Ferne*, by umquhile Captain *Wishart*, containing the Sum of a thousand Merks; against the which the Defender using for an Exception, his Action of Reduction of the said Bond, and Reasons thereof, *viz.* That the Name of the Creditor insert in the Bond, was only borrowed, to the behove of *Katharin Leyes*, who was Concubin to the Captain, giver of the Bond, with whom he conversed, and the same granted to her, he having then a Married Wife, and so the same being given *ob turpem causam & ut præmium adulterii*, ought not to be sustained, to produce any Action thereupon. The *Lords* found, that this Defence and Pursuit of Reduction, tending to the Tryal and Probation of a Fact of Adultery, was prejudicial, and in effect a precognition to a Criminal Pursuit, which ought to be moved against the Woman, for Adultery committed by her; which being moved before the *Justices*. This Action preceeding, might be a Probation to the *Justices*, and Assyse whereupon her Life might be Indamnaged; and therefore found, that the Tryal of that *Turpitude* could not be taken in this Pursuit, or Defence, which tended so prejudicially to the Conviction of the Party, and hazard of her Life before the *Justices*, and consequently found no Proces, in the Reduction, and repelled the Defence of the alleadged *turpitude*, while the same should be tryed before some ordinary, and competent Judge. Actor. *Aiton* & *Stuart*, Alter *Hope* & *Nicolson*, *Gibson* Clerk. *Vid. February* 25. 1624. betwixt the same parties. *July* 20. 1622. *Weir* *.

Stuart contra *Hume*, *February* 21. 1624.

IN an Action betwixt *Stuart* and Sir *George Hume*. The *Lords* preferred, and admitted the Answer of a persons Majority, against an Alledgance of that persons Minority, which was Repelled, albeit he who alledged Minority, produced an Extract out of the Ministers Books, of the time of the Baptism of the Person, whose Age was controverted, and conform thereto asserted also to prove, that she was born at such a time particularly, whereby she would be found yet to be Minor, which was repelled, because the Party offered to prove Majority, by sufficient lawful Probation, wherein he was preferred as said is. Actor. *Craig*. Alter. *Nicolson*.

Broun contra *Johnston*, *Eodem die*.

IN an Action betwixt *William Broun* and L. *Johnston*, wherein the L. of *Johnston* was desired to be decerned to make forth-coming to *Broun*, a Sum addebted by L. *Johnston* to *Thomas Johnston*, for satisfaction of a Sum owing by the said *Thomas*, to the Pursuer, and which was Arrested by the Pursuer in the L. of *Johnstons* hands. The *Lords* decerned the L. of *Johnston* to make the same Sum forth-coming to the Pursuer, as was desired in the Summons, albeit that the Term of Payment of that Sum adebted by the L. *Johnston* to *Thomas* was not come, neither at the Intenting of this Action, neither was the same to be payed for diverse Terms yet to come; but the *Lords* Superceeded all Execution, which might be used upon this Decreet, against *Johnston*, while the Term of his Obligation were by-past.

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The like was also done the day preceeding this, in the Action betwixt *James Renton*, and Mr. *John Acheson*, whereby *James Renton* was decerned to make a Sum Arrested in his hands, at the Instance of Mr. *John Acheson* a Creditor, forth-coming to the Creditor after the decease of the said *James Renton*, seing he was not Debitor to the said Mr. *John* for the same, while after his decease, the Liferent thereof being provided to himself, and therefore Superceeded the Execution at the Creditors Instance, during *James Rentons* Lifetime. Actor. *Belshes*. Alter. *Cunningham*. *Gibson* Clerk. *Vid. Feb.* 5. 1624. *Wood*, and the other Cases there cited *.

Donaldson contra *Donaldson*, *February* 24, 1624.

IN an Action of Reduction pursued betwixt *Donaldson* and *Donaldson*; whereby the Heir pursues his Brother for Reduction of an Assignation, made by their Father in his Death-bed of a Bond, for payment to the Father of a Sum, and to his Heirs, and bearing the Debitor to be obliged, to pay Annualrent, alsewel not Infeft as Infeft, and so the Bond being Heretable, and which by Law could not be Assigned by the Father to his second Son the Defender, upon his Death-bed, in prejudice of the Heir. This Reason was sustained, and found relevant, albeit no Infeftment followed upon the Bond, and albeit the Bond was not of that Nature, and Tenor, whereupon the Debitor might be compelled to give Infeftment, seing he was not therein obliged thereto, but was only obliged to pay Annualrent to the Creditor, and his Heirs, alsewel not Infeft as Infeft, but the Reason was thereafter Elided, by this Exception, *viz.* That the Father in his Lifetime, before the Assignation controverted, had charged the Debitor for payment of the Principal Sum, conform to a Clause of the Bond, whereby the Debitor was obliged to pay the same upon a simple Charge of six days, by the which Charge the Sum was become Moveable, and so might lawfully be Assigned, as a Bond Moveable after the Charge, to any Person whom the Father pleased, and could not be quarrelled by the Heir, which Exception was found Relevant.

In this Process, the *Lords* also found, that no man upon their Death-Bed may Assign or Dispone any thing (albeit it were of his Moveables) except *in quantum* may be found to pertain to their own Part, after their decease, and no further than by Testament; but there being no Reason lybelled thereupon in this Process, but only the Pursuit moved here by the Heir, to whom this Reason was not competent, the Action received no Decision upon this ground. *Vid. January* 7. 1624. *Shaw* contra *Gray*, and the other Cases there.

Dunmuire contra *Payweell*, *February* 25. 1624.

IN an Action of Spulziation of certain Sheep pursued by *Dunmuire* Flesher in *Edinburgh*, against one called *Pay-weell*, which Action was restricted to wrongous Intromission, and the Spulzie past from, because it was not pursued within three years. The *Lords* found, that no Profits ought to be granted in Actions of wrongous Intromission, neither Ordinar, nor Violent Profits, and that in such Actions the Pursuer had right only to pursue, and seek *ipsa corpora*, without Profits; albeit he contended, that the wrongous Intromission gave him Right to seek the ordinar Profits, for tho he passed from the Spulzie, which he behoved to do, for not pursuing the same, within the time appointed by the Act of Parliament, yet that never purged the wrong done to him by the Defender, but took only away from him that priviledge of *juramentum in litem*, which he had, if the

Spulzie had been sustained; but in all other Consequences, he alledged, that his Action stood good to him for the Profits of so many Goods, as should be proven, were Intrometted with by the Defender; which Reply was not sustained, nor Action granted for the Profits. Actor. *Nicolson* younger. Alter. *Russel. Gibson* Clerk. *Vid. July* 15. 1626. *Mephadrick, March* 16. 1627. *Walter Hay* *.

Ferne contra Captain *Wishart*'s Heirs, *Eodem die.*

IN the Cause of Captain *Wishart*'s Heirs, whereof mention is made, *Feb.* 18. 1624. The *Lords* found, that an Assignation made by umquhile Captain *Wishart*, to a Debt owing to him, after the date of that Bond mentioned, and controverted in that Cause, and made to the same person, to whom that Bond was given, and containing also great, or greater Sums, than the Sums in the Bond, and payment made to the Assigney thereof, conform to the Assignation, was not enough to take away the foresaid preceeding Obligation, or to liberat the Heir therefrom, seing the Assignation was not made for that cause, but that the same bore, to be made for Sums payed to the Cedent, and confest by him in the Assignation, and found it not Relevant, where it was referred to the Assigneys Oath, that no Sums was payed therefore; for albeit it were so, yet the Cedent might confess the receipt of Money, which he received not, and so the Assignation ought not to take away the prior Bond, by the alledged Presumption of Payment and Satisfaction, by vertue of that posterior Assignation, which had no Mention, or Relation to the Bond, or Sums thereof, *partibus ut illic comparantibus. Vid July* 24. 1623. *Stuart. Feb.* 4. 1623. *Guild. Novem.* 13. 1624. *Wallace* of *Elderslie.*

Aikman contra *Hunter*, *February* 26. 1624.

IN an Action betwixt *Aikman* and *Hunter*. The *Lords* found, where a Debitor is by his Bond, obliged to his Creditor in a certain Sum, and after this Bond, this same Creditor, by another posterior Obligation, granted him to be owing to his said Debitor, a certain Sum, that this posterior Bond granted to the former Debitor, ought not to import liberation to the Debitor, of the preceeding Debt, as if through the Creditors acknowledging him to be adebted, by vertue of the posterior Bond to him, who was Debitor, by the prior Obligation, the first Debt should be presumed to become extinct, and to cease, and that the Creditor could not challenge any Debt owing to him, seing he was become himself Debitor to him, to whom he was Creditor; Which prior Debt, the *Lords* found was not taken away by the foresaid posterior Bond, upon any pretence that he who was a prior Creditor, needed never to have constitute himself Debitor thereafter, to him, who was standing adebted unto him, seing he might have allowed, or defalked the preceeding Debt, which is probable, and presumed he did, before he gave a new Bond to him, who was standing his Debitor before, as said is; which Presumption the *Lords* found not sufficient, to extinguish or take away the first Bond, but found that both the Bonds might subsist, and that the last should only compense the first Bond *pro tanto*. Actor. *Lawtie.* Alter. *Gibson* Clerk.

Maxwel contra *Maxwel*, *February* 27. 1624.

IN an Action of Reduction at the Instance of *Maxwell* of *Pollock* against *Maxwel* of *Cowhill*, for Reduction of an Heretable Right of Lands holden of the Abbacy of *Melross*, upon the reason of Anteriority, because the Pursuer was first Infeft, and first confirmed; the Defender compearing, and proponing an Exception, that there was a Submission betwixt the Parties Fathers (they then being Infeft in the Lands) of all Controversies

Controverſies betwixt them, to certain Judges; whereupon Decreet followed, by the which the Right to the Lands lybelled, was decerned to pertain in all time coming to the Excipient. This Exception was not ſuſtained, for the *Lords* found this Decreet not ſufficient, to maintain the Defender, in the Right of the Lands controverted, proceeding upon a Submiſſion of the Tenor forſaid; For the *Lords* found, that a Submiſſion, wherein Parties ſubmitted all Controverſies generally, could not be a Warrand, to decide the Heretable Right of the Lands, to pertain to one of the Parties, and to take the ſame away from the other Party; except either the Right of the Lands had been eſpecially ſubmitted, or elſe that the ſame had been given in by the Parties in their claims, before the Judges, and that the general Clauſe, ſubmitting all Controverſies betwixt the Parties, could not be a ſufficient Warrand to pronounce that Decreet. *Scot* Clerk. *Vid. Decem:* 15. 1631. Dr. *Kincaid*, contra *Aikenhead*.

Gladſtanes contra *Hamilton*, *February* 28. 1624.

IN an *Action* of Violent Profits purſued by *Gladſtanes* contra *Hamilton*, and certain others, wherein the Defenders were abſent, and the Summons was referred to the Parties Oaths of Verity, who were alſo in abſence, holden *pro confeſſis*. The *Lords* would not decern for the whole Quantity lybelled, albeit the parties were holden as confeſt, upon the whole quantity; but found, that in this, and all the like Caſes, when this Caſe occurred, that the Purſuer ſhall be holden before Sentence, to give his Oath *ex credulitate*, upon the Quantity of the yearly Profits, which he acclaimes, and for the which he ſeeks his Sentence, and that no Decreet ought to be given in ſuch Matters, except the Purſuer by his Oath, ſware and depone upon the ſaid Quantity. *Actor. Lawtie. Alter* abſent. *Scot* Clerk. *Vid. January* 13. 1625. Lo. *Duffus*. *June* 28. 1623. Lo. *Blantyre*, &c. where the like was found in an *Action* of Spulzie.

Lo. *Currihill* contra Executors of *Currie*, *March* 2. 1624.

IN an Action at the Inſtance of Lord *Currihill*, againſt the Executors of umquhile *Walter Curris*, for payment of the Sum contained in a Bond, given to the Purſuer, by the ſaid *Walter*, whereby he obliged him for the pains taken by the Purſuer in his Affairs, and becauſe he had deburſed ſome Charges in doing thereof, to pay to him five hundred Merks, at the Term after the ſaid *Walters* deceaſe, if before his deceaſe, the ſaid *Walter* did no other Deed, which might be derogatory to the ſaid Bond, and if alſo he died, having no Heirs-Mail gotten of his own Body, againſt this Bond and Purſuit, the Executors compearing, alledged that the Bond was *donatio mortis cauſa*; Likeas according to the Tenor thereof, it was manifeſt, and conform thereto, the Maker in his Teſtament, had left the Purſuer a thouſand Merks, and Ordained the firſt Bond, whereupon this Purſuit is founded, to Ceaſe and become Extinct, and alſo alledged, that *Walter Currie* had left one Daughter, who was Married, and had Sons, who behoved to be reput Heirs-Mail, gotten of his Body, and ſo the Condition of the Bond thereby was taken away. Thir Alledgances were Repelled, and the Bond found not to be *Donatio mortis cauſa*, nor to be revocked by the ſaid poſterior Teſtament, ſeing it was made for Onerous Cauſes; and therefore was not Revocable, nor could be Altered, or the force thereof prejudged any wayes, by the Maker; And alſo it was found, that the Heirs-Mail, born by the Daughter of the Defunct, purged not the condition of the Bond, which Ordained the Sum to be payed, if the Defunct had no Heirs-Mail, gotten of his own Body, which Clauſe could have no reſpect to his Oyes, but to the Sons to be gotten immediately by himſelf.

Actor. *Lawtie.* Alter. *Nicolson* elder. *Scot* Clerk. *Vid. March ult.* 1624. betwixt thir same Parties. 13 *Jan:* 1631. *Houstoun.* 10 *March* 1626. *Traquair.*

Colthird contra *Paterson*, *Eodem die.*

IN an Action betwixt *Colthird* and *Paterson*, The *Lords* sustained a Comprising deduced upon a Bond, for payment of a Sum to the Compriser; which Bond, bearing the Debitor to be obliged to pay Annual, was an Heretable Bond, albeit the Bond and Sum therein contained was not made Moveable by any Requisition, or other preceeding Charge, execute or given before the Comprising, in respect of the Tenor of the Bond, whereby the Debitor was obliged to pay the Sum to the Creditor at any Term whereat he pleased, without any Requisition preceeding to have been made; and therefore seing the Bond provided not, that the Creditor should be holden to use any preceeding Charge; but that it bore, that the Debitor should pay at any Term whereat the Creditor pleased; As at any Term, the Term being bypast, he might Poynd, so he might also Comprise therefore; for by the Comprising he declared his will, and it was a lawful and ordinary Execution, as Poynding or Horning is. This was proponed in a double Poynding. Actor. Alter. *Sandilands. Scot* Clerk. *Vid:* 20 *July*, 1622. L. *East. Nisbet.* 6 *March*, 1623. *Finlason* contra *Johnstoun.* The like was done 29 *January*, 1629. *Smith* contra *Auld.*

Drysdale contra L. *Sornbeg*, *March* 4. 1624.

IN an Action betwixt *Drysdale* contra L. *Sornbeg* and L. *Langtoun*; a Horning being produced by *Sornbeg*, and quarrelled by *Drysdale*, alledging the same to be null, because in the Denounciation, the Messenger Executor thereof had not Indorsed, and the Execution did not bear, that the Messenger had used and given three Blasts of the Horn, at the Denouncing of the Party; which Deed, as it was a Solemnity necessar to the Denounciation, so was necessar in Formality, that the Execution should proport the same to have been used; and the Execution not bearing the same, the same could not be sustained, but the Horning for want thereof ought to be found null. The *Lords* repelled this Alledgance, but found that the User of the Horning ought to prove, that the Messenger truly gave three Blasts at the time of his Denouncing the Rebel, which being proven, albeit the Execution proported not the same, seing it proported and bore that he orderly and lawfully Denounced the Rebel; The *Lords* sustained the Horning, because that word, *lawfully and orderly*, included all these Solemnities, the same being proven to have been truly given, as said is. Actor. Alter. *Miller*, *Foulis* & *Belshes. Hay* Clerk. *Vid:* 22 *March*, 1626. *Somervel* contra L. *Edmiston.*

Hay contra *Wright*, *March* 5. 1624.

AN Action for delivery of a Bond, being pursued betwixt *Hay* contra *Wright*; after the same was Exhibit by who was called as Haver of the Bond, and in whose hands the same was depositat. The *Lords* found, that the conditions whereupon the same was depositat, ought to be proven by the Oath of the Depositar, and would not receive the probation of the saids conditions, to be proven by the Witnesses insert in the Bond. And this was found Relevant, albeit that the Defender alledged, that the like reason was for receiving of this Probation by the Witnesses insert in the Bond, as by the Depositar, seing the Depositar was but one of the Witnesses insert therein, and the rest had the like interest, to know and depone upon the conditions, which he had, they being all Witnesses together, which was repelled. The like was done 22 *Jan.* 1624, *Lermonth* contra *Alexander.*

Actor.

Actor. *Primrose.* Alter. *Mowat.* *Ratio videtur, quia deponendo apud eum ejus fidem sunt secuti,* and so the parties had more confidence in him than in the rest.

Cunninghame of *Mongreenan* contra *Semple, Eodem die.*

IN an Action pursued at the instance of *Cunninghame* of *Mongreenan*, as Heir to his Predecessor, against *Semple*, for Reduction of a Service and Brief of Terce. The *Lords* sustained the Pursuit upon the production of a Retour, where the Pursuer was served Heir; albeit it was Deduced, Served, and Retoured after the intenting of the Summons, which they found sufficient to instruct the Pursuit, albeit he was neither Served nor Retoured at that time, seing he was neareſt of Blood, and that person who only could be Heir, and the Service drew back the Retour to the time of the Pursuit, and so much the more, because it was a general Retour, and not in any particular Lands. Actor. *Hope.* Alter. *Nicolson. Hay* Clerk. *Vid:* 20 *January*, 1625. *Elphingston* of *Selms.* 15 *Feb:* 1623. *Hoppringle.*

Gechin contra *Cochran, Eodem die.*

IN an Action pursued by *Isobel Gechin*, against *William Cochran* her Husband, to hear the Deposition of *Francis Keith* declared to be null, which was made by him as Witness in the Action of Divorce, depending betwixt thir Parties, before the Commissars of *Edinburgh*, because the said *Francis* was suborned by the Husband, in so far as he had received promise of good deeds before his Deposition, from the Party producer of him, and which was performed and given to him after his Deposition. The *Lords* found this Summons and reason of Subornation, as it was qualified, as said is, Relevant to infer the conclusion of nullity of his Deposition, albeit it was not Libelled in the said Summons of Subornation, that the good deed was promised and given and received to Depone falsly; For the *Lords* found it not necessary, and would not restrict the Pursuer to Libel or Reply, that the good deed was given *specificè, ad hunc effectum*, to Depone falsly, but that he said enough, if he Libelled and Proved Corruption, by the promise made by the Party, before his Deposition; albeit the Excipient contended, that the Corruption could not be found Relevant, unless it were expresly Libelled, that the good deed was conditionat to him, and that he Deponed falsly, and against the verity, seing he contended, that of the Law any Witness might lawfully receive from him, who used and produced him, good deed, if he Deponed nothing against the truth; which alledgance was repelled. Actor. *Hope* & *Stuart.* Alter. *Nicolson* younger & elder. *Gibson* Clerk. *Vid:* 26 *June*, 1623. *Cochran.* 7 *July*, 1632. *Renton. Vid: Lanfrac. de Test. vol.* 5. *fol.* 217, *Ubi dicit sufficere allegationem corruptelæ (licet verum dixerit) & hoc, sive ante, sive post sententiam*; but *Covarruvias pract. Quæst.* 18. *dicit, post sententiam non posse recipi Reprobationes testium.*

Ramsay contra *Mackison, Eodem die.*

IN an Action pursued by *John Ramsay*, contra *Mackison*, for payment of the Sum of 500 *Merks*, conform to the Defenders Obligation made thereupon. The *Lords* found, that this Pursuer had no Action subsisting in his person, to pursue for this Debt, because the Pursuer was denounced Rebel, and his Escheat gifted, and declared generally. Likeas the Donatar had intented special Declarator for this same Sum, against this same Defender; which being called, albeit in that special Declarator, the Donatar past from this Excipient, yet the intenting of the special Declarator so denuded the Rebel, that no right remained in his person, wherupon he might conveen the Defender, but the same was only competent to the Donatar. This al-

ledgance was found Revelant, to exclude the Creditors Pursuit; for the *Lords* found, that albeit it was *Jus tertii*, which was alledged, yet that it was competent to the Excipient, sicklike as if the Pursuer had been denuded by an Assignation, which had been intimat; and that the once intenting of a special Declarator against him, albeit thereafter past from, was of the like force as the Intimation of an Assignation. Actor. *Aiton*. Alter. *Hope*.

Dowglass contra L. *East-Nisbet*, *March* 6. 1624.

William Dowglass being Donatar to the Escheat and Liferent of *John Stuart* of *Coldinghame*, and thereupon having obtained a Declarator, intents Action against L. *East-Nisbet*, for a Declarator of *East-Nisbets* Liferent of the Lands of *East-Nisbet*, as holden of *John Stuart*, and in which *John Stuarts* hands the said Liferent was fallen, through the said L. *East-Nisbets* remaining Rebel year and day; the which Liferent was acclaimed by the Pursuer, as becoming in *John Stuarts* place, wherein he was surrogat by the said Gift and Declarator, and so whereby he might claim *John Stuarts* Vassals Liferent, as the said *John Stuart* might have done himself: This Action was sustained by the *Lords*, and they found that the same neither needed to abide continuation, nor any probation, that L. *East-Nisbet* was Infeft in the Lands holden of *John Stuart*, thereby to prove him to be his Vassal, but found it sufficient to infer Sentence, as was desired, the Pursuer producing *John Stuarts* Seasin in the Lands Libelled, without any other probation, seing if *East-Nisbet* was not his Vassal, he might disclaim him, and that not being done, there was no necessity to produce L. *East-Nisbets* own Seasin. Actor. *Craig*. Alter. *Belshes*. *Gibson* Clerk. *Vid.* 2 *July*, 1622. L. *Kilspindie* contra *Lermonth*, where the same was done. *Vid. infra* 9 *March* betwixt the same Parties.

Stuart contra *Eodem die.*

IN an Action of Reduction of a Horning pursued at the instance of Mr. *James Stuart* Commissar of *Dunkell*, upon this reason, because it was not stamped; the reason was found Relevant, & the Horning found null, for the Execution was not stamped, nor any Vestige or appearance, that ever any Stamp had been affixt thereto, albeit that the same bore these words of the Officiar, giver of the Charge, *viz.* that *for mair verification his Stamp and Signet was affixt*; which words were not respected, seing there was no appearance, that the same had ever been Stamped, for the Horning was but lately Execute, and the Charge given in *September*, 1623. so that the Stamp might have appeared by some mark *in facto recenti*; but there was no Dispute in this Process for the Defender, but only the Horning produced by the Defender, and the reason referred to the *Lords*. Actor. *Mcgill*. Alter. *Nairn*. *Hay* Clerk.

Monypenny contra Tennents of *Lunbenny*, *March* 9. 1624.

IN an Action pursued by *William Monypenny*, against the Tennents of *Lunbenny*, for payment to him of the Duties and Farms of the Lands, since the Date of his Infeftment, which was in *Anno* 1609. continually unto the Date of his Summons, which was in *Anno* 1622. By the space of 12 years the Defenders were assoilzied, because they were Infeft in the same Lands in *Anno* 1609. for payment of a Blensh Duty allanerly to him, who was common Author to both the Parties; which Infeftment, albeit it was after the Pursuers Right, yet being clad with continual possession, and never being interrupted by the Pursuer since the Date thereof, before the intenting of this late Pursuit, was found sufficient by the *Lords* to defend them, and to constitute them in *bona fide*, to bruik the saids Lands all the years preceeding the date of this Summons, free of payment of any other Duty, except allanerly

nerly the Blensh-Duty contained in their Infeftment, and found this exception relevant to eleid the Pursuers Action, notwithstanding of his prior Right, whereupon no Diligence nor Interruption was made to the Defenders, which might make them subject to pay any other Duty, than that which was insert in their Infeftments. Actor. Alter. *Chaip. Scot* Clerk. *Vid.* 19 *Novemb.* 1623. S. G. *Hamilton.*

Dowglas contra L. *East-Nibet*, *Eodem die.*

IN the Declarator pursued at the instance of *William Dowglas*, as Donatar to the Liferent of *John Stuart*, whereof mention is made *March* 6. 1624. It being alledged for the Defenders in that Process, *viz.* by the Viscount of *Air*, who was a Donatar to that same Liferent, that no Declarator ought to be granted by vertue of the Pursuers Gift, because *John Stuart*, for whose Liferent the Parties controverted, was not year and day Vassal to the King, the time of the granting of the Gift of his Liferent to the Pursuer, for his Seasin was in *December* 1622, and the Gift is granted to him in *September* 1623, so that he not being Vassal year and day before the Gift, albeit he was at the Horn before the Gift, year and day, the Liferent could not fall. This Alledgeance was Repelled, for the *Lords* found, that albeit there was not a year betwixt the Rebels Seasin, and the Gift of his Liferent, yet seing he had a Right in his Person, which was of a date more than year and day *anterior*, and before the said Gift, by vertue of which Right he might have taken Seasin of the Lands controverted, at the date of the same Right, which was a sufficient Title and Warrand, by vertue whereof he became potentially Vassal to the King, albeit he delayed to take Seasin, or if he should yet delay, and had not yet taken Seasin, he remaining, and being found at the Horn, year and day, since that time that he had Right, by the which he might have been Seased, and so have been actually Vassal to the King, and at the Horn a year before the Gift, albeit not actually Seased a year before the same, his Liferent thereby pertained to the King, and consequently to the Pursuer. Actor. *Craig.* Alter. *Hope & Belshes. Gibson* Clerk. *Vid.* 25 *July* 1623. Lo. *Ramsay* contra E. *Lothian. Et infra*, the 11 Day, betwixt the same Parties.

L. *Touch* contra E. *Hume*, *Eodem die.*

IN an Action betwixt L. *Touch* and E. *Hume*, being a Cause of special Declarator, which being accessor to a general one. The *Lords* found, that there needed no Continuation in special Declarators, in respect of a priviledge contained in the Summons, *viz.* because it was accessor to the general Declarator, albeit the special Declarator was pursued for payment of certain particulars, consisting *in facto*, which of its own nature required Continuation, and for the which, if the Rebels self had intented Pursuit, the Summons behoved to have been continued, and that it was Alledged, that the general Declarator put only the Donatar in the Rebels place, which was Repelled, as said is, in respect of the preceeding general Declarator, which put the Donatar in a better case than the Rebel, and in respect of the priviledge. Actor. *Stuart* & *Craig.* Alter. *Hope. Gibson* Clerk.

Dowglas contra L. *East-Nisbet*, *March* 11. 1624.

IN an Action mentioned before upon the 6. & 9. of *March* of *William Dowglas*, Donatar to *John Stuarts* Escheat and Liferent. The *Lords* found, that albeit that Gift was taken, and given by the Thesaurer to this Donatar, at the Rebels request and desire, and that the same was expede the Seals upon the Rebels own Expenses, and by his Moyen obtained, yet seing the Donatar was a true Creditor to the Rebel, and who insisted in that Declarator, to recover

payment thereby of his true Debt, justly owing by the Rebel to him, that the said Gift could not be found simulate, notwithstanding that the Rebel had procured it by his Moyen and Charges to the Donatar, who was his Creditor, which the *Lords* found he might lawfully do, even as he might pay his Debt to the said Donatar; and by that Deed the *Lords* found, that the Donatar could not be prejudged to prosecute the Declarator, but sustained the Gift and Pursuit, and Repelled this Alledgeance, the same being proponed by the Viscount of *Air*, a second Donatar, who desired to be preferred to the Pursuer, in respect of the said alledged Simulation, and was not preferred. *Partibus ut supra. Vid.* 26 *June* 1622. *Inglis.* 28 *Nov.* 1626. E. *Kinghorn*.

Lamb contra *Heth*, *Eodem die.*

IN an Action of Improbation pursued by *James Lamb* against *Letitia Heth*, who was an *English* Woman born, and ever remaining in *London*, for Improving of her Right of a Tenement of Land in *Edinburgh*, whereto she claimed Right by Compryfing and Seasin. The *Lords* sustained this Process against her, albeit she was a Stranger born and bred, and dwelling ever in *England*, because the Subject of the Action was for Land within *Scotland*, whereto she claimed Right, which could not be decided but by the Judges in *Scots* Causes, and so *ratione rei* found that she was subject to the Jurisdiction of this Realm. Actor. *Nicolson* & *Lawtie*. Alter. *Hope* & *Mowat*. *Scot* Clerk. *Vid.* 12 *Nov.* 1624. *Nasmith.* 15 *Nov.* 1626. *Galbraith*, and the Cases there. The Action here was real, but if it had been personal, they had not been Judges competent.

L. *Touch* contra Tennents of *Dunglass*, *March* 17. 1624.

IN an Action pursued by the Laird of *Touch*, as Assigney constitute by *William Hume* Provost of *Dunglass*, to the Duties of the Provostry, addebted to him, against the Tennents, Intromettors, and addebted in payment of the saids Duties. The *Lords* found the payment made of the saids Duties by the Tennents to the Earl of *Hume*, who was Father to the Provost, for he was a Bastard and a Natural Son to the Earl of *Hume*, and which payment was made to the Father, the Son who was Provost being Minor, all the years of the payment, to be relevant to defend the Tennents, and that the said payment was made *bona fide*, and so sufficient to liberat the Tennents; albeit it was answered for the Pursuer, that the said payment could not be found good, which was made by them to the Father, seing the Father could not be found lawful Administrator to a Bastard-Son, as in *filius legittimus*, especially seing the Son being a Church-man, *viz.* a Provost, of whose Benefice the Father is not presumed to be lawful Administrator: Likeas, the Pursuer, to exclude *bonam fidem*, and to put the Defenders in *mala fide*, offered to prove, that the Provost had obtained Letters conform, upon this Provision to the Provostry, before any payment made to the Earl of *Hume*, which Provost also had chosen an Administrator and Economus to him in his Benefice, and which Economus was in use to set Tacks to divers persons, of the said Benefice, and to receive the Provosts Duties, and to give Acquittances thereupon; Likeas, the same Tennents were conveened at the Provosts instance, and this Economus *per expressum* in an Action of Improbation, which was a sufficient Intimation that he was the person, to whom the only payment should have been made, and to none other; which Reply was repelled, and the Exception and Payment made to the Father sustained, and found done *bona fide*, seing the Father was found to be lawful Administrator to his Bastard-Son was in these things

things which are given to him by the Father, as was this Provostry, whereto he was presented, and provided by the Father; and also, in respect that the Defenders offered to prove, that the Duties payed by them to the Father, were converted and applyed by the Father to the Intertainment and Maintenance of the Provost at Schools and Vertue, partly within, partly without the Country, which was found, being applyed to that use, to be as sufficient, as if the payment had been made to the Provosts self, or to his Economus. *Quia extraneus potest dare Curatorem rebus à defuncto minori relictis.* Actor. *Stuart* & *Craig*. Alter. *Hope*. *Gibson* Clerk.

Cant contra *Cheisly*, *March* 18. 1624.

Barbara Cant being conveened as Intromissatrix with the Goods and Gear of *William Muirhead*, her umquhile Husband, to pay to Mr. *Robert Cheisly* the Sum of 300 merks, addebted to him by her said Husband; and she alledging that there was Executors confirmed before the intenting of this Pursuit, to whom she was only answerable for her Intromission, and not to any Creditor, who ought to pursue the Executor, and not her. This Exception was Repelled, in respect of this Reply, bearing, that the Defender had intrometted with as many of the Movables and Utensils of the House, as would pay this Pursuer of his Debt, by and attour the quantity of the Utensils confirmed in Testament, and which Intromission of the said further quantity, was referred to the Relicts own Oath, and which was found relevant by the *Lords*, to the effect, that the particulars so intrometted with by her, and not confirmed, might be made forth coming to the Pursuer *pro tanto*, to satisfie his Debt: And the *Lords* sustained this, and found no necessity to seek a Dative *ad omissa*, as the Defender alledged ought to have been, seing this Sentence was sufficient to her, to liberate her *pro tanto*, at all hands. Actor. *Mowat*. Alter. *Nicolson*. *Vid.* 5 *Feb.* 1623. *Shaw* contra *Affleck*, from the which this differs, because in that, the Testament was given up by the Relicts self, and her Bairns confirmed Executors, so that her fraudulent omission ought not to be profitable to her: and in this Cause, Strangers, *viz.* two of the Defuncts Creditors were confirmed Executors, who gave up the Inventar, and not the Relict.

The like Case was Agitate upon the last of *March* 1626, betwixt *Touris* and *Dowglas*, wherein the Daughter being called as Intromettor with her Fathers Goods, to pay his Debt to the Pursuer, the Defender alledging, that there was Executors confirmed to him, and at the Term assigned to prove, producing a Testament, where another Creditor was confirmed for his own Debt, which being quarrelled by the Pursuer, as not sufficient, to exclude his Action against the Intromissatrix, where there was only so much confirmed, as would pay that one Creditor confirmed Executor. The *Lords* reponed the Parties to prove, or to elied and purge the Intromission, notwithstanding of that Confirmation, which was not respected, and was not found necessary, that the Party Pursuer should be compelled to take a Dative *ad omissa*, but sustained the Action against the Intromissatrix, except she purged her Intromission. See the Case following, and 5 *Decemb.* 1626. *Jaffray* contra *Gray*. 13 *Feb.* 1627. *Knieland* contra *Baillie*.

Cochran contra *Sturgeon*, *March* 20. 1624.

IN the Action pursued by *James Cochran* Burges of *Edinburgh* against *Helen Sturgeon*, as Intromissatrix with the Goods of her umquhile Husband, for payment of a Debt owing by her Husband to the Pursuer. The *Lords* sustained the Action against the Relict as Intromissatrix, notwithstanding

standing that she alledged, that there was Executors Confirmed, in respect that they were not Confirmed before the raising of the Principal Summons in this Cause, and before the Execution thereof, albeit they were Confirmed before the day of Compearance, to the which the Defender was Summoned, which was found not to be sufficient, albeit the Commissars in their Judicatories admits Confirmations before Litis-contestation, to be sufficient to liberat persons conveened as Intromettors, which is not received before the *Lords*; and where the Defender would have purged her Intromission, being condescended to be of Wares in her Husbands Merchand Buith, in the Town of *Dunce*, where he dwelt, such as Pepper, and Spices, and such like other Wares, which she alledged was sold by her, for the supply and necessar intertainment of her self and her Bairns, in Meat and Drink, having no other means wherewith to intertain them; the same was not sustained, but the *Lords* found, that she was answerable, as Intromissatrix to the Pursuer, for his Debt owing by her Husband. Actor. *Nicolson* younger. Alter. *Miller*. *Vid:* the preceeding Cause, and the cases there cited, and 14 *July*, 1626. *Smith*.

Mckenzie contra T. of *Elgine*, *March* 23. 1624.

IN an Action betwixt *Mckenzie* and the Town of *Elgine*, for payment of Thirle-Multures astricted to the Miln of *Elgine*, conform to an old Indentor made betwixt the Town of *Elgine* & the Monks of *Pluscardine*, wherein the Inhabitants of *Elgine* are expressly bound to Grind their Corns at that Miln, as well growing on their Lands, as the Corns they should happen to buy from Strangers, or others about in the Countrey. The *Lords* found, that albeit the Indentor foresaid astricted the Inhabitants to bring their Corns to the said Miln, *tam crescentes, quam pervenientes ad eos sine exemptione qualicunque*, yet they were not holden to pay Multure, nor to Grind any bought Corns, growing out with their own Lands, at the Miln Libelled, except only such Corns as should be Grund by them, so that they might not Grind the same at no other Miln, but at the Miln Libelled, and if they contraveened, that they should be holden to pay astricted Multures therefore; and that they were not subject to pay Multure for any Grund Corns, such as Meal, Malt, or other Grund Corns, which they should happen to buy out-with the Lands Libelled, and which grew not upon the saids Lands, the same being Grund before they bought the same, and that the astriction struck only *ut supra*, and that Corns bought by them without the Territory, although brought within the Territory after the buying thereof, and albeit the same were made in Malt, whereby they tholed both Fire and Water, yet if they were not Grund at any other Miln, but were sold before they were Grund, that the Parties should not be subject to pay Multure therefore. Actor. *Stuart* & *Mowat*. Alter. *Hope* & *Nicolson*. *Scot* Clerk. *Vid:* 11 & 12 *July*, 1621. *Nathaniel Keith* and *William Dowglass*, 21 *March*, 1637. *Cuthbert* contra T, *Innerness*.

Brown contra Tennents, and *Haliburton*, *Eodem die*.

IN an Action pursued at the instance of one *Brown*, for making of the Maills and Duties of a Tenement of Land in *Edinburgh* forth-coming, which was Arrested in the Tennents hands, for satisfying of a Debt owing to him by his Debitor, Master to the Tennents, and Heretor of the Land; wherein compeared one *Haliburton*, who had acquired from the said Heretor, Infeftment of the said Tenement, before the Pursuers Arrestment, for Debt owing to the said *Haliburton*, and who had set a Back-Tack to the Heretor the common Debitor, for yearly payment of a certain Duty, with Provision

Provision if he failzied in payment two Terms, the Tack should expire, and the Land remain with him irredeemably, whereupon he had obtained a Declarator, decerning the Tack to be expired; which Declarator was obtained in *Decem*: 18. 1623. and the Summons and Action was intented before the Term of *Martinmass* the same year 1623. which Terms Maill was only controverted in this Process; wherein the *Lords*, notwithstanding of the date of the Summons, and subsequent Declarator, preferred the Pursuer, who had arrested before the date of the said Summons, and would not draw back the Declarator, to give the Excipient right to the said Terms Duty preceeding his Sentence; but found, that it should begin only to take effect for the subsequent Terms, notwithstanding of his Heretable Right preceeding the Arrestment: And the *Lords* found, that the Arrestment affected the Maills of that Term, albeit it was laid on before the Term of payment, and before the same could be sought from the Tennents, seing the same was running and *dies cessit* the time of the Arrestment. Actor. *Mowat.* Alter. *Haliburton. Vid*: 1 *March*, 1623. L. *Blair.* 19 *Novemb*: 1623. *Ker* contra *Colthird*, and the other cases there cited. 24 *March*, 1626. *Gray.* 24 *Novemb*: 1626. *Glen.* 16 *Feb*: 1633. *Harper* contra *Johnston.*

Duff contra *Kellie*, *Eodem die.*

IN an Action of double Poynding betwixt *Duff* and *Kellie*; The *Lords* would not sustain a Disposition made by a common Debitor to sundry persons, done to one who was a conjunct person, *viz.* Brother in Law to the Debitor, bearing, to be done for onerous Causes, and for satisfying of a Debt owing to the Receiver, except the said party, to whom the same was made, should qualifie, and produce, and instruct the Debts, for the satisfying whereof the said Disposition was made, otherwise than by the confession contained in the Narrative thereof; and the *Lords* repelled the alledgance, whereby the Party alledged, that he ought not to be compelled to produce, as said is, seing he alledged, that the Party who was Maker of the said Disposition, and common Debitor, as said is, was not a Bankrupt, the time of the acquiring of the Disposition controverted, but was a free person, not being at the Horn at that time, and who had Goods and Gear of his own, answerable to have satisfied the other Creditor contradictor, by and attour this Land Disponed; so that it was lawful to him to have taken that Disposition *etiam ex causa donationis*, albeit there had been no other cause of Debt preceeding, which was repelled by the *Lords*: But the contrary hereof was decided in the Action betwixt *Mark Ker* and *Hoppringle* by Interloquutor, and thereafter was ordained to be further heard. Actor. *Mowat.* Alter. *Davidson* & *Boyd. Gibson* Clerk. *Vid*: 20 *Feb*: 1622. *Young* contra *Denniston.* 21 *Feb*: 1623. *Craw* contra *Irvine.* 6 *March* 1632. L. *Garthland.* 22 *Novemb*: 1630. *Mark Ker.* 28 *Jan*: 1625. *Livingstone.*

Hamilton contra *Livingstone*, *Eodem die.*

IN an Action betwixt *Hamilton* and *Livingstone* of *Belstane*, who being obliged to pay to *Hamilton* 1000 Merks in Tocher with his Daughter at a certain Term, of long time past; to the effect the same might be employed upon Land or Annualrent, for yearly profit to *Hamilton* and his Spouse; and being pursued for the yearly Annualrent of all Terms since the Term of payment. The *Lords* found, that albeit by the destination of the Contract, the Defender was obliged to pay the Sum, to the effect it might be so employed by the Pursuer; yet seing the Defender was not obliged himself to Imploy it, and that the Pursuer had never sought it after the Term of payment, before this present Pursuit; and that the Defender was specially o-

bliged in the Contract, in case of failzie of payment at the Term, to pay only a liquidat Sum for penalty, that the Defender was not holden to pay Annualrent. Actor. Alter. *Miller. Gibson* Clerk. *Vid:* 29 *Novem:* 1626, *Scot* contra L. *Gallashiels.* 21 *June* 1626. *Murray* contra *Scot.* The like was done before, betwixt L. *Dundass* and Mr. *John Sharp.* and 21 *Novemb:* 1623. L. *Kinblethmonth.*

Inglis contra *Austine* and others, *March* 26, 1624.

IN an Action of double Poynding at the instance of the Tennents of *Easter-Gellettie*, for the Maills & Duties of these Lands, which were claimed by *James Inglis*, & *Alexander Dowglass* his Assigney, and by *Gilbert Austine*, and some Partners, to whom the saids Lands were sold by Contract, no Seasin following thereupon, by *Rodger Duncanson* Heretor of the saids Lands, for relief of a certain Debt proportionally undertaken by the saids Partners, for the said *Rodger* on the one part; Likeas on the other part, the same Farms were claimed by Sir *Alexander Naper*, as Donatar to the Escheat and Liferent of the said *Rodger*; and having obtained a general Declarator, and intented a special Declarator of the same, in respect whereof, he claimed the only Right to pertain to him, of the Farms of the saids Lands, during the said *Rodgers* lifetime; and which Gift was purchased by him since the said Contract made with the Partners, in the which Contract the said Sir *Alexander* was also a Partner, and Contracter with the rest. The *Lords* found the Partners, and Sir *Alexander* as a Partner, should be answered of the Duties of the Land, and that ilk one of them should have their own part thereof, according to the proportion of their Debt, by them undergone by the said Contract, and that Sir *Alexander Naper*, as Donatar, could not claim the whole, by vertue of the said Liferent-gift and Declarator; for albeit any other Donatar would have been preferred to the saids Partners, seing the said *Rodger* the Rebel, was not lawfully Denuded by the Contract, but that he standing Infeft, and they never Seased, his Rebellion made his Liferent of the Lands to appertain to the Donatar: Yet the *Lords* found Sir *Alexander Naper* could not have preference, which another Donatar would have had, seing he being a Contracter with them, and Partner by the foresaid Contract, which was *Contractus bonæ fidei*, and wherein they were all bound to others, faithfully to assist others, conform to their Security made by the said Contract; in respect of that Clause none of them could do any deed, which might derogat from the effect of that Contract, and prejudge any of them of the benefite thereof. Actor. *Mowat* & *Russel.* Alter. *Nicolson* younger. *Gibson* Clerk.

Liddel contra *Robbs*, *Eodem die.*

IN a Suspension betwixt *Liddel* and *Robbs*, whereby a Decreet was desired to be Suspended, which was Transferred before the Commissar of *Aberdene*, the principal Decreet being recovered, before the Provost and Baillies of *Aberdeen*; In the which Suspension, the *Lords* found the Reason thereof Relevant, and the Decreet of Transferring foresaid, given by the Commissar of *Aberdeen* to be null, because the *Lords* found, that the Commissars Power and Jurisdiction extended not, to Transfer the Decreet, and Sentence obtained before any other Judge; Likeas they found, that no Inferior Judge had Power to Transfer the Decreet given, and pronounced in another Inferior Judges Court; For albeit a Judge might Transfer the Sentence, in some Cases, given in his own Court, yet he had not that Power, in Sentences pronounced in other Courts, but such Transferrings ought to be sought in the Soveraign Courts, to which the other Judicatories were subaltern. And this was found, albeit the Decreet of Transferring was desired

desired to be maintained, as properly belonging to the Jurisdiction of the Commissar, and as being a Consistorial Matter, because the Decreet was Transferred *active*, only in the Executors of the Defunct, obtainers of the Sentence, and so pertaining to the Executors, therefore the Commissar was Judge, which was Repelled. Actor: *Mowat*. Alter, *Nicolson* younger. *Gibson* Clerk. *Vid. July* 21, 1631. *Adamson* contra *Masterton*, *Jan.* 18. 1628. *Nasmith*.

Paip contra *Keith*, *March* 27, 1624.

IN a Suspension of a Decreet given by the Sheriff of *Aberdeen*, betwixt *Paip* and *Keith*, decerning a Bond to be registrat, and payment to be made by the Defender, of the Sum of Money contained in the Bond, which was particularly expreſt in the Decreet, and the Defender therein decerned to pay the Sum. The *Lords* found the Decreet null in that same Suspension, because the Obligation was not insert *ad longum* in the Sentence, albeit the Substance thereof was contained therein, for the Defender was but a Cautioner, and the Principal was not conveened, and the Obligation not being Insert, prejudged the Cautioner, of the remeid of his Relief, against the Principal Party. Actor *Paip*. Alter *Davidson* & *Russel*. *Hay* Clerk.

L. *Curriehill* contra Executors of *Cumming*, *March ult.* 1624.

IN the Action pursued by L. *Currehill*, whereof mention is made *March* 2. 1624. The Lady *Cowie* being conveened as Executrix to her Husband, who was Executor to umquhile *Walter Cowie*, Debitor to the Pursuer, for payment to the said Pursuer of the Debt, owing to him by the said *Walter*. The *Lords* sustained the Action against the Defender, for so much of the said Defuncts, *viz. Walter Curriors* Goods and Gear, as were intromet-ted with, by the Laird of *Cowie*, before his decease, or by his Lady, who is Defender, at any time sensyne allanerly, and found Process against her allanerly, for her own and her Husbands Intromission, with any of the said *Walters* Goods, to make her answerable *pro tanto*, to the Pursuer for his Debt, and not to make her subject to pay any further than her, and her Husbands Intromission extended unto, in respect that the said umquhile *Walter Curriors* Testament was Confirmed in *July*, shortly thereafter, *viz.* within a half year after *Walters* decease, after which Confirmation, the Executor Confirmed, *viz.* the Laird of *Cowie* died in *August*, that same year; so that for the shortness of time interveening betwixt the Confirmation, and the Executors decease, he could not of reason be subject, in any more than was Intromet-ted with by him, and consequently, that his Executor could be no further answerable than himself, except *pro tanto*, if she intromitted with any more sensyne her self, and where the Defender desired some defalcation of her Husbands Intromission foresaid, of some particular Debts, payed by her Husband to *Walter Curriors* Creditors. The *Lords* would not allow any Article of Defalcation, for such Debts alledged payed by him, after the time of the Intenting of the Pursuers first Action, which was moved by him, against the Laird of *Cowie*, in his own Life-time, and before the Testament was Confirmed by him; albeit the Defender alledged, that the saids Debts was given up by the Defunct, with his own mouth, and contained in his Testament, subscribed by himself; and being a Testament Testamentar, whereby it was alledged, that there needed no further Warrand to pay the same, but the Testament it self and the Parties Discharge, it being a true Debt, which Alledgance was repelled; For the *Lords* found, that the Executor being once Summoned, before Payment, and before Confirmation of the Testament, the Testament unconfirmed, albeit bearing the Debts, could

not be a Warrand to exoner him, in his Payment thereof, there being no Sentence recovered thereupon, against him, whereby to prejudge the Pursuer of his Debt, at least of his Proportion thereof, amongst the rest of the Defuncts Creditors, seing by his Citation, he had timously interrupted the Executors voluntary payment. *Partibus ut supra. March* 2. 1624. *Vid. Feb.* 20. 1627. Duke of *Lennox.*

Lady *Dun* and her Husband contra L. *Dun, Eodem die.*

IN an Action pursued by the Lady *Dun*, and Sir *John Carnegy* her Spouse, against the Laird of *Dun*, as Intromettor with the Corns growing upon the Lands of pertaining to the Lady, Pursuer, in Liferent, which Lands were possest by a Tennent, to whom the same was set for a certain Farm yearly, and from the which Tennent the Defender had received all the Corns, growing upon the said Liferent Lands; and therefore he was pursued for Payment of the Farm, adebted to her therefore, by the Tennent. The Defender alledging, that the Tennent foresaid, as he occupyed the Pursuers Lands, the Cropt lybelled, so also he was the Defenders Tennent in other Lands, the Corns growing upon both the Lands being led, as they were wont of before, to the Barn, and Barn-yeard, upon the Ground of the Excipients Lands; and at the Term of payment, he received from the Tennent foresaid, delivery of his own Farms by Peck and Boll, which he might very lawfully do, and had no necessity to know where the Corns received grew, whether on the Pursuers Liferent Lands, or not. This Alledgance was repelled, for the *Lords* found, that the Corns growing upon the Pursuers Land, were Hypothecat to her for her own Farm; and that therefore, according to the Quantity of the Corns growing upon that Ground, Intrometted with by the Defender, he should be answerable for the Farm *pro tanto*; and where the Defender further alledged, that at the time of his Intromission, the Tennent had as many Horse, Nolt, Kine and Sheep, as would have payed the Pursuer her Farm, and so that he ought not to give back the foresaids Corns received by him *bona fide*, as said is. This was also repelled; for the *Lords* found, that the Corns growing on the Ground, was first and principally Hypothecat to the Master for his Farm, in the which he was preferred to all others; and that he had his first Election of the Corns, before any other Goods, pertaining to the Tennent, if the Master pleased to ask the Corns, rather than any of the Tennents other Goods, wherein the Master had his Preference, and Election before others. Actor. *Aiton.* Alter. *Hope* & *Flesher, Gibson* Clerk. *Vid. Feb.* 3. 1624. *Hayes*, & *Jan.* 15. 1625. *Stuart. July* 25. 1628. *Hay* contra *Keith. June* 29. 1642. L. *Polwart.*

L. *Rattray* contra *Wedderburn, Eodem die.*

IN a Suspension raised by *Rattray*, against Mr. *David Wedderburn*, as Assigney constitute to the Liferent of an Annualrent, and Profit of a Sum of a thousand Merks, pertaining to L. *Drumloquhy* his Cedent. The *Lords* found a Liferent-Right was not cessable by a Cedent, being at the Horn, the time of the making of the Assignation, in prejudice of the Creditor, at whose Instance he was at the Horn, albeit the Assigney alledged, that the Act of Parl. prohibiting such Assignations to be made by Rebels extended only to Assignations of Goods and Gear, which were meerly Moveables, and comprehended not Liferents, which he alledged might be assigned by a Rebel, the same being given to a Creditor, for a Just Cause, which alledgance was repelled; For the *Lords* found, that such Liferents could not be assigned, in prejudice of the Creditor, and this Liferent was only constitute

conſtitute by a Bond, whereby the Profit of the Sum was ordained to be payed to the Father, during his Lifetime, but this in Heretable Rights holds not. Actor. *Ruſſell.* Alter. *Nairn. Vid. March* 21. 1623. *Cunningham* contra E. *Glencairn. Feb.* 10. 1624. Sir *John Ker. January* 27. 1630. *Roſs* contra *Hume.*

L. *Dunipace* contra *Sandis, March ult.* 1624.

IN a Suſpenſion betwixt L. *Dunipace*, and Mr. *Patrick Sandis*, as Aſſigney to an Obligation conſtitute by one *Erſkin*, the Charges being deſired to be Suſpended, becauſe they were given at the Aſſigneys Inſtance, after the Cedents deceaſe, the Aſſignation not being Intimate in the Cedents Lifetime; The Charges were ſuſtained for this Alledgance, *viz.* becauſe the L. of *Dunipace*, who was Debitor by the ſaid Obligation, had treated ſundry times with the Aſſigney anent the payment to him as Aſſigney, of the ſaids Sums, and had offered to him ſome ſatisfaction therefore, which was referred to the L. of *Dunipace's* own Oath, and which the *Lords* ſuſtained, as a ſufficient Intimation, he knowing the ſame, as ſaid is, in the Cedents Lifetime, and which the *Lords* found als ſufficient, as if Intimation had been Legally and Formally made; for by his treating with him as Aſſigney, he acknowledged the Aſſignation, as if it had been Intimat. Actor. *Aiton.* Alter. *Mowat. Gibſon* Clerk. *Vid. June* 15. 1624. *Adamſon. Novem. ult.* 1622. *Durham, Jan.* 23. and 27. 1624. *Stevinſon. March* 14. 1626. *Nisbet* contra *Williamſon. Jan.* 8. 1628. L. *Halkerton.*

Strachan contra *Scot, June* 8, 1624.

IN an Action purſued by Mr. James *Strachan*, againſt Sir *John Scot*, as Executor, or Intromettor with the Goods and Gear of umquhile *James Courty*, for payment of ſome Moneys adebted to the Purſuer, by the ſaid umquhile *James Courty*, and which Sums was referred to the Defenders Oath of verity, who being at the Horn, when he was deſired by the Purſuer, to be holden as confeſt, for not Compearing to give his Oath, being lawfully Summoned to that effect. The *Lords* found, that his being at the Horn, being a Cauſe why he could not compear, ought to ſtay him, to be holden as confeſt, albeit the Purſuer obtruded no Horning againſt him, and albeit it was in his own Cauſe wherein he was Summoned, and that it was his own default, through not relaxing of himſelf, that he compeared not; And the *Lords* granted a Commiſſion to any Judge the Purſuer pleaſed, to paſs privily to ſome privat part, where the Defender might ſafely Depone, and to take his Oath upon the Summons. Actor. *Ruſſell.* Alter. *Scot. Gibſon* Clerk.

But this Deciſion is of an evil preparative, and not to be obſerved; for hereby the Rebels are in better caſe, than the King's free and obedient Subjects, who will be holden as confeſſed, being lawfully Cited, and who will not obtain commiſſion, except upon lawful excuſes of Sickneſs, verified, or ſuch like; Thereafter the Purſuer reſiled from referring of the Summons to the Parties Oath, and offered to prove the Defenders Intromiſſion by Witneſſes, which was permitted, and granted by the *Lords. Vid.* 15: *July* 1624. *Dickſon* contra L. *Coldingknows.*

L. *Touch* contra E. *Hume, June* 9. 1624.

IN an Action betwixt the L. of *Touch*, and the E. of *Hume*, after Litiſcontеſtation was made, and the Term of Probation come, admitted for proving of an Exception, the Purſuer deſired to be permitted to Propone and Reply for elieding of that Exception, which Reply was newly come to his Knowledge, ſince Litiſcontеſtation, and whereupon he was content to make Faith. The *Lords* found, that after Litiſcontеſtation, neither

Exception, or Reply might be proponed, as *noviter veniens ad notitiam*, where the same consisted *in Jure*, seing no Party ought to be ignorant of the Law; and therefore that Alledgance, of *noviter venientis ad aures*, could not be decerned to be proponed by any Party, but where the same consisted *in facto*; and also where the Proponer instantly shewed the Instruction and Verification thereof, but it being contested by the Defender, that it was against all Law, to suffer a Pursuer to propone a Reply, as *noviter veniens ad notitiam*, seing that was only competent in an Exception, and not in a Reply. The *Lords* gave no answer to this doubt, if the Pursuer might Propone a Reply, as *noviter perveniens ad notitiam*, or not, but left it undecided. Actor. *Stuart* & *Craig*. Alter. *Hope*. *Gibson* Clerk. *Vid*: *June* 8. 1627. *Crausurd* contra *Cunningham*: *Jan.* 20. 1631. *Gordon* contra E. of *Galloway*.

Strachan contra *Scot*, *June* 15. 1624.

IN this above-written Cause of Mr. *James Strachan*, of which the 8th instant the Defender compeared, and proponed an Exception, that he could not be conveened as Intromettor with *James Courties* Goods, &c. because the same were disponed by the said *James* in his own Life-time, to *Daniel Melvil*, who after the said Disposition, disponed the same to the Defender. To which it was Answered, by the Pursuer, that that Disposition behoved to be repute *simulat*, seing *James Courty* Desponer, remained in Possession of the Goods, to the time of his decease, notwithstanding of the Disposition, after whose decease the Defender Intrometted. This Reply was found Relevant to elide the Exception. And the *Lords* found it not necessar to the Pursuer, to Reply any further, that the said Disposition made to *Daniel Melvil*, was to the Defenders behove, but found it sufficient to Reply, that the Disponer retained the possession to the time of his decease, and that thereafter the Defender Intrometted.

Adamson contra M^c*mitchell*, *Eodem die.*

IN a Suspension, the *Lords* found, the Parties Knowledge not equivalent to an Intimation; for an Intimation ought to be Legally, and Solemnly made, to put a Party *in mala fide*, to do any thing against the same, and albeit any Party knew that which formally required Intimation, yet that Knowledge, albeit it were confessed by the Party, could not put him *in mala fide*, where there was not a Legal Intimation, seing he could not be prejudged by that Knowledge, which was not made known to him by the Law, and so which was not necessary to them to know, and thereby was not bound nor obliged by that Knowledge. Actor. Alter. *Cunningham*. *Vid. Novem. ult.* 1622. Sir *James Durham*. *March ult:* 1624. L. *Dunipace* contra *Patrick Sandis*, and the Cases there.

Finlasons Wife contra *Wood*, *Eodem die.*

IN an Action of Double Poynding betwixt *Walter Finlasons* Wife and *John Wood*, who for a Debt owing to him by the said *Walter*, had comprysed an Annualrent, wherein the said *Walters* Wife was Infeft out of the Lands pertaining to the Lord *Sanquhar*, and which Comprysing being deduced at the instance of the said *John Wood*, against the said *Walter*, for the said Annualrent, in so far as it pertained to him *jure mariti*, it was quarrelled, because the Wife, who was principal Party, having Right to the Annualrent, and in whose person the same was principally inherent, (for it belonged only to the Husband *pro interesse*) was not cited to the deducing of the Comprysing, whose Right could not be taken from her, except she had been expressly called thereto. This Alledgeance was Repelled, and the Com-

Compryfing was fuſtained; for the *Lords* found no neceſſity to Cite her, ſeing there was no Right compryſed from her, but only the Right which the Husband had thereto *jure mariti*, during their Marriage; ſicklike, this Compryfing being quarrelled, becauſe it was deduced by *John Wood*, who the time of the deducing thereof, was payed of the Debt, for the which he compryſed. This alſo was Repelled, becauſe the Payment was made by the Cautioner in the Bond granted to him, to whoſe uſe, and for whoſe relief, albeit in his name, the ſaid Compryſing was deduced. Actor. *Aiton*. Alter. *Nicolſon* younger. *Gibſon* Clerk.

Crawford contra *Wood*, *June* 17. 1624.

IN a Suſpenſion betwixt *Crawford* and *Wood*. The *Lords* found a Decreet given by the Provoſt and Baillies of *Edinburgh*, which was ſuſpended then, to be null ſummarly, without Recuction; becauſe the ſame was given againſt the Suſpender, as holden as confeſt, being ſummoned to give his Oath by one of the Town Officers, and his Execution having no Witneſſes, in reſpect whereof, that Citation was found could not be ſuſtained; and the Decreet therefore was null; albeit it was alledged againſt the Suſpender, that the Form within the Burgh of *Edinburgh*, was, that Executions made by their Officers, was made without Witneſſes, and that the Officers were ſworn in Judgment, upon the verity of their Executions; which Form the *Lords* would not allow, becauſe thereby the ordinary mean of Improbation, *viz.* by the Witneſſes, was taken away. *Scot* Clerk. *Vid.* 25 *July* 1626, *Lickſon* contra *Anderſon*. 11 *July* 1634, *Hay* contra L. *Gricht*.

Clerk contra *Brown*, *Eodem die*.

THE *Lords* are in uſe to find Decreets null, which are given by any inferior Judges, upon the Defenders Confeſſion and Conſent, where the ſaid Confeſſion and Conſent is not warranded by the Subſcription of him, who gives the ſame, extant in the Proceſs; and finds the Aſſertion of the Clerk, or his Minut in the Proceſs, not authorized with the Parties Subſcription, no Warrand to pronounce Decreet thereupon, except that the ſaid Confeſſion proceed, and be made after Citation, made to the Defender to compear, to give his Oath of verity before the Judge, upon the Libel and Claim, the ſame being referred to his Oath, and the Term circumduced; which was found this day in the Action betwixt *Clerk* contra *Brown*, and of before in the Action betwixt Doctor *Felly* and *John Ury*.

Somervel contra her Fathers Creditors, *June* 25. 1624.

Jean Somervel Daughter to umquhile *Samuel Somervel* Burges of *Edinburgh*, being Charged to pay a Sum, wherein her ſaid umquhile Father was Cautioner for *Patrick Somervel*, which *Patrick* was Brother to her Father, and Tutor to her, after her Fathers deceaſe; and which *Patrick* becoming Bankrupt, the ſaid *Jean* being charged to pay, ſhe Suſpends, and deſires, ſeing ſhe is a Minor, and that her Father was only a Cautioner for that principal Debitor, who ſenſine became her Tutor; and ſo ſeing ſhe is diſtreſt for her Tutors Debt, therefore that ſhe might be free of any perſonal Execution, to be uſed againſt her by Caption, or Warding of her Perſon, during her Minority. The *Lords* ſuperceeded all perſonal Execution of Caption and Warding of the Perſon of the ſaid *Jean*, for the ſpace of a year after this date; after the expiring whereof, they would conſider, if any further Prorogation ſhould be granted, but prejudice of all other lawful Execution againſt her Goods and Lands: This Woman was paſt fourteen years of Age. Actor. *Cunninghame*. Alter. *Hay* Clerk.

Commissar *Bannatine* contra *Cranston*, *Eodem die.*

MR. *James Bannatine* Commissar of *Edinburgh*, pursues *Cranston* of *Skatisbus*, to hear him decerned to restore a Burn which ran betwixt their Lands, to the old Channel and Water-gang, wherein it ran continually, before that the said *John Cranston* diverted the said Burn out of the old course, by cutting of a Ditch, and drawing the Water in within that Ditch, to serve a Miln which the Defender had builded upon his own Lands, whereby a part of the Channel, where the Water used to run is dry. The Summons and Action for restoring of the Water and Burn to the old course was sustained, albeit that the Pursuer could qualifie no prejudice in any sort, which he sustained by the said diverting thereof, and that the Defender was served therewith, and had a going Miln thereby; and albeit the Defender alledged, that as the Pursuer had no prejudice by the said Diversion, so he had profite thereof; likeas, it was lawful to him to draw in the Water before it ran or touched, or came to the Pursuers Lands in any part, and to make his use thereof, seing the Pursuer had no prejudice thereby, as said is, and that the Water was restored and ran again in the old Channel, after that the Defender was served therewith, so that albeit it ran not thorow the whole Channel and Course, wherein it ran before the Defenders in-taking thereof, yet seing it fell in within a part of the old Channel again, albeit that part neareſt to the Defenders in-taking was thereby dryed, and seing it was as steadable to the Pursuer, as it now runs, as it was when it formerly ran thorow the whole Channel, before the Defender made use thereof, therefore the Pursuers Action could not be Sustained. This Alledgeance was Repelled, and the Action was Sustained, for causing of the Defender, to restore the Water to the whole old course where it ran, before his in-taking thereof; and it was not found necessar to the Pursuer, to libel or qualifie any use of the Burn and Water thereof, wherein he was prejudged by the Defenders in-taking of the same, seing the *Lords* found, that the Water running by his Land, which lay marching contigue to the one side thereof, could not be drawn from any part of the Land marching thereto without his own consent; for albeit he had no present use thereof, yet he might possibly find thereafter some use for the same; neither was there any use qualified *in spe*, or appearing, whereof he might be prejudged; for the burn fell in again into the old Channel, and ran by the Pursuers Lands some space, under and beneath the part where it first fell in, and ran by the Pursuers Ground before the Defenders cast, and served him in all uses, as profitably as before: And the *Lords* found it enough of prejudice, that he wanted his pleasure, seing he had the use thereof *ad amanitatem & voluptatem*, and also had sometimes Fishing therein of Trouts, whereof he alledged he was prejudged, and which could not be altered without his own consent. Actor, *Stuart*. Alter, *Nicolson* younger. *Hay* Clerk.

Drummond contra L. *Cunninghame-head*, *June* 26. 1624.

IN an Action of Suspension betwixt *Drummond* and *Cunninghame-head*, wherein *Cunninghame-head* being charged upon his Obligation, as Cautioner for *Patrick Somervel*, to pay 1000 merks, which being Suspended, as being subscribed by him, being then Minor, having Curators, without their Consent; and this Reason being elieded by an Answer, that he was Major at the date and time of the subscribing of the Bond; which being admitted, it was found by the Probation, that he wanted 12 or 18 hours, or at the most a day of his years of Majority, when he subscribed the Bond foresaid, and for that inlake, they found the Bond null; for the *Lords* found, that in this, and the like Cases, the Compt behoved to be made *de momento in momentum*,

tum, for he was born upon the 24 *Novemb:* 1601. and the Bond was Subscribed upon the 23 *Novemb:* 1622. Actor. *Nicolson.* Alter. *Cunninghame.* *Hay* Clerk.

The *Lords* also found, that where a Renunciation to enter Heir, is Subscribed by a Minor, with consent of his Curators, that the Curators are not restricted to be bound as Cautioners for the Minor, or otherwise to become obliged for him to warrand that Deed, and that they are no further obliged, but to consent.

Hamilton of *Silvertonhill* contra his Sisters, *Penult June*, 1624.

FRancis *Hamilton* of *Silvertounhill* younger, being Infeft in the Lands of *Provand* in Fee, upon his Mothers Resignation, who was Heretrix thereof, with special Provision contained in his Infeftment, that it should be lawful to his Mother, to Dispone in her own Lifetime an Annualrent of 800 Merks yearly out of the saids Lands, to her Daughters, for the help of their Marriages, redeemable upon 8000 Merks; whereupon she having made and subscribed a Charter to them, after the said Fee granted to her said Son, but no Seasin being taken thereupon while she lived; after her decease the Daughters pursues the said *Francis*, whose Fee was affected with the said Provision, to give them a Precept, whereby they might take Seasin, comform to the foresaid Charter, made by their Mother in their favours. This Action was sustained against the said *Francis*, and he was ordained to grant and subscribe a Precept of Seasin in their favours; albeit it was alledged by him, that the Provisions foresaid contained in his Fee, reserved a liberty to his Mother to provide the said Daughters; which liberty not being used in her lifetime, nor the deed perfected by her, which she might have perfected, if it had been her intention, to have made a compleat and profitable security to them, which she hath not done, and so hath not clad her with that liberty, which she had for a Charter, whereupon no Seasin followed in her lifetime, it is not a valuable Right, specially seing she lived by the space of nine years after the date of the Charter, during the which space no Seasin was taken, but the Charter remained beside her self; whereas if she had intended valiably to have secured the Pursuers, she would have delivered the Charter, and given Seasin to them, while she lived; which not being done, the action becomes extinct, and the Defender cannot be compelled to fulfill the same. This alledgance was repelled, in respect the *Lords* found, that this Subscribing of the Charter by her, was sufficient to give to the Daughters, that Right which was reserved to her; and the not taking of Seasin thereupon was not her deed; for by the Charter containing Precept therein, she was denuded, and the Seasin might be taken when the Daughters pleased; which not being taken while she lived, the said Charter being now in the Pursuers hands, was a sufficient ground to compel the Defender to make a Precept, whereby they might be Seased. Actor. *Cunninghame.* Alter. *Hope: Scot* Clerk. *Vid:* 11 *Novemb:* 1624. *Wallace* of *Ellerslie.* 14 *Decemb:* 1627. *Dickson.* 20 *Novemb:* 1624. L. *Lagg*, and the cases there.

Edgar contra *Halliday*, *Eodem die.*

IN an Action of Registration of a Bond made by umquhile Mr. *James Halliday*, pursued by *Thomas Edgar* against *William Halliday*, as served Heir to his Brother. The *Lords* sustained the Action against him, as Heir served: albeit it was alledged, that no Action could be granted against the Heir, while the expiring of year and day after the Defuncts decease, which was not expired in this case, as was provided by the 76 *Act*, 6 *Parl: Ja:* 4. Which alledgance was repelled, in respect that the Defender was served Heir, by the which the liberty and time of a year after the Defuncts decease, by the

intention of that Act, is only granted to persons to deliberat and advise, if they will enter Heirs, or not; of the which liberty, by the said entering Heir, he had prejudged himself.

In this Process also, the *Lords* found, that a Bond bearing to pay Annual, albeit not containing a Clause of Infeftment, was Heretable, and so was Prestable by the Heir of the Defunct, and not by the Executor of necessity, as if they were only lyable. Actor. *Lawtie*. Alter *Craig*. *Gibson* Clerk. *Vid:* For the first part of this Decision, 11 *Novemb:* 1624. L. *Ellerslie*, 29 *July*, 1623. *Stuart* contra *Fleming*. *Item* 12 *March*, 1622. *Fairlie*: for the last part of the Decision, 29 *March*, 1626. *Couston* contra *Stuart*.

Smith contra *Andersons* Relict, *Eodem die.*

IN a Registration pursued by *Smith*, as Executor to his Father, against the Relict of *Peter Anderson*; The Bond desired to be Registrat, bearing, to pay Annual after the Term of payment; and it being therefore alledged, that it was Heretable, and so could not be Registrat at the Executors instance. The *Lords* repelled the alledgance, and found the Bond pertained to the Defuncts Executors, notwithstanding of that Clause of paying Annualrent, because the Defunct, to whom the Bond was made, died before the Term of payment contained in the Bond, so that the Clause adjected for payment of Annual, in case of failzie of payment of the Sum at the Term, could not take effect in favours of the Defunct, in his own time, to make it profitable to his Heir, aud therefore that it pertained to his Executors. *Scot* Clerk. *Vid.* 8 *January*, 1624. Collonel *Hendersons* Bairns for this case, and also the cases immediatly preceeding, and others there cited.

contra *Fulwood*, *Eodem die.*

ONe having Compriſed from his Debitor the Right of a Contract, made betwixt the said Debitor and *Fulwood*, after the Compriſing pursues *Fulwood* to hear the Contract Registrat; who compearing, alledged, that the Debitor, from whom the Contract was Compriſed, was dead before the Compriſing, and offered to prove the same; which alledgance was repelled in this place against the Compriſing standing, and the Parties Action of Reduction upon that ground reserved to him. Actor. *Belshes*. Alter. *Hay* Clerk. *Vid:* 20 *Novemb:* 1624. L. *Lagg*.

Keir contra *Hepburn*, *Ult. June*, 1624.

IN an Action pursued for spulzied Goods by *John Keir* against *Hepburn*. The Defender alledged, that the Goods Libelled to be spulzied, was lawfully Poynded, by vertue of a sentence of Poynding of the Ground for an Annualrent adebted out of the Ground; the Pursuer quarrelled the Decreet, as no warrand to Poynd, seing the same was given against the L. of *Syd-serff*, first Heretor of the Ground, who was only party called therein, and who being dead before the Poynding, the Sentence could not be a Warrand to use any Execution thereupon, after the decease of him, against whom only the same was given; the alledgance upon the Poynding was by the *Lords* found Relevant, and the Decreet sustained as a sufficient warrand thereto, albeit the Heretor, who was called only was dead: For the *Lords* found, that the Decreet to Poynd the Ground was real, and served against the Ground, to Poynd the same, by vertue thereof, so long as that person lived, at whose instance the Sentence was obtained, albeit the Heretor should die, or change from one person to another; which alteration ought not to imped the said real Execution, the obtainer thereof living, as said is. *Gibson* Clerk. *Vid*; 21 *Novemb.* 1628. *Watson* contra *Reid*.

Lo.

Lo. *Frendraught* contra L. *Balvenie*, *July* 1, 1624.

BY the practice observed when Lands are Compriſed lawfully, and Seaſin follows thereupon, albeit the Seaſin be diverſe years after the Compriſing, yet that Seaſin will be drawn back to the date of the Compriſing, and furniſh Action for the Mails and Duties of the Lands Compriſed, of all years ſubſequent, ſince the Compriſing; as was found in the Suſpenſion betwixt the Lo. *Frendraught*, and *Balvenie*: But it is conſiderable who are called for theſe bygone Duties, *&c.* For in the ſaid Suſpenſion, *Balvenie* being charged by *Frendraught*, to warrand certain Lands Diſponed to him by *John Leſlie*, Heretor of theſe Lands, with conſent of *Balvenie*, Superior of the ſame, and which they were both obliged to warrand, from an Inhibition and Compriſing deduced thereupon, at the inſtance of one *Innes*, for Debt owing by *Leſlie* to the Diſponer, whereupon Inhibition was ſerved before the Right made to *Frendraught*; he Alledged, that that Inhibition and Compriſing, could not be a diſtreſs to produce preſent Execution of Warrandice, ſeing *Frendraught* was in real and peaceable poſſeſſion of the Lands, and no trouble nor action moved againſt him, upon the ſaid Inhibition or Compriſing, to imped him to bruik: Likeas, no Seaſin was taken upon the Compriſing, nor the Compriſer received or entered by *Balvenie*, who was Superior of theſe Lands, before whoſe Entry, he being Superior, he offered to take order to remove that impediment, and therefore he contended, that before Seaſin, or before ſome Deed, done upon that Inhibition and Compriſing, which could diſturb his Right and Poſſeſſion, he could not be charged to warrand. The *Lords*, notwithſtanding of this reaſon, ordained *Balvenie* to warrand from the ſaid Inhibition and Compriſing, albeit the Charger was not troubled in his Poſſeſſion, ſeing the ſame was ſuch Rights as might prejudge his Right to bruik, being anterior to him; and that the Compriſing, when ever Seaſin ſhould follow, would make him Comptable for the Maills of the Lands, ſince the Date thereof, as ſaid is; and therefore the *Lords* decerned to warrand, but ſuperceeded the Execution to a certain day, that betwixt and the day aſſigned, *Balvenie* might remove that impediment of the Inhibition and Compriſing, either by ſome lawful Proceſs, or by conſent of the Compriſer. Actor. *Hope* & *Oliphant*. Alter. *Burnet*. *Gibſon* Clerk. *Vid:* 5 *March*, 1628. *Scot* contra L. *Whitſted*. 25 *March*, 1628. L. *Barr* contra his Tennents. 14 *Feb.* 1623. L. *Salt-Coats* contra *Brown*. 22 *March* 1626. *Robert Areskine*.

Mowat contra *Mowat*, *Eodem die*.

IN an Action of Adjudication betwixt *Mowat* and *Mowat*, the *Lords* found, that this and the like Adjudications ſhould abide continuation, where the Summons wanted a priviledge, and where the ſame could not be inſtantly verified. Actor. Alter. *King*.

L. *Randkillor* contra *Eodem die*.

IN a Removing purſued by *Sibbald* of *Randkillor*, contra the Defender compearing & defending himſelf with an Infeftment of the Lands Libelled proceeding upon a Compriſing, and clad with Poſſeſſion, before the Right made to the Purſuer by him, from whom the Defender had Compriſed, as ſaid is, and who was Author to the Purſuer: And it being Replyed, conform to the Act of Parliament, *Anno* 1621. anent Compriſings, that the Purſuers Author, from whom the Defender had Compriſed the Lands, was then Minor; and that the Defenders intromiſſion with the Maills and Duties thereof, extended to as much as would ſatisfie him of his whole Principal Sums, for the which he had Compriſed, and all the Annuals and Expences, and others mentioned in the Act of Parliament; ſo that the Compriſing was extinguiſhed,

tinguished, and could not furnish any Defence. This Reply was found Relevant by the *Lords*, and received in this same place and judgment of removing, to be discust, without any other Tryal, or Action of Declarator to be intented thereupon; and the Parties were ordained presently to condescend and compt upon the quantities of the Maills and Duties of the Lands, and the Defenders Intromission therewith: Neither was it found necessar, that the Pursuer should be urged to intent any new Pursuit, or Declarator, but received the Tryal summarly in this place; albeit the Defender contended, that in this Judgment it ought not to be taken in, but that his Infeftment, clad with Possession, should maintain him, ay and while it were taken away by some direct Pursuit, which was repelled, in respect of the Act of Parliament, which appoints the Comprising to expire, *ipso facto*, where satisfaction is received in manner foresaid; which words, *viz. to expire ipso facto*, the *Lords* found, gave warrand for summar Tryals. Actor. *Lermonth.* Alter. *Aiton. Gibson* Clerk. *Vid:* 15 *January*, 1624: Viscount of *Annand.* 2 *July*, 1625. *D. Kincaid.* 3 *March*, 1629. *Herris* contra *Stuart.*

The like done 21 *March* 1629. *Scarlet* contra her Tennents, by way of Suspension of a Decreet of Removing against the Tennents, and only the Compriser, who was not called to the Decreet, compearing in the Suspension, to defend the Tennents, who were decerned in absence.

Kinlochie contra Lo. *Conservator*, *Eodem die:*

THe Conservator being pursued by one *Kinlochy*, for payment of Money contained in his Bond, against which Pursuit, he alledging Nullity of the Bond, because it wanted Witnesses; whereto it was Replyed, that it was Holograph, which was referred to the Parties Oath; and he being sworn thereupon, deponed that the Bond was his Hand-writ, but that he took it on his Conscience, that he had truly payed the Sum therein contained, to the Person to whom the Bond was made many years since; which Bond was given to him, out of his own Charity, without any onerous, or other necessar impulsive Cause, to the Person, to whom he was bound, being his near Kinsman, for his help, there being more than thirty years since the date thereof, and the Person to whom it was given, living many years after the Bond, who died but lately, in a poor estate; and who, if it had been unpayed, would not have omitted or delayed so long to have sought it, and it being found by his Executors, since his decease, who had made *Kinlochy* the Pursuer, Assigney thereto, he had good reason to Defend himself, against that Pursuit; Which Oath being considered by the *Lords*, they found, that the Oath confessing the Hand-writ, proved the Reply, and had no respect to the second Part of his Declaration, bearing the payment; seing that was an Exception, which he could not swear himself, to import his Liberation, not being referred to his Oath; and so the *Lords* divided the Deponers Oath, which usually is respected ever conjunctly, as the same is given, *Hay* Clerk: *Vid. Feb.* 9: 1631. *Batram Dutchman*, and the other cases there cited.*

Mitchelson contra *Law*, *July* 2. 1624.

IN an Action of Removing pursued by *Mitchelson* contra *Law*, the *Lords* found, a Bond made by the Pursuers Author, before any Right acquired by the Pursuer from him, to the Lands lybelled, by the which Bond the said Author, for Sums owing by him to the Defender, and which the Defender had payed, as Cautioner for him, had disponed the Crop growing upon the Ground, the year of that Disposition, and also the Farms of the Lands,

Lands, in all time and years to come, ay and while he were payed again of the Sums wherein he was obliged for him, and conform thereto, had put the Defender in Possession of the Corns Disponed, then growing upon the Ground that Cropt, not to be a sufficient Right to defend against the Removing pursued against the Defender; albeit it was Alledged, that the Defender, since the Bond, was continually in real Possession of the Lands, by the space of diverse years; and that he was not yet satisfied of the Sums addebted to him; Because they found, that albeit the Bond had contained an expres Disposition of the Lands to have been bruiked, ay and while the Defender had been payed (which it bore not, bearing only a Disposition of the Farms) could not have Defended against the Removing, which was Pursued by a Singular Successor, who could not be prejudged in his Right, by the said Bond, but that the same would only furnith Action against the Giver, and Maker thereof Personally. *Scot* Clerk. *Vid.* *July* 13. 1621. L. *Auckall* and 22, *November* 1625. *Isobell Ronnald.*

L. *Hemsfield* contra *Maxwel*, *July* 22 1624.

L. *Hemsfield*, Donatar to the Waird, and Marriage of L. *Appil.girth*, pursuing Declarator thereupon, compeared one *Maxwel*, who had a Right to certain of the Lands, which fell in Waird, made to him by the Vassal, by whose decease the Waird fell; and Alledged, that the Gift, and Pursuit could not extend to the Lands Disponed to him, because the Gift of Waird Lybelled, was taken to the behove of the L. *Appilgirth*, eldest Son, and appearand Heir to the Vassal deceast, the Excipients Author, who being his appearand Heir, could not, by any Gift of Waird, or any other Deed, impugne the Right, made to him by his Father, nor come against the same, which Alledgance was Repelled, in respect that the eldest Son might alswel have procured the Gift of Waird foresaid, as any Stranger, so that as a Stranger might have Pursued upon the Right of that Waird, and could not have been debarred from the Lands, whereof the Excipient pretended to have Right, from the Defunct; even so the appearand Heir, to the Defunct might do the like, except that he had been Heir to his Father, or that the Excipient might make him Legally to represent him, in which case, he could not quarrel his Fathers Deed; but being only appearand Heir, he might acquire the Gift, and do thereanent, which a Stranger might do. Actor. *King.* Alter. *Gibson* Clerk. *Vid.* *March* 21. 1629. *Weyms.*

Watson Minister contra Lo. *Kinclevin*, *Eodem die.*

IN a Double Poynding raised by certain Tennents, against one *Watson* a Minister, on the one part, and the Lord *Kinclevin* on the other. The Lord *Kinclevin* being out of the Countrey, the time of the Citation, and not Summoned upon threescore days; and therefore, it being Alledged, that no Process could be given against him, upon that Summons. The *Lords* took this Order, that in all the like Cases of Double Poynding, and Suspensions, where any of the Parties therein, are not in the Countrey, and are not Summoned upon threescore days, and so are not ready, but refuse, to Dispute upon that Right, that they will sustain the Process, and discuss the Rights of the Parties Compearing; with this Provision, that the Party, who shall be Decerned, to be Answered, and obeyed, shall be bound, and find Soverty to that effect, if need beis, to Refound what he shall Recover by that Sentence, to the Party out of the Countrey, if it shall be found, that he has better Right to that which is controverted, than the Party, who then in his absence, is decerned to be Answered. *Hay* Clerk. *Vid.* *January* 20. 1627. *Dumbar* of *Burghy.*

E. *Annandale* contra *Johnston* of *Betock*, *July* 3. 1624.

IN an Action of Removing, pursued by E. of *Annandale*, against *Johnston* of *Betock*, the Defender having Compeared, who had acquired the Right of the Lands from one *Graham* of *Thornik*, Heretor of the Lands Controverted, from whom he had Acquired double Infeftments; one holden of the said *Graham* of *Thorniks* self, and another of the King, upon *Thorniks* Resignation, in the King's hands; upon which Resignation, the Defender was Infeft, holding of the King; this Infeftment granted to be holden of the King, to the Defender, is Reduced, and also decerned to make no Faith, at the Pursuers Instance, the Defender Compearing, after which Sentence, this Removing being Intented, the Defender Compeared, and Defended himself, with the other base Infeftment, granted to him, to be holden of *Thorniks*. *Item* he Defended himself, that he bruiked, by Right, or by Tollerance of the said *Thorniks* his Author, who was neither called in that first Reduction, and Improbation, nor was his Right in that Process drawn in Question, but subsisted as a Good Right, untaken away, both which Defences were Repelled by the *Lords*; for they found, that the Defender could not have recourse to the base Infeftment, holden of *Thorniks*, seing the same was obsorbed by the Publick Right, given to the Defender, upon his Authors Resignation, after the accepting of which Publick Right, the other was extinct, and the Defender could not return thereto, neither could he defend himself, with his Authors Right, as if the same were Good; and that it was not Reduced, nor called for in that Process, seing no Right remained, in his Authors Person, he being lawfully denuded, in the Defenders Favours, and the Defender thereupon Infeft, which Infeftment being Reduced against the Defender compearing, he could never have Recourse to Cloth himself with his Authors Right, which he Alledged not in that Reduction, and so prejudged himself therein, suffering his own Right, which Depended thereon, to be Reduced, by Compearing; Likeas he being once Heretor, upon his Authors Resignation, there remained no Right in his Authors Person, which could furnish any Defence to the Excipient, *as if* he bruiked by his Tollerance, for the accepting from him of an Heretable Right, barred him from Alledging that he was his Tennent, seing he to whom he Alledged himself Tennent, retained no Right in his Person, neither of Property, or Superiority. This Decision is remarkable; for *Thorniks* own Right, was never impugned, and so the Defenders own oversight imported this Decision, and was the only Cause thereof, seing he omitted to propone the same, which seing he Compeared, he might have done, and eschewed thereby the Sentence of Reduction and Improbation; and it might appear, that albeit the Infeftment given to the Defender, holden of the KING, was Reduced, and decerned to make no Faith, yet that he might have Defended his Possession with the base Infeftment, holden of his Author, or that he was Tennent to him, his Authors Infeftment being Good in it self; for that Sentence of Reduction, would appear to prejudge him no more, than if the Defender had Renounced that Publick Infeftment, *quo casu* he could not have been hindered to return to the other, or to alledge himself Tennent to his Master, who had a Right. But the *Lords* found the contrare, that the Publick Infeftment, made the Base to cease. Actor. *Hope*. Alter. *Aiton* & *Oliphant*. *Scot* Clerk, *Vid. January* 23. 1624. *Andrew Meldrum*, where in effect the force of a base Infeftment becomes not extinct, by a posterior Publick Infeftment.

Mutè

Muire contra *Abannay* and E. of *Galloway*, *Eodem die.*

IN an Action pursued betwixt *Muire* contra *Abannay*, and the E. of *Galloway*, wherein a Donatar to a Rebels Liferent Escheat, pursuing for the Mails and Duties of the Rebels Lands, after the expyring of year and day, and the Defender defending himself, with an Infestment of the Lands granted to him of the same, by the Rebel, The *Lords* found, that that Infestment, albeit it was Replyed and granted by the Defender to be true, that the same was made, after that the Rebel was year and day at the Horn, whereby the Right of his Liferent of these Lands was Acquired to the King, and so that no Deed could be done in the King's prejudice, which might make the Liferent un-profitable to him; yet that the same was sufficient: Likas the *Lords* sustained the same, to liberat the Defender, who had acquired the Infestment, for all the Duties acclaimed of these Lands, of all years preceeding the Intenting of any Declarator, upon that Rebellion; and that the Defender was *in bona fide*, to intromet with the same Duties, of the saids preceeding years; and therefore he could not be compelled, to refound the same, seing they were *Fructus bona fide & percepti & consumpti*, and so could not be repetit from him, and therefore allolzied him therefrom.

In this Process, it was found, that the Liferent of him who was appearand Heir to a Defunct, who died Infest in Lands, fell to the Superior, by the appearand Heirs Rebellion year and day, albeit that the appearand Heir was not Infeft in the Lands.

In this Process also, a Tack being quarrelled as null, because it was conferred to a time of Entry unlawfull, and so behoved to be respected, as wanting an Entry, in which case it would be null, by reason the words of the Tack bore, *That the Tacks-mans Entry is, and shall be at a year therein expreſt*, which year was by-past, many years before the date of the Tack, the Tack being set long after that year, to the which this Entry was conferred; which Alledgance was Repelled, and the Tack sustained, in respect it was but the Incongruity, or Informality in the writing thereof, in these Words *is and shall be*, respecting the Future Time, whereas it should have said, The Entry was at that time, respecting the Preterit; For the which, the *Lords* found no cause in Substance to anull the Tack, or which might derogat therefrom. Actor. *Hope* & *Nicolson* younger. Alter. *Nicolson* elder. *Gibson* Clerk. *Vid. July* 24. 1624. Sir *William Stuart.*

Baillies of *Killrinny* contra *July* 6. 1624.

THe Baillies of *Kilrinny*, being pursued at ones Instance for not taking of a Rebel, conform to Letters of Caption directed against them, whereby they were Charged to take the Rebel, he being in their Company for the time, and therefore they were pursued for payment of the Sum, for the which the Rebel was Denounced. In this Process, the *Lords* found, that they would not sustain this Action, by the production of the Letters of Caption against the Baillies, except the Letters of Horning were also produced, and shown, which was the warrand whereupon the Caption was directed, albeit the Pursuer Alledged, and Answered, that he ought not to be compelled to produce the Horning, seing the Disobedience of the Charge of Caption, was the Foundation of this Action, and was sufficient against them, who ought not to Disput, if there was Horning or not, seing the Judge saw the Horning, before he granted Caption thereupon, and it was not their part to enquire any further, but to obey. Which was Repelled, and the Horning ordained, to be produced to the Pursuer. *Scot* Clerk,

Vid. July 14. 1626. *Adam* contra Baillies of *Air. Novem.* 28. 1628. *Baillie* contra *Porter* *.

Richardson contra *Hay*, *July* 8. 1624.

IN a Suspension betwixt *Robert Richardson* Burges of *Anstruther*, and *Hay*. The *Lords* found, that a Barron may pursue his Tennent, for payment of his Farms, in his own Courts, in feriot and clos time of vacans, albeit he have no Dispensation to sit; and therefore they sustained a Decreet so given, which was quarrelled in that Suspension as null, being given in feriot time, without Dispensation; This Decreet also being alledged to be null; because it bore to be given without any other Probation, but that the Defender confest the Summons to be true; which was no cause whereupon Sentence might follow, seing the Confession was not subscribed by the Party, and the Clerks Affirmation in an Inferior Court, ought not to be Warrand to any Sentence exceeding Fourty Pounds; for the Pursuit was not referred to the Parties Oath, whereby that the Confession might be reput to depend necessarily, upon the Judicial Order of proceeding, but was a voluntar Confession, which ought to be otherways instructed, than by the Clerks Assertion. This nullity was also Repelled, because instantly the obtainer of the Sentence produced Writ, which verified the Summons, which the *Lords* found sufficient to maintain the Sentence, albeit the same was not mentioned in the Decreet; as the cause thereof, seing the Party could not oppon against that Writ now produced. Actor. *Russell.* Alter, *Scot.* Clerk. *Vid. Feb.* 6. 1624. *Gordon* contra *Meheugh.*

Nisbet contra *Short* in *Leith*, *July* 15. 1624.

IN an Action pursued by one *Nisbet*, against *Short* in *Leith*, for payment of some little Sums Adebted by the Defender, to *Millar*, the Pursuers umquhile Husband, to whom she was Executrix. The Defender alledged, that the Sums contained in the Bonds were payed, and offered to prove the same, by Witness. The *Lords* found, that this Alledgance of payment, could not be proven, but by Writ, or Oath of Party, and refused to admit the same, to be proven by Witnesses, albeit that the Sum contained in each Bond, was within Fourty Pounds, seing Writ could not be taken away, nor destroyed by Witnesses. Actor. *Oliphant.* Alter. *Belshes.* *Hay* Clerk. *Vid. Novemb.* 25. 1624. *Bisset* contra *Bisset.*

The same was found, in an Action betwixt *Maxwell* and *Aikenhead*, albeit the same was offered to be proven payed, *per testes omni exceptione majores. July* 27. 1624. Actor. *Aikenhead.* Alter. *Gibson* Clerk.

Dickson Apothecary contra *L. Coldingknows*, *Eodem die.*

IN an Action pursued by *Thomas Dickson* Hypothecary, contra the L. *Coldingknows*, where the Summons being admitted to the Pursuers Probation, and referred to the Defenders Oath of Verity *simpliciter*, and at the Terms Assigned, to that effect, the Defender offering to depone, and give his Oath, he was debarred by a Horning produced by the Pursuer against him, whereby he alledged, that he could not Depone, but should be holden as confest, being Rebel. The *Lords* found, that in this, and the like cases the Pursuer could not exclude the Defender to depone, nor obtrude Horning against him, to debar him, seing he craved his Oath, for his Probation, and had warned him to compear to give his Oath; and therefore could not refuse that, whereof he himself had made Election, and which was desired by him, and so the Horning was not admitted, in respect it was a preparative of a severe Consequence, to hold the Defender *pro confesso*, upon a Lybel, which might possibly contain more than the Defender

was

was worth, being so debarred, and there being no other Probation: But it is to be adverted, that in all the Causes almost, where Parties Defenders are Summoned, this Reason may exclude all Pursuers to debar the Defenders, by Horning; For it may be alledged, that seing they are Summoned to hear Decreets given against them, or else to alledge a Cause in the contrare; by the same Reason, they may say, that seing he is Summoned to alledge a Cause why the Pursuer should not have his Intent, he ought not to be debarred by Horning, to propone lawfully, that which by the Pursuers Summons is permitted to him to do; and in this Cases, the Defenders, not the less may be debarred by Hornings. Actor. *Chaip* & Alter. *Hay* Clerk, *Vid: July* 29. 1625. *Touris* contra *Dowglas: June* 8. 1624. *Strachan:*

Forbes of *Monymusk* contra *Gairdin* of *Banchry*, *July* 16. 1624.

Gairdin of *Banchry* sells his Lands to *Forbes* of *Monymusk*, for the Sum of 20000 Merks; for the surety of payment of the which Sum, he Transacts with *Monymusk*, and takes him obliged to give him an Infeftment of Property of some Lands, which by that same Contract, bearing that Security, *Banchry* sets back again, for payment of the Proportion of the Annualrent of the Principal Sum, which Principal Sum is, by that Contract, appointed to be payed at four several years expressed in the Contract, *viz.* A fourth part at ilk *Whitsunday*, the first four years, after the Contract, so that by the Contract *Banchry*, after ilk Term, if he pleased, might charge for the fourth Part, notwithstanding of the Condition of this Infeftment, which Infeftment is ordained by the Contract, to stand effectual, for the remanent of the said Principal Sum, whereof the Terms of payment are not come; and also but prejudice of the same Infeftment, for the Annualrent of the Sum, whereof the Term is past; So in like-manner, *Monymusk* by that same Contract, may pay the Sum, at ilk one of the said Terms, proportionally, but any Requisition to be made by him to *Banchry*, to receive the same; This being the Tenor of the Contract, *Banchry* after the expiring of the first Term, Charges for payment of the first Fourth Part, and for the Penalty conditioned, for not payment thereof; which Charges being Suspended, upon a Reason, that the said Sum was Arrested by *Banchrie's* Creditors. The *Lords* found the Reason no ways Relevant; For albeit that the Sum was Arrested by the Creditors, after the Term appointed for the payment thereof, by the Contract, and also that *Monimusk*, who was Debitor, might have payed it at the Term, without any Requisition, to *Banchry* the Creditor; Whereby it would appear, that the Sum was Moveable, when the Term was past, and so might be Arrested; nevertheless the *Lords* found, seing that the Debitor had not Offered, nor Consigned the Money, as he might have done, if he had pleased to use the Liberty of the Contract; which not being done, the same remained in the nature of an Heretable Sum, and so not subject to Arrestment, before the Charge was Execute at the Creditors Instance, for payment thereof, after the which Charge, the Sum became *Moveable*, and no Arrestment was made after the Charge, albeit the same was made after the Term of Payment; For the *Lords* found, that the nature of the Security tended to an Heretable Destination of the Sum, albeit the Debitor might have payed the same, at the Term as said is, without any preceeding Requisition, either on the part of the Creditor to his Creditors, to receive the Money, or on the part of the Debitor to provide and pay the same, seing that was not done. And consequently found, that this Sum, before the said Charge, or before the Consignation, or Payment by the Debitor, was neither subject to Arrestment, nor would fall under

Banckries Escheat, nor his Testament, if he had died, or been put to the Horn, before the Term of Payment, or before a Charge, or Consignation. Actor. *Hope* & *Lermonth.* Alter. *Nicolson* & *Craig. Gibson* Clerk.

Bell contra Baillies of *Dunss*, *July* 20. 1624.

IN an Action at the Instance of *John Bell*, against the Baillies of *Dunss*, for payment of 1000 Pounds, adebted to him by his Debitor, because they suffered his Debitor to escape out of their Ward, wherein he was Incarcerat, being apprehended by Letters of Caption, by a Messenger, who presented him to their Jaylor, which Jaylor received him from the said Messenger, and put him in Ward, and keeped him therein, by the space of diverse days. This Action was not sustained against the Baillies; for the Rebel not being offered to the Baillies, nor commanded by them to be received by the Jaylor, nor the Rebels Warding ever Intimat to the Baillies selves. The *Lords* found, that the Baillies therefore was not obliged; albeit it was alledged, that they should be answerable for their Jaylor, and therefore the Action was not sustained against them, but they were Assoilzied, Actor. Alter. *Belshes. Hay* Clerk: *Vid. March* 13. 1623. Baillies of *Dunss* contra *Mudie*, *Feb.* 12. 1624. L. *Langton.*

Straton contra Lo. *Balmerinoch*, *July* 21. 1624.

IN an Action pursued by *James Straton* Writer, against my Lord *Balmerinoch*, and *David Little*, and against *Patrick Somervel*, for his Interest, for making of Money forthcoming, adebted to the said *Patrick*, by the said Lord and *David*, in Satisfaction of a Debt owing to the Pursuer, by the said *Patrick Somervel*: The said *David Little* Compearing, and alledging, that *Patrick Somervel* was denuded of his Right of the Sums, adebted to him by them, for the which they were conveened to another Person, to whom they had payed the same, before the Arrestment Lybelled; and a Term being assigned to them, to prove this Exception, the Principal Debtor, *viz. Patrick Somervel*, not compearing in this Process. The *Lords* found, that it was necessary to Summon the said *Patrick*, to the Term assigned for Probation, without which the Diligence could not be sustained, but that the Term ought to be Circumduced, he not being warned thereto. Actor. *Mowat.* Alter. *Lermonth. Scot* Clerk.

Lo. *Herris* contra Lo. *Drumlanrig*, *July* 23. 1624.

IN an Action pursued at the instance of the Lord *Herris*, against the Lord *Drumlanrig*, for Reduction of a Decreet of Spulzie of Teinds, which was obtained by the Defender against the Pursuer, before the Commissar of *Drumfreis*. The *Lords* found not themselves Judges in this Reduction, but found that the Commissars of *Edinburgh* were only Judges to Reduction of Sentences given by other Commissars, in respect of the Act of Parliament, *Anno* 1609. whereby the Commissariots are given to the Bishops: And this was found, albeit it was answered by the Pursuers Procurators, as that that Act of Parliament ought not so to be understood, as to take away that Jurisdiction from the Session absolutely, but that thereby power was given also to the Commissars of *Edinburgh* to Judge in such cases, and so that Act was made *cumulative*, and not *privative*, to seclude the *Lords*, but that the *Lords* might Judge, and als the Commissars, seing the *Lords* were Supreme Judges in the Kingdom, whose Jurisdiction could not be taken away, nor the same impared, except they had been called thereto, and that after citation it had been done, which was not done; and therefore ought not to be respected, in respect of the last Act of the same Parliament, *viz. Salvo Jure*, &c. whereby it is ordained, that privat Acts should not prejudge

judge Parties having intereſt, not cited to hear theſe Acts made; and as the Seſſion is Judges to Suſpenſions of ſuch Decreets, and will, and may, and frequently finds Commiſſars Decreets null, by way of Suſpenſion, far more may they take them away by Actions of Reduction, and be Judges therein; all which was Repelled, in reſpect of the Act of Parliament foreſaid. Actor. *Aiton*, *Stuart*, & *Belſhes*. Alter. *Hope* & *Nicolſon*. *Gibſon* Clerk. *Vid:* 10 *Decemb:* 1622. E. *Rothes*, 25 *July*, 1623. E. *Nithſdale*. 23 *July*, 1625. *Patrick Whitelaw*.

Donatar of Sir *William Stuarts* Liferent, contra his Ladies Tennents

July 24. 1624.

SIR *William Stuart* Conſtable of *Dumbartoun* being Rebel, the Donatar to his Eſcheat purſues the Tennents of certain Lands, whereof his Wife was Liferenter, by a Conjunct-fee granted to her by the L. of *Lochnoreis*, her firſt Huſband, for payment of the Farms of the Lands of that year, wherein the ſaid Sir *William* died, ſeing he died not while after the Terms of payment were both by-paſt of that year acclaimed, and the ſame were claimed by the ſaid Donatar, as pertaining to the Rebel *Jure Mariti*; and being owing the time of his Rebellion to him. The Defenders compearing, alledged that they had made payment to the Lady his Spouſe, who was clad with the principal Right, and that the Rebel her Husband hath only Right as Husband, who being dead before payment made, they behoved to be repute in *bona fide* to have payed the ſame to their Miſtriſs, and ought not to pay the ſame again to any pretending Right from the Huſband, or by his Rebellion, which they could not know, that Rebellion being unknown to them; and there being 8 or 9 years paſt ſenſyne, during the which time there was never Purſuit nor Action, or any queſtion moved for the ſaids Farms. This exception was found Relevant, to liberat the Tennents, and Action was reſerved to the Donatar againſt the Lady, who had received payment of the Farms, but the Tennents alwayes were ordained to furniſh probation to the Donatar, which might verifie lawfully her receipt of the ſame, when ever the Donatar ſhould purſue her therefore. Actor. *Burnet*. Alter. *Gibſon* Clerk. *Vid:* 3 *July*, 1624. *Muir* contra *Ahannay*.

Lady *Stanipath* contra her Sons Relict, and Bairns, *July* 27, 1624.

THE Laird and Lady *Stanipath* having aſſigned to *Francis Lyle* their Son, their Right which they had to a certain yearly Duty, which was due to them, and to the longeſt liver of them, for either of their Lifetimes, out of ſome Lands: The Laird being dead, and alſo *Francis* who was Aſſigney being dead, the Lady purſues the Relict of *Francis*, Haver of that Aſſignation, for production thereof, and the Bairns of *Francis*, to hear them decerned to repone her againſt the Aſſignation, and to hear it found, that their Sons name, who was made Aſſigney, was but borrowed to their own behove, and that he promiſed never to prejudge his Father nor his Mother in their Rights, but to uſe the Aſſignation to their behove; there was neither Back-bond made by the Son, nor any Adminicle in Writ, to verifie the promiſe, nor any other thing extant to verifie, that the deed was done upon Truſt or Confidence; and both the Father, who was one of the Cedents, being dead, and alſo the Aſſigney, yet the *Lords* took tryal thereupon *ex officio*, by Examination of the Witneſſes inſert in the Aſſignation, who were all but ſimple and poor folks, and by Examination of the Relict of the Aſſigney, who had no intereſt in the Right, but was conveened as Haver; and upon their Declarations, found the truſt, and confidence, and promiſe made by the Aſſigney ſufficiently tryed, and decerned in favours of the Purſuer, without any other Adminicle of Probation. Actor. *Cockburn*. Alter. *Nicolſon*. *Hay* Clerk. *Vid:* 1 *March*, 1623. *Williamſon* contra *Law*.

L. *Collingtoun* contra *Faw*, *July* 29. 1624.

IN an Action pursued by L. *Collingtoun* and Mr. *Robert Fowlis*, persons to whom *George Hume* of *Broxmouth* was Interdyted, against one called *Faw*, for Reduction of a Bond of 120 Pounds given to the Defender by the said *George Hume*, because it was made after the publication of the said Interdiction. The *Lords* assoilzied the Defender from the Pursuit, and found that the reason of the preceeding Interdiction, ought not to militat against Bonds, of the nature and quality of the Bond controverted, *viz.* where Bonds are granted to Crafts-men by persons Interdicted, for the price of their Work, Travels, or Workmanship, or Wages, as this Bond was, which was granted to a Mason, who had wrought to the said *George Hume* in his Craft of Mason-work, who ought not to be defrauded of the price of his Travels: But the *Lords* ordained him to prove, that he really wrought in his Craft to the Pursuer; which being proven, the Bond was found ought to be sustained. Actor. *Fowlis.* Alter. *Belshes.* *Gibson* Clerk. *Vid:* 11 *Decemb:* 1622. *Seton.* 20 *Decemb.* 1622. L. *Glenurchie.* 4 *Decemb:* 1623. *Hay* contra *Geichen.* 7 *July* 1625. L. *Innerweik.*

Norkat Englisch-man contra *Hume*, *Eodem die.*

IN an Action of Registration pursued by *Norkat* Englisch-man against *Hume.* The *Lords* found, that the Obligation desired to be Registrat, ought not to have Execution for that quantity of the Sum therein mentioned, whereof there was a Note written upon the back of the Obligation, by the Creditor himself, now Pursuer, bearing so much of the Sum to be payed, and that there rests only the particular Sum expressed in that Note; in respect of the which Note written by the Pursuers self, and coming out of his own hands, The *Lords* found, that no Execution ought to pass, but for that Rest which he had written to be owing; and this Note so written, was found sufficient to liberat the Defender for the remnant of the Sum, except the Rest foresaid: Albeit it was Replyed, that the Note ought not to derogat from the Bond, nor prejudge the Pursuer, seing it was delete, and was not Subscribed by the Pursuer, who might have written the same upon hope of payment; which never being made, he might lawfully delete that Note, as he hath done, and ought not to be hurt in his lawful Debt, by the once writing thereof, except that the Defender might prove payment of the same. Which Reply was once sustained as Relevant: But the Defender further Duplying, that since the Writing of that Note, the Pursuer had received an Obligation from him of far greater Sums, than was contained in this Obligation now controverted; which Sums he had payed, and had retired the said posterior Bond, which he then produced cancelled, it was a great presumption, that the Sums which the party had granted payed of that Obligation Libelled, were comprehended in that posterior Bond; and so the said posterior Bond, with the Note of Receipt written upon the first Obligation being respected together, ought to liberat the Defender. This Duply was admitted to liberat the Defender, conform to the Note written, as said is, albeit it was delete; but the Defender was astricted to prove, that the last Bond was once delivered by the Defender to the Pursuer, and thereafter retired upon payment. Actor. *Belshes.* Alter. *Hope:* *Gibson* Clerk.

L. *Capringtoun* contra L. *Keir*, *Eodem die.*

L. *Capringtoun* pursues the L. of *Keir*, to receive him as Heir Retoured to his Father, in some Lands holden of the L. of *Fowlsheills*; which *Fowlshiells* held the same of the L. of *Keir*; and because *Fowlshiels*, who was *Capringtouns* Immediat Superior, being charged by *Capringtoun* to enter to the Superiority within 40 days, conform to the 57 *Act*, *Parl.* 7. *Ja.* 3. with

with Certification, therefore he hath recourſe, and purſues *Keir*, *Fowlſheills* Superior, to enter him: This Purſuit was ſuſtained againſt *Keir* ſummarly, albeit it was alledged for *Keir*, that *Capringtoun* could be in no better caſe than *Fowlſhiels* would have been, who if he had been deſiring to be received as Vaſſal, and Heir to his Predeceſſor by the Defender, he could not do the ſame by this ſummar Purſuit, but ought to have his recourſe to ſeek Precepts out of the Chancellary to that effect, conform to the order in ſuch caſes, and ſo *Capringtoun* ought to do the like: Which alledgance was repelled, and this order ſuſtained. Likeas, the *Lords* declared they would ſuſtain the ſame, when the like Queſtion occurred. In this Proceſs alſo the *Lords* found, that *Keir* ought not to receive *Capringtoun*, while all the Retour'd Duty of the Non-entry were payed to him, which *Keir* might claim by the Non-entry of *Foulſheills*, his immediat Vaſſal, ſince the deceaſe of *Fowlſheills* Father, laſt Vaſſal and Tennent of the Lands, the time of whoſe deceaſe he offered to prove; which the *Lords* found ought to be performed to *Keir* by *Capringtoun*, in the ſame manner as *Foulſheills* behoved to perform the ſame, if he were deſiring to be entered, ſeing *Capringtoun* came in his place; and ſeing he was forced to change his Vaſſal, no reaſon was that he ſhould be defrauded of that Caſuality, which was due to him from his immediat Vaſſal; neither was it reſpected, that the Purſuer alledged, that the Non-entry ought to be tryed, and the time of the Deceaſe behoved to be proven; which not being done, he ought not to be prejudged in his Entry, ſeing alſo the Act of Parliament foreſaid, *Ja.* 3. appointed no ſuch thing to be performed by the Sub-Vaſſal in thir caſes; and that it was againſt reaſon, to urge him to any thing not contained in that Act. Likeas, the Sub-Vaſſalls, who in thir caſes hath recourſe to the King, are not compelled to pay the Non-entry of the King's immediat Vaſſal, and other Superiors, ought not to be put in better caſe than the King; all which was Repelled, and the Non-entries Duties ordained to be payed, before the Superior were holden to receive the Sub-Vaſſal in place of his immediat Vaſſal: But the *Lords* ordained him to prove the time of his Vaſſals deceaſe, through whoſe deceaſe he craved the Non-entry, at a Term aſſigned to that effect, without further Dyets to be granted therefore, that the Sub-Vaſſal by theſe delays be not fruſtrat of his Receipt and Entry to the Lands. Actor. *Hope*. Alter. *Nicolſon* younger. *Scot* Clerk. *Vid.* 1 *July* 1623. Capt. of *Crawfurd* contra L. *Covingtoun*.

This Deciſion in the other Page immediatly preceeding, was followed *July* 16, 1628. betwixt the Earl of *Wigton* and the Lord *Teſter*; where the *Lords* found, that the Lo: *Teſter* was not obliged to enter the Earl of *Wigton* in ſome Lands wherein he was Retoured, holden of the Lo: *Teſter*, until the time he payed all the Duties contained in his own Retour, for the Non-entry of the ſaids Lands, before payment whereof it was found the Lo. *Teſter* was not holden in Law to enter him, ſeing the Retour expreſly bears, that he ſhould do to the Superior *omne quod de Jure facere tenetur*. To which Deciſion Mr. *Alexander Gibſon* was Clerk. *Vid.* 23 *January*, 1630. *Peebles*, &c. where ſome different thing is done.

L. *Bonningtoun* contra *Crawfurd*, *Novemb:* 6. 1624.

IN an Action betwixt the L. of *Bonningtoun* and *Malcolm Crawfurd*, the *Lords* found, that albeit one of the Witneſſes who were produced by the L. of *Bonningtoun*, was within Degrees of Blood, which of Law repelled Witneſſes if the Deſcent had been from a lawful Conjunction, yet that the Witneſs might be admitted; Likeas he was admitted to bear Witneſſing, ſeing the

reckoning was from a Bastard, who of the Law is repute to be procreat *ab incerto patre*, and so not to make Consanguinity; and therefore the same was found no cause to repel the Witness; albeit it was alledged, that the being of a Bastard, took not away the ground and reason of affection. *Nam* Bartol. *dicit eos non posse recipi ob affectionem naturalem. Idem dicit Gl.* Actor. *Cunninghame.* Alter. *Belshes. Gibson* Clerk. Yet this hath been usually done.

Hope contra the Minister of *Craig-hall*, *November* 9. 1624.

IN an Action betwixt Mr. *Thomas Hope* and the Minister of *Craig-hall*, of double Poynding, for the Teinds of certain Lands of the Barony of *Craig-hall*. The *Lords* found, that a Tack Set by the Minister of *Ceres* of the Teinds controverted, which Teinds pertained to him as a part of his Benefice of the Parsonage of *Ceres*, needed not to have the Consent of the Bishop of *St. Andrews*, and of the rest of the Chapter of *St. Andrews*, of the which Chapter the Parson of *Ceres*, who is come in the place of the Provost of *Kirkhill*, one of the said Chapter, constitute by the second Act of Parliament *anno* 1617, is now one of the said Chapter; upon the which Act, the Minister, Party in this Process, and who succeeded to the Minister, Setter of the Tack, proponed this Argument of Nullity; that seing the Setter thereof, and his Successors, are by that Act appointed to be of the Chapter of *St. Andrews*, as his Consent with the rest of the Chapter, is necessary to the Deeds done by the Bishop, by the same reason the Bishops consent with the rest of his Chapter, is necessary to the Deeds done by any of the rest of the Chapter in their proper Patrimony. Which Alledgeance was Repelled by the *Lords*, and the Bishops Consent, nor any of the rest of the Chapter, was no ways found necessary to any Deed done by any person, who was made one of the Chapter of *St. Andrews*, in the things which belonged properly to that Parsons Patrimony, seing it might be, that some of the Chapter might possess a Benefice belonging to the Presentation of a Laick Patron, and so no consent would be requisite in that case, but of his own Patron; and as the Benefice might be at the Presentation of a Laick Patron or some other, and that the same was not of the Patrimony of the Bishoprick, so it might also have its own proper Chapter, as some of the Members of that Chapter appointed by that Act indeed hath, whereby the consent of their own Chapter, and no other is required. And the *Lords* found, that seing that Act of Parliament appointed only a special Chapter, whose consent was declared by the Act, to be necessary to all Deeds to be done by the Bishop, that the said Act could receive no extention to infer thereby the like necessity, to Deeds done by any Member of the Chapter, especially where the consent was not necessary, to the Deeds done by that Member, before that Act.

In this Process also, the *Lords* found, that a Tack set by an inferior beneficed person, for longer space than their Lifetimes, and five years thereafter, was not null, notwithstanding of the fourth Act of the Parliament *anno* 1617, which determinats that space to such Tacks, in respect that Act prohibites not Tacks to be Set for any longer space; which if it did simply, without any adjection of a Penalty to the same, might then infer the nullity thereof; but seing the Act hath thereto adjected a special Punishment against the Setters, who sets for any longer space than is therein permitted, the Punishment might thereby be incurred by the Contraveener, but the Tack would not fall as null, no nullity being set down in the Act against the same, especially also seing the Tack is registrat in the Registers of Session, conform to the Ordinance of that Act, in due time; which Registration was Sustained, being made in the Books of Session, seing there was then

then no other Deput appointed by the Clerk of Register for that effect, as that Act imports. Actor. *Hope*. Alter. *Stuart* & *Nicolson*. *Gibson* Clerk.

The same done again upon the 16 of *November* 1624, betwixt the same Parties. *Vid.* 14 *March* 1622. and 24 *June* 1623, L. *Drumlanrigs* Son contra *Maxwell*, anent the consent of the Chapter. *Vid.* 26 *March* 1629, Colledge of *Aberdeen* contra *Meinzies*, where the contrary would seem to be done, except that here the Provost was in use to set Tacks alone, without consent of the Bishop or his Chapter, which was not there alledged.

The Bairns of *Wallace* of *Ellerslie* contra their eldest Brother, *November* 11. 1624.

UMquhile old *Wallace* of *Ellerslie* having made a Bond in favours of his Bairns, obliging him and his Heirs to pay to each of them a certain Sum of Money, by and attour that which would fall to them by his Decease, as their Bairns part of Gear, and by and attour any Legacy, which he might leave to them in his Latter-will; upon this Bond, the said Bairns pursues their eldest Brother, as Heir to their Father, to make payment to them of the said Sums. In the which Process, the *Lords* sustained the Action at the Pursuers instance, albeit it was alledged, that the Bond was made 25 years before the Defuncts decease, during the which whole time, the Bond never became the Pursuers Evident, nor at no time during the Lifetime of the Maker, but remained still ever till he died beside himself, and since his decease was only recovered by the Pursuers, by what means it is uncertain; which alledgeance was Repelled, seing now the Bond was in the hands of the Pursuers the time of their Pursuit, as their Evident, which the *Lords* found sufficient. In this Process also, the *Lords* sustained the Pursuit against the Defender, albeit it was not year and day by-past since the decease of his Father, as was alledged should have been, before Process could have been moved against him, conform to the 76 *Act* of the 6th Parliament of *James* 4, in respect he was conveened as Heir entred to his Father, and not as lawfully charged; and also the *Lords* found no necessity, that the Pursuer should produce and instruct instantly, that he was Heir, but found it sufficient to prove the same *cum processu*. Actor. Alter. *Nicolson*. *Hay* Clerk. *Vid.* for the first part of this Decision *penult July* 1624, *Hamilton* of *Silvertounhill*. 21 *Feb.* 1628. L. *Monimusk*. *Vid.* for the last part of the Decision *penult June* 1624, *Edgar* contra *Halyday*, and the first part of that Decision.

Nasmith contra *Nasmith*, *November* 12. 1624.

IN an Action for making of Tutor-Compts, pursued by the Bairns of umquhile *John Nasmith*, Chyrurgian to his Majesty, against *James Nasmith* their Tutor. The *Lords* sustained the Pursuit at their Instances, as they were authorized by Curators given to them in *England*, where they were for the time, by the Arch-Bishop of *Canterbury*; which *Act* of Curatory, so made in *England*, the *Lords*, sustained, and found it sufficient to authorize the said Pursuit, and to authorize the Minors in pursuing of the Tutor in this Judgment in *Scotland*, for his Intromission with their Means in *Scotland*; neither found the *Lords* any necessity, whereby that the Minors should be compelled to choose again Curators, after the Laws and Form of *Scotland*, for authorizing of them in the said Pursuit, for the Goods in *Scotland*.

In this same Pursuit also, the *Lords* found, that a Procuratory being once lawfully made by a Minor, with consent of his Curators, was sufficient to give their Procurator power to do the Deeds contained in the Procuratory

curatory, after that the Minor, Granter thereof became Major, at the years of whose Majority, the Procuratory ceaseth not, nor becomes extinct, but that the same endures and lasts also after the Majority, ay and while it be Revocate and Discharged by him. Actor. *Hope & Stuart.* Alter. *Nicolson & Burnet.* Scot Clerk. *Vid.* 11 *March* 1624, *Letitia Heth.*

Wallace contra *Wallace* of *Ellerslie*, *November* 13. 1624.

IN the Action mentioned in the former Page, betwixt *Wallace* of *Ellerslie* and his Brothers. The *Lords* found the Exception Relevant, whereby it was alledged, that the Father in his own time, after the date of the Bond, had provided the Bairns, in whose favours the Bond was conceived, to als great Sums, equivalent to the Sums provided to them by the Bond; which Alledgeance bearing the said Provision, the *Lords* found sufficient, being proven, to Elied the Action upon the Bond libelled, and found that the Defender had no necessity to lay, that the said last Provision made by the Father, was given in Satisfaction of the said Bond; seing that behoved to be understood, that the Father would rather liberate himself of his preceeding Bond, than to have given the said last Provision to his Bairns, and to have the former Obligation still to stand over and above his Head, for *quisque magis præsumitur se liberare quam donare.*

In this same Process, two of the Bairns, in whose favours the Provision contained in the Bond was made, being deceas'd, before the Father Maker of the Bond, which Bond bore, *that the part provided to any of the said Bairns, who should decease without Heirs of their own Body, should accresce to the rest of the Bairns surviving*: And the said Bairns surviving having pursued for the Defuncts Bairns-part, the *Lords* found no Action for the part of the Bairns who died before their Father, notwithstanding of the foresaid Clause of the Obligation, in respect the Bond remained still in the Fathers Hands so long as he lived, so that the same could not be qualified to have come in the Hands of the Bairns, who were deceas'd, during their Lifetime, and so became never their Evident; and as that Bond would never have produced an Action to the Bairns against their Father, if they had been all living in the Fathers Lifetime, so now two of them being dead before the Father, and the Provision being appointed to them for their Help and Sustentation, themselves being dead, none of their Brethren could acclaim that part provided for their Sustentation, notwithstanding of the Clause foresaid, bearing, *that the part of the Deceasing, should accresce to the Survivers. Vid.* 4 *February* 1623, *Guild* contra *Guild.* 24 *July* 1623, *Stuart* contra *Fleming.* 25 *Feb.* 1624, Captain *Wishart.*

Chein contra *Meldrum*, *Eodem die.*

IN Actions of Spuilzie, where the Defender compears and propones an Exception, for a partial quantity of the Goods libelled *pro tanto*; the Summons being admitted to the Pursuers Probation, for the rest of the quantity not Elieded by the Exception, if the Defender succumb in Probation of the Exception, either in whole, or for any part of the quantity contained in his Exception, albeit the Pursuer prove no Super-plus, as is ordained by the Act of Litiscontestation; yet the *Lords* finds, that the Pursuer ought to have *juramentum in litem*, upon the whole quantity libelled, the benefite whereof becomes competent to him, by reason of the Defenders succumbing to prove any part of the quantity, whereupon he excepted; the proponing whereof, is a confession of the Libel, and having succumbed, produceth that same effect, as if the Pursuer had proven that quantity, whereupon the Defender excepted; and which is not proven by him,

in

in which case of Probation of any quantity, *Juramentum in litem* is not refused. This was done this day, in an Action of Spulzie pursued by *Cheyn* against *Andrew Meldrum*, which appears to have some doubt, seing the succumbing in an Exception, should import no more but *Condemnator* in that which the Exception Eleids; and seing it Eleids but that part, it ought only to produce Sentence for that, for which it is proponed, and cannot be further extended, even as if he had proven it *pro tanto*, he would had no more Absolvitor, but from that for which it was proponed, although the Probation would have Eleided the whole Libel, if it had been so Alledged. *Scot* Clerk.

Hope contra Minister of *Craig-hall*, *Novemb*: 16. 1624.

IN the above-mentioned Action of Mr. *Thomas Hope*, whereof mention is made 9 *Novemb.* 1624. The *Lords* found a Procuratory of Resignation subscribed by the Provost and his Prebendars, of a part of his Benefice; which Prebendars dwelt in divers parts of the Countrey, so that their Subscriptions could not be had at one time, and therefore the Procuratory behoved to be of divers dates, as the same was subscribed by the Prebendars, albeit the Instrument of Dimission following the said Procuratory, was of a date anterior to some of the dates of the Procuratory, *viz.* before the time that some of the Prebendars Subscribed the same, yet that the Procuratory & Dimission foresaid was sufficient, seing it is the frequent custom to take consent of Prebendars, or of Chapter, or Convent, at any time, to deeds done by the Prelat, and after the date of the Principals Subscription; albeit it might appear, that seing the Prebendars consent was necessary to the Procuratory, without which it could not be a perfect Act; therefore while the same was made perfect by all the Subscriptions necessar, the Instrument of Dimission, which could not be valid without warrand of the Procuratory preceeding, ought to have been made, after the Procuratry was a compleat and perfect Evident, which could not be, until it was Subscribed by all the Prebendars requisite thereto. The Parties compearing, as is there marked. *Vid:* 23 *January*, 1624. *Black.*

Troup contra Lo. *Herries*, *Eodem die.*

IN an Action betwixt *Troup* and Lo. *Herries*, a Horning was sustained, whereupon *Troup* sought Declarator against the Lord *Herries* of his Escheat, albeit the same was quarrelled as null, being only Execute upon general Letters, raised upon a Prebendars Decreet of general Letters conform; which alledgance was repelled, and the Horning found good, albeit the same proceeded upon general Letters, and Decreet of Letters conform generally, not bearing any special quantity, by reason that there was a special Charge given to the Party Denounced, to pay a special and certain particular quantity, contained in a special Execution of the general Letters; in respect of the which special Charge, the Horning was found good, notwithstanding that the Charger had no special warrand by his Letters or Decreet, to charge the Party for that special quantity: And notwithstanding of the Act of Parliament, *viz.* 140 *Act*, 12 *Parl: Anno* 1592. which requires, that there should be a Warrand for a special Charge, otherways allows not of Horning; for the *Lords* thought that the Parties charged for a special quantity, ought to Suspend; otherways if he do not, the Horning ought not to be found null. Actor. *Nicolson.* Alter. *Belshes.* *Scot* Clerk. *Vid:* 6 *Decemb:* 1626. *Jamison*, 22 *Feb:* 1627. L. *Aitkin.*

L. *Lagg* contra his Tennents, *Novemb*: 18. 1624.

IN a Removing at the instance of the L. *Lagg*, contra his Tennents; The *Lords* found an exception proponed by one of the Defenders, upon an

Heretable Infeftment granted to him of the Lands Libelled, clad with 40 years poſſeſſion continually without interruption, not ſufficient to defend the Excipient in that Judgment of Removing, except the Defender alledged by whom he was Infeft, and that his Author had power to grant him that Infeftment; and ſo the Defender was forced to diſpute upon the validity of his Authors Right, in that Judgment Poſſeſſor, without any Reduction. Actor. *Cunninghame & Belſhes.* Alter. *Gibſon* Clerk. *Vid:* 18 *July*, 1626. La. *Glengarnoch.* 17 *Feb:* 1627. *Wilſon.* 19 *Novem:* betwixt thir Parties.

Wallace contra *Walker*, *Eodem die.*

THe *Lords* ſuſtained a Regiſtration of an Obligation at the inſtance of the Relict of the Husband, after the Husbands deceaſe, being done by conſent of Procurators; but it was ſo found, becauſe the Sum was ſmall, *viz.* 100 Merks, and the Relict was a poor Woman, and alſo becauſe ſhe was Executrix Confirmed to her Husband, and the Debt Libelled Confirmed in his Teſtament. The Parties were *Wallace* contra *Walker*. *Gibſon* Clerk.

Kincaid contra *Haliburton*, *Eodem die.*

IN an Action betwixt Doctor *Kincaid* and *James Haliburton*, for Redemption of ſome Lands Compriſed from Mr. *Robert Monro* by the ſaid *James Haliburton*, and which Dr. *Kincaid* deſired the Lands to be Redeemed at his inſtance from the ſaid *James*, as having right to the Legal Reverſion, by reaſon of a Compriſing deduced at his inſtance. In this Action one *Monro* compeared, who had alſo Compriſed the ſame Lands, but after *James Haliburton* and Dr. *Kincaid*, and alledged that Dr. *Kincaids* Compriſing was null, and ſo could not produce this Action of Redemption at his inſtance, ſeing thereby he could not be found to have Right to *James Haliburtons* Legal Reverſion of his Compriſing, in reſpect that the ſaid Purſuer had Denounced the Land to be Compriſed before *James Haliburton*, ſo that at the time of his Denounciation there was not a Legal Reverſion, nor no Right thereof then extant, there being then no other Denounciation nor Compriſing uſed before the Purſuers Denounciation, which might make any Legal to have been extant. Which alledgance was Repelled; for the *Lords* found, albeit the Purſuer was the firſt Denouncer of the Lands to be Appriſed, and that *James Haliburton* Denounced after him, which *James Haliburton* had Compriſed before the Purſuer; yet ſeing under the firſt Compriſing, albeit ſecond in Denounciation, the Property of the Land was comprehended, and ſo thereby *James Haliburton* ought to be preferred to Doctor *Kincaid*, who had Compriſed after him, albeit he had Denounced before him, that the Right of the Legal Reverſion, which was, or might have been competent to *Monro* the common Debitor, againſt whom all the Compriſings were deduced, fell under Doctor *Kincaids* Compriſing; albeit it was alledged, that it could not fall under the ſame; ſeing it was alledged, that nothing could fall under the Compriſing, but that which could be comprehended under his Denounciation; and at the Denounciation there was no Legal extant, which was repelled, as ſaid is; becauſe the *Lords* found, that the ſecond Compriſing, albeit proceeding upon the firſt Denounciation, ought to extend to all Right, which at the time of the ſaid ſecond Compriſing was inherent in the perſon of him, from whom the Compriſing was deduced, and conſequently to the ſaid Legal Reverſion; and therefore the *Lords* preferred him to the ſaid third Compriſer, who claimed to be preferred to the Doctor, the ſecond Compriſer foreſaid, by reaſon he alledged, as ſaid is, that the

the Legal fell only under his Compriſing, ſeing he had Denounced when the Legal was extant, *viz.* after *Haliburtons* Compriſing was compleat, and perfected; and that *Kincaids* Compriſing, proceeding upon a Denounciation, which could not extend to a Legal, which was not then in *rerum natura*, the Compriſing therefore could not extend thereto, which followed upon that Denounciation; which alledgance was repelled, as ſaid is. Yet the contrair of this was found *in terminis*, in an Action betwixt *Malloch* and *Murray* contra *Weir*, in *July* 1620. But the *Lords* found this laſt Deciſion moſt juſt, and would hereafter ſo Decide therein. Actor. *Hope* & *Lawtie*. Alter. *Nicolſon* & *Belſhes*. *Gibſon* Clerk.

It is a common opinion where Compriſings are deduced for Sums, whereof a part is payed before the Compriſing, that the Compriſing falls *in totum*, and will not ſubſiſt for the reſt of the Sums, which are truly owing; and this was found in the Action betwixt *Lamb* and *Blackburn*, and L. *Smeiton*, *Anno* 1620. or about that time; but there are many who doubts of the equity of that opinion, and thinks it no reaſon, that the Compriſing ſhould fall for the Sums which are truly owing, no more than Horning and Poynding, or Arreſtment, if they be execute for more than is owing, will not cauſe the whole Execution to fall, but only for ſo much as is not a juſt Debt; and a Decreet obtained for more than is due Debt, will not make the Sentence to fall *in totum*: And this hath warrand alſo from the Civil Law *de plus petitionibus*. But the reaſon of the common opinion is, for the fraud of the Compriſer, to Appriſe for that which he knows to be wrong, and his Fraud is therein puniſhed; but where there is no appearance or ſuſpition of Fraud, there the Law admits place of excuſe, *nam poteſt exiſtimari Inique judicaſſe, qui reum omnino abſolverit, cum conſtaret & probatum ſit, eum partem debere.*

L. *Lagg* contra his Tennents, *Novem.* 19. 1624.

IN an Action betwixt the L. of *Lagg* and his Tennents, the *Lords* ſuſtained a Removing purſued at *Lagg's* inſtance, for removing from Lands, upon a Seaſin given to him of the Superiority only of theſe Lands; which Seaſin of the naked Superiority, they found to be a ſufficient Title to the Purſuer for producing Removing thereupon at his inſtance, from the Property of the ſame Lands, againſt any who could not alledge an Heretable Right of Property, or ſome other Right, whereby they might maintain themſelves in the poſſeſſion of the ſaids Lands; and which the *Lords* found, albeit the Defenders alledged, that there was no neceſſity to clothe themſelves with any Right, until the time that they were deſired to remove, by one who had Right to the Property, ſeing they excluded this Purſuers Title, which being *per expreſſum* only of the Superiority, preſumed neceſſarly that there was another Proprietar, in whoſe perſon the right to remove only behoved to ſubſiſt; which alledgance was Repelled, as ſaid is. *Partibus comparentibus*, as is marked 18 *Novemb.* 1624. *Vid: infra* 20 *November*, betwixt the ſame Parties.

Ramſay contra *Hay*, *Eodem die.*

IN a Suſpenſion of charges raiſed upon a Decreet-Arbitral, at the Inſtance of one *Ramſay* contra *Hay*. The *Lords* found the Submiſſion and Decreet Arbitral null, in the ſame Suſpenſion ſummarly without Reduction; becauſe the Submiſſion was for the Right of Tutory of a Minor betwixt two Tutors: the one Alledging himſelf to be Tutor Lawful, and the other Teſtamentary, which Right was ſubmitted by them, & what ſatisfaction either of them ſhould do to others for their Rights, which the *Lords* found was not lawful to ſubmit: And ſicklike they found the Decreet null, becauſe the

Judges had decerned the one Tutor to give to the other, for giving over of his Right, some of the Defuncts Gear, which pertained to the Minors, whose Tutory was controverted; and so it was not lawful to give away the Goods pertaining to the Pupils, for acquiring of the said Right of Tutory, by any of them; seing thereby the Pupils were evidently damnified. Actor. *Lermonth.* Alter. *Gibson* Clerk.

L. *Lagg*, contra his Tennents, *Novem.* 20, 1624.

IN this aforesaid Action of the Laird of *Lagg*, and his Tennents; The *Lords* found, that the Denounciation of Lands to be Compriſed, being done and made before the Term of *Whitsunday*, was not a sufficient ground, whereupon warning to Remove from these Lands Denounced might be made, except also that upon the Denounciation Compriſing had followed, and were exped before the warning: And that it was not enough that the Denounciation preceeded the time of the warning: And that the Compriſing thereafter followed thereupon, albeit the said Compriſing was exped before the Term, if it was not also exped before the time of the making of the warning; before the which warning The *Lords* found that there could be no right to warn, except the Compriſing had been deduced before he made the warning: And the *Lords* are in use to find, that it is a sufficient title in a Removing, a Seasin proceeding upon a Compriſing, which is dated after the Term of *Whitsunday*, to the which the warning is made, where the Compriſing, upon which the Seasin depends, preceeds the time of the warning.

In this Proceſs also the *Lords* found, that any Seasin taken by any Compriſer ought to be a sufficient Title, albeit the party from whom the Compriſing was deduced, was deceist before the Seasin was given to him, who Compriſed; for the Compriſing denuded him, from whom the Lands were Appriſed, so that it was lawful to him who compriſed *quocunque tempore*, to take Seasin thereupon, as well after the decease of him, from whom the Lands were Compriſed as before. *Vid. Jan.* 20 1625. *Elphingstoun. Vid.* for this last part. *penult July* 1625. *Guthrie. March* 22, 1626. *Collace.* 23. & 27. *Jan.* & 3. *Feb.* 1624. *Stevinson, Decemb.* 20, 1626. *Hamilton* of *Blair. Decem.* 6, 1622. *Milburne. penult July* 1624. *Foulwood.*

Forsyth, contra L. *Smeiton*, *Eodem die.*

IN an Action betwixt *Marion Forsyth*, and L. *Smeiton*. The *Lords* found, a Compriſing sufficient, whereby two Lands being Compriſed upon two Denounciations, made at two several times, to wit, a Denounciation for the one Land, done at one time after searching for poyndable goods, was used first upon the ground of that Land; & the other Denounciation made for the other Lands, after searching was made upon the ground of that other Land Denounced: which searching at the second Land Denounced, being made after the Denounciation of the first Land, the Defender alledged, rendered the Compriſing altogether null, seing he alledged, that the searching ought to have been made upon all the Lands compriſed, and every one of them, before Denounciation could be made, for Compriſing of any of the Lands; and that he alledged, that it was not sufficient, that the searching preceeded the denounciation of each several Land, but there behoved to have been searching at all the Lands, before any Denounciation could be made at all, of any Land, which alledgance was Repelled, and the Compriſing sustained; for it was found sufficient, that the searching preceeded each Denounciation. *Vid. penult July* 1623, Mr. *Thomas Nicolson.*

Turnbul

Turnbul contra *Ker* of *Cavers*, *Novemb.* 24, 1624.

IN an Action of Spulzie at the Instance of *Turnbul* of *Syminton*, against *Ker* of *Cavers*, for Spulziation of certain Kine and Oxen, which was restricted to wrongous Intromission. The *Lords* found an Exception proponed for the Defender, Relevant to Eleid the Action, founded upon a poynding from the Laird of *Baldrule*, the Defenders Debitor, of the Goods libelled, off his ground: And that the saids Goods were in the Laird of *Baldrules* possession, divers years before the poynding; And at that time used by him as his Goods, by working of them, and milking of the Kine, and that the young Goods were bred upon the saids Lands, being the increase of the said old Goods. This Exception was found Relevant, albeit it was both specially Libelled, and also Replyed by the Pursuer, that the Goods lybelled properly belonged to himself, and were bred by him upon his own proper Lands of *Symintoun*, and there used by him at his pleasure, and thereafter the same was put by him in Grasing to *Baldrule*, upon the Lands libelled, out of the which the same were alledged to be taken & poynded, upon condition that the Laird of *Baldrule* should have for the grasing thereof the Milk and the first Calf: Likeas diverse others of the young Breeding of the saids Goods was received by the pursuer, and also how soon he heard of the poynding, *viz.* within a day or two thereafter, he offered to make Faith, that the Goods were his own: Which Reply was not respected, but the Exception sustained, seing the *Lords* found, that the Goods remaining diverse years together in the Possession of any person, who keeped them upon his own Ground and Milked and used them, and the Increase thereof all this time as his own proper Goods, the Creditors of such Possessors might lawfully Poynd them, as the Goods of their Debitors, who had keeped them in their Possession, as their own Goods diverse years together: And so this Presumptive qualification of Property, consisting in the retention of Possession sundry years, was preferred to the Pursuers offering to prove himself the only true owner of the Goods, as being bred upon his own Heretage, and sent only in grasing to that Person, who is alledged to be the Defenders Debitor; which Reply was not found Relevant, seing the Pursuer could not qualifie real Possession of the Goods, by the space of two years preceeding the Spulzie, albeit he Alledged the Propertie of the same to be truely his.

In this Process also, The *Lords* were of the mind, albeit it past not into Interloquitor, That Steelbow Goods being delivered by the Master to his Tennent at the Setting of any Room, after the manner of Setting with Steelbow, might be poynded by the Tennents Creditor for the Tennents Debt, and that the Master would have only Action against the Tennents for the Steelbow, at the time appointed, for delivery thereof, in respect the Steelbow Goods, being either Corn or Cattel, became the Tennents, seing every year they were changed, and the first which were delivered to the Tennent by the Master, could not probably be extant, in respect of the alteration by the course of years, which alteration made the same to become absolutely the Tennents own, and subject to his Debt. Actor *Hart*. Alter *Belshes*. *Gibson* Clerk. *Vid. June* 17, 1625. *Brown*. & *Decemb.* 6. 1628. *Lawson*.

Ramsay contra his *Curators*, *Novem.* 25, 1624.

IN an Action of Reduction, pursued by one *Ramsay* of *Dundie* against her Curators, for reducing of an Act of Curatory upon this reason *viz.* Because the Curators were chosen by her within the time of her Tutorie, she having lawful Tutors for the time, and the years of her Tutory not being fully expyred, when she choised the saids Curators. The *Lords* found this reason Relevant, and reduced the Act of Curatory, albeit it was alledged, that

the reason was not Relevant, to reduce the said Act; And to remove the Curators voluntarly Chosen by her self, within a moneth or two only before the age of Pupullarity, specially where this was neither fraud of the Curators, nor wrong, or negligence qualified against them, and without the which, or that the Minor had been prejudged or hurt, in some sort by the said Election; albeit the same was done in so short a space, only before the time of Law appointed for choising of Curators, and being once chosen and doing their duty, ought not to be *Removed*, no Suspition being able to be qualified against them; which alledgance was Repelled, and the Reason nakedly Conceived, bearing only that Curators were given before the full Expiring of the years of Tutory, without any other qualification, was sustained and found Relevant to reduce; And when the Curators Defenders desired to be repayed of the necessar Expence depursed by them, profitably in the Pursuers affairs, since the time of their accepting to be Curators, which they Alledged ought to be Repayed to them, before they were removed from their Office, and that they ought not to be put to any new Pursuit therefore. This was also *Repelled* in this Process, seing the Minor not being lawfully Authorized, could not be holden now to Answer thereto, while new Curators were chosen, who might defend her, and reserved to them their Action to Pursue therefore, *prout de Jure*. Actor *Rollock*, Alter. *Russel*. *Gibson* Clerk *Vid. Decem.* 5. 1627. *Rollock*.

Bisset contra *Bisset*, *Eodem die*.

John Bisset Executor to *George Bisset*, pursues Mr. *Robert Bisset*, Son natural to the said *George*, for delivery to him of a Discharge of eight Chalders of Victual yearly, which the said umquhile *George* in the said Mr. *Roberts* Contract of Marriage, was obliged to pay yearly to him, during the said *Georges* Lifetime, and which Victual, the said Pursuer affirmed in his Summons, was payed by the Defunct, to the said Defender, all these years, for the which the Pursuer, as Executor to the Defunct craved the said Discharge. It being alledged by the Defender, that the payment of the Victuall yearly, as was Lybelled, ought to be proven by Writ, or Oath of Party, and was not probable by Witnesses, in respect it was a Matter of great Importance, and tended to evacuat and destroy the Condition of Payment, obliged in a Contract of Marriage, which cannot be taken away, but after such manner, as it is obliged. The *Lords* Repelled the Alledgance, and found that it might be proven by Witnesses, seing it was the delivery of Victual, and it was not necessary, to prove the delivery thereof by Writ, or Oath of Party.

The same Executor pursuing in another Summons, the same Defender, for intrometting with 2000 Merks of Money of the Defuncts, after the Defuncts decease. The *Lords* found, that he ought to prove that Intromission either by Writ, or Oath of the Defender, and would not admit the same to be proven by Witnesses. Actor. *Burnet*. Alter. *M^cgill. Scot* Clerk. *Vid. July* 15. 1624. *Nisbet* contra *Short*, *November* 26. 1624. *Job* contra *Ker*.

The like *de novo* was found betwixt *Ker* and *Robison*, in a Matter of 200. Pounds, whereto *Scot* was Clerk, *viz.* that it should not be proven by Witnesses. Likeas in an Action pursued by *Claud Hamilton*, as Executor to a Defunct against *Hamilton*, for his Intromission with Money, lying beside the Defunct; and with his Corns and Bestial. The *Lords* found, that the Intromission might be proven by Witnesses, but that the Quantity, so far as concerned the Money, should only be proven by his Oath. *March.* 1626.

Tennents

Tennents against *Craufurd*, &c. *Eodem die.*

IN a double Poynding pursued by certain Tennents against *Craufurd* and *Fleming*, the one being Heretor of the Lands, who had obtained Decreet against the Tennents Suspenders, for payment of the Duties of the Lands to him as Heretor; the other being Lady Tercer *Served* and *Kenned*. The *Lords* found, that notwithstanding of the Heretors Decreet, the Lady Tercer ought to be answered of her Terce of the Duties of the said Lands; and that not only of these years subsequent to her Service, and Kenning, but also of all years preceeding her Kenning and Service, from the time of the decease of her Husband: to the time of whose decease, The *Lords* found, as in all the like Cases, that the Service ought to be drawn back; and that so she ought to be answered of all the years bygone foresaids, especially seing the Farms are yet extant in the Tennents hands, un-uplifted Actor. *Lawty.* Alter. *Aiton, Gibson* Clerk. *Vid, November ult.* 1627. Tennents *East-houses.*

Hamilton contra *Matheson, Eodem die.*

IN an Action betwixt *Hamilton* contra *Matheson* and others, for Reducing of a Contract of Alienation of Lands, and of diverse subsequent Securities, of the saids Lands, made to subaltern Persons *in consequentiam*, as depending upon that Contract. The *Lords* found, that one of the Defenders being Minor, whose Father had acquired a subaltern Right of a part of the saids Lands, disponed by the said Principal Contract, which was principally quarrelled, and being Heretably Infeft, in a Part thereof, ought not to be compelled to disput upon her Heretage, in her Minority; albeit it was Replyed by the Pursuer, that seing her Right was not Principally nor Originally quarrelled, but only was a Dependence upon a Contract made betwixt other Parties; and which Contract was only drawn in question upon nullity, that therefore her Minority could not hinder the course of the Process, for annulling of that Contract, wherein she, nor her Father were not Parties, they having only acquired a subaltern Right, as said is, from the Party Contracter, against the which principal Contracter the Action was also pursued; which Reply was not Respected. For the *Lords* found, that a Minor ought not to Dispute upon Heretage, whether they had Right thereof Originally, which was Controverted, or if the same depended upon an other Original, and so would fall *in consequentiam*, in neither of which Cases, The *Lords* found, that the Minor ought to Disput her Right

In this Action, notwithstanding of the Minors excuse foresaid, for her part of the Land, yet Process was sustained against the rest of the Defenders, who were Majors, for the remanent of the Land, whereto the Minor had no Right, albeit it was Alledged by the Defender, that *propter continentiam causæ*, Process ought to stay for the whole Land, during the Minority foresaid, in respect that it was Alledged, that if the Cause should decide against the rest of the Defenders, that Decision would Militat thereafter against the Minor, when she should be conveened in her Majority; So that the admitting of her Minority, now to stay Process against her self, would not be profitable to her thereafter; and seing the Subject Controverted, was only a Contract, which was a Body of a Writ, and could not be divided, the same ought not to be reasoned, betwixt any other Parties, but ought to cease for them all, which Alledgance was Repelled, and Process found against the Majors, seing the Minor had gotten the benefit of the Law, by staying of Process against her, which ought not to hinder the Course of Law against Majors; But it is to be considered, that Minors being in Ward, and during their Ward called to warrand any Deed, which otherways they are obliged to war-

rand, are not holden to answer during the time of their Ward, before their perfect Age, which Priviledge, for that space also, exeems the Cautioners Sons, who are Majors, for the conjunction of the Cause, and is marked in my Notes out of *Craig*, 2. *lib. Feud. fol.* 155. Actor. *Nicolson* & *Stuart:* Alter. *Hope* & *Oliphant: Gibson* Clerk. *Vid. June* 23. 1625. *Pringle* contra E. *Hume*, & *July* 14. 1626. *John Stuart.*

Johnston contra *Roreson, November* 26. 1624.

IN an Action betwixt *Johnston* and *Roreson*, for payment of a yearly Duty, conform to the Defenders promise made to the Pursuer. The *Lords* found the promise null, and ineffectual, to produce any Action against the Maker, because it was a promise made by the Defender, to an interposit Person, to the behove, and in favours of the Wife, during the time of their Marriage; and so was not Obligator, albeit it was Replyed, that the promise ought to be maintained, seing howsoever it was made *stante matrimonio*, by the Husband, to the behove of the Wife; yet since the making thereof, Divorcement had followed; since which Divorcement, and also before the Divorcement, the Promise had taken effect, by payment making of the yearly Duty promised diverse years, both before, and since they were Divorced, notwithstanding whereof the Promise was found not Obligatory. Actor. *Mcgill:* Alter. *Cunninghame. Gibson* Clerk. *Vid. January* 9. 1623. *Marshell. January* 11, 1625. *Hamiltons* Inhibition, *Decemb.* 21. 1626. La. *Foulis.*

Job contra *Ker, Eodem die.*

IN an Action of Spulzie, pursued by *Job*, contra *Ker*, an Exception of Poynding being proponed, to Elide the Spulzie, for a Terms Duty, adebted to the Excipient, by the Pursuer, which he was obliged to take, to pay to him. And it being Replyed, that the Poynding for that Term, could not Elide the Spulzie, seing the Defender placed in other Tennents in the Land that Year, for the which the Poynding is used; which Tennents so placed, and in-put by himself, laboured the Ground that Year, and the Pursuer left the same, and removed therefrom before, so that he could not be Debitor in that years Duty. This Reply was only found Relevant, to be proven by writ, or Oath of Party, seing it tended to prove payment of a Duty, contained in a written Tack, and so to make the Tack and Poynding thereupon ineffectuall; and would not admit the same to be proven, *per testes omni exceptione majores*, as the Pursuer offered. *Hay* Clerk. *Vid. Novem.* 25. 1624 *Bisset* contra *Biset*, & *Feb.* 26. 1631. L. *Garthland*, where none may poynd their own Ground.

Maxwell contra *November* 27, 1624.

IN an Action of Removing pursued by *Maxwell* of *Portrak* contra The *Lords* found, that a Seasin of the Lands Lybelled (being of old Kirk-Lands, of the Abbacy of *Melross*, now Erected in a Temporal Lordship) which Seasin given to the Pursuer, proceeded upon the Earl of *Melross*, who was Lord of the Erection, his Precept of *Clare Constat*, was a sufficient Title to produce this Action to the Pursuer, notwithstanding that it was alledged, that the same was null, being of Kirk-Lands, not Confirmed; Which Alledgance was Repelled, and found, that there was no necessity to Reply upon Confirmation, seing if there was no Confirmation, then the Right of the Lands pertained to the Lord of Erection, who, by the said Precept of *Clare Constat*, was denuded; and he opponed not that nullity, and so the Right was sustained, without necessity of Confirmation,

specially

specially against the Excipient, who alledged no Right in his *Person*, of the Lands Lybelled; and which the Excipient contended, he had no necessity to alledge, seing it was sufficient to him, to exclude the Pursuers Title, upon a nullity statuted by Law, and which was not Elided, by the Precept of *Clare Constat* granted by the Lord of Erection, who has not given to the Pursuer his Right to the Lands, by any Original Security flowing immediatly from him, but only has received the Pursuer, by a Precept of *Clare Constat*, as Heir to his Fore-bears, which of necessity requires, that his Fore-bears should have had a Lawful Right; and so the Defender alledged, he might oppone against the Lawfulness of that Right, in respect of the said defect; Which Alledgance was Repelled. Actor. *Cunninghame*, Alter. *Scot* Clerk.

Baxter in *Leith* contra *Mackeson*, *Eodem die*.

IN an Action pursued by a Baxter of *Leith*, against *Henry Mackeson*, for payment of the Price of Bread furnished to his House, by the space of one Year, and received by the Defenders Daughter, from the Pursuer, extending to an hundred Pounds. The *Lords* found, that this Action, and the like, ought not to be sustained, in respect of the danger which might ensue thereupon, *viz.* That Masters might be conveened, if this were sustained, for many years furnishing, either taken on by their Servants, or Bairns without any Warrand, or Direction; or when the Master might have given to his Servants, or others, who had the Charge of Provision of his House, full Satisfaction to do the same; which Payment, if the saids Servants should bestow otherwise, than for satisfying of these, who had made the Furnishing, it were against Reason, that the Master should be conveened therefore, except that the Master himself had directed the Furnishers to Furnish his House, and to answer his Servants; In which case, if he so commanded, then he ought also to have seen the Furnishers payed; but there being no Direction given by the Master, to these, who made any Furnishing. The *Lords* would not sustain any such Pursuit moved against them, albeit it was alledged in this Action, that the Daughter, who had received the Bread Furnished, was in use divers years before, to receive and take, for the Defenders House, the whole Furnishing, and Provision thereto, both in Bread from the Pursuers, and other necessaries thereto, from diverse other Persons; Likeas he Replyed, that he offered herewith also to prove, that the whole Bread Lybelled, was really received within the Defenders House, and applyed to his own use, which was not respected, nor the Action sustained. Actor. *Craig*. Alter. *Hope*. *Gibson* Clerk. *Vid. June* 21. 1634. Sir *James Hamilton*.

Hamilton contra her Husband, *January* 11. 1625.

AN Inhibition being sought by a Woman called *Hamilton*, upon her Contract of Marriage against her Husband, that he should not Annailzie in prejudice of the Provision, conditioned to her by him, by the said Contract of Marriage, this Inhibition craved by her Supplication was refused, because the *Lords* thought that no such Inhibitions, nor no Action could be sustained betwixt Man and Wife, while the Marriage stands. *Vid. January* 9. 1623, *Marshell*: *Novem.* 26. 1624. *Johnston*: *July* 13. 1638. La. *Glenbervy*.

Mc Mitchell contra *Mcquharg*, *January* 13. 1625.

IN an Action betwixt *Mc Mitchell* and *Mcquharg*, where two Executors of a Defunct were conveened, for payment of a Sum of Money, left by the Defunct to the Pursuer. The *Lords* found, that where there is moe

Executors to a Defunct than one, that any one of them cannot be conveened by the Defuncts Creditors *in solidum*, for the whole Debt owing by the Defunct; But that they ought all to be conveened, ilk one proportionally, for their own Parts, according as they are in number, except that where there is one of moe only conveened, that that one conveened, had intrometted with als much of the Defuncts Goods, as would pay the whole Debt acclaimed, without Defalcation compleatly. Actor. *Nicolson* & *Mowat*, Alter. *Lawtie* & *Hope*. *Gibson* Clerk: *Vid. July* 23: 1625. *Aitkin* contra *Ewart*: *July* 18. 1628. *Peacock*.

Lo. *Duffus* contra *Monroes*, *Eodem die*.

IN an Action of Ejection, for a Salmond-fishing, pursued at the Instance of the Lo. *Duffus*, against *Monroes*, and for payment of the Profites since the Ejection, the Summons being proven, and the special Quantity of the Profits of the Fishing, being also clearly proven. The *Lords*, nevertheless, before they would decern for that special Quantity, which was proven; And albeit the Defenders were likewise holden as Confest, for not giving their Oaths *de calumnia*, yet at the advising of the Process, found that the Pursuer ought to give his Oath *de Credulitate*, upon the Quantity of the Profits, and would not pronounce Sentence thereupon, untill the time he by his Oath foresaid deponed, that the Profits extended to the Quantity, for the which the Summons was proven; and this was found, albeit no Party Defender compeared in the Cause. Actor. *Belshes*. Alter. absent. *Gibson* Clerk. *Vid. June* 28. 1623. Lo. *Blantyre*: *Feb.* 28. 1624. *Gladestons* contra *Hamilton*: *January* 26. 1628. L. *Drum*.

Lo. *Kilsyth* contra *Balfour*, *January* 14. 1625.

IN an Action of Double Poynding, at the Instance of the Lord *Kilsyth*, who was Debitor to *David Lennox* in 500 Merks, conform to his Bond, for the which he was Charged, at the Instance of *Robert Balfour*, as Assigney made thereto, by the said *David Lennox*, and which Assignation was Intimate upon the 18 day of *June* 1623. And which Charges were Suspended by the Lord *Kilsyth*, upon Double Poynding, as being distrest therefore, on the one part, by the Assigney, and as being distressed on the second part, by *John Abernethy* in *Glasgow*, who had Arrested the Money in the Lord *Kilsyth's* hands, to be made forth-command to him, for satisfying of a Debt owing to *Abernethy* by *Lennox*; and that his Arrestment was Execute the same 18. *June*, 1623. Which is the very day of *Balfours* Intimation of his Assignation. The *Lords* preferred the Assigney to the Arrester, because the Arrestment being made, the said 18 *June*, 1623. no further Diligence was done by the Arrester sensine, whereas the Assigney upon his Bond, Assignation and Intimation, had raised Charges of Horning, and being drawn in Question, and desired to be discussed in this Suspension, and Double Poynding, he could do no more exact Diligence; the other Party never having raised any Charge, or Summons sensine, to make the Money furth-coming to him, upon his Arrestment, which naked Arrestment the *Lords* respected not. Actor. *per se*. *Gibson* Clerk. *Vid. January* 26. 1625. *Andrew Couper*: *January* 28. 1625. Lo. *Kilsyth*: *February* 14. 1623. L. *Saltcoats*.

Stuart contra *Main*, *January* 15. 1625.

IN an Action betwixt Mr. *Lewis Stuart* contra *Main* and *Smith*. The *Lords* found, that Corns growing upon any Ground, Set by the Master of the Ground to a Tennent, where the said Corns after the Shearing are transported off the Ground whereon they grew, to another Ground, are not

not Hypothecat to the Master for that years Farm, by any priviledge or prerogative of Prelation, which might make the Master to be preferred to any other Creditor of that Farmorer, in case any other Creditor do greater Diligence by Pounding, or Arresting, or otherways than the Master of the Ground doeth; but that in such Cases where the Corns are off the Ground whereon they grew, the Master for his Farms hath no priviledge nor preference to another common Creditor, except for so much as he may claim by any more timely and lawful Diligence done by him, than by another Creditor, albeit the Question be moved for that years Farms and Corns of that same Cropt; for the prerogative granted to the Master of the Ground, is only competent and sustained, when the Corns of that Cropt are standing upon the Ground of the Lands, whereon they grew, and for the which the Farms are addebted to the Master. Actor. *Craig.* Alter. *Stuart* & *Cheap.* *Gibson* Clerk.

This Decision was immediatly stayed, and no Interloquitor past thereupon, and that Matter ended by Submission; but the contrary is decided betwixt *Hay* and *Keith*, 25 *July* 1623. and 3 *Feb.* 1624. and *ult. March* 1624, Sir *John Carnegie*.

Watt contra *Dobie*, *January* 18. 1625.

IN an Action betwixt *Watt* and *Dobie*, for Registration of an Obligation, made by umquhile Sir *Robert Dobie*, whereby he was oblig'd to pay to one *Watt* a Sum of Money at a Term, and failzieing of *Watt* by Decease, to pay the same to another person designed in the Bond, and to his Heirs, with ten for each hundred for the Annual thereof, so long as it should be unpayed; which Bond being desired to be Registrat at the instance of that second person, mentioned in the Bond, the first person being deceas'd: The *Lords* sustained the Action at his instance, and found, that the right of the Bond, and Sum therein contained, pertained to him; albeit it was alledged for the Defender, that seing the first person in the Bond, lived after the Term of Payment appointed by the Bond, and that the destination of the second person therein-contained, depended only, and would have taken effect only, in case the first person had died before the Term appointed by the Bond, for payment of the Sum, who living thereafter, the right of the Sum ought to appertain to his Heirs or Executors, and not to the alledged second person substitute in the Bond, who now pursues. Which alledgeance was Repelled by the *Lords*, and the Sum found to appertain to the person substitute, as said is. *Scot* Clerk. *Vid.* 21 *Decemb.* 1626, Executors of *James Brown*. 15 *January* 1630, *Thomson*. 26 *June* 1634, *Keith*. 18 *July* 1626, L. *Tulliallan*.

This Decision appears to be direct contrary to the Decision in the Action betwixt Mr. *John Leith* and L. *Balnamoon*, whereof mention is made 22 *February* 1623.

Elphingston contra *Guthrie*, *January* 20. 1625.

IN an Action of Removing pursued by *Elphingston* of *Selms* against *Bethia Guthrie*. The *Lords* found the Seasin produced by the Pursuer for his Title, not to be a sufficient Right whereupon to seek Removing upon that Warning and Title, because the Seasin was given by vertue of a Precept of *Clare Constat* of the Superiors, which Precept and Seasin were both after the Term, before the which the Warning was made, so that he neither being Seased before the Term, nor obtaining the Precept before the same, he had no right in his person to Warn; and albeit the Seasin was given to him, conform to the Precept foresaid of *Clare Constat*, as Heir to his Brother,

and to thereby the Pursuer Replyed, that the Right which was in his Brothers person, and whose Seasin of the Lands he produced, was transmitted in the person of the Pursuer as his Heir of Blood, and so that the same should be drawn back to the time of his Brothers decease. This was not respected, but Repelled, because the Precept of *Clare Constat*, which was the Ground of the Seasin, would never make the Pursuer Heir to his Brother, valuably to prove him Heir to him *activè*, albeit it was enough to prove against him *passivè*; for albeit the Seasin, by vertue of the Precept of *Clare Constat*, might be enough to maintain the person so Infeft in Possession of the Lands, or to give him Action against any, who had Right flowing from that Author; yet the *Lords* found, that such Seasins will not furnish Actions to them for any other thing, which they might seek *activè*, as Heirs thereby to their Predecessors; but the *Lords* finds, that if this Seasin had proceeded upon a Rerour, lawfully Serving any person Heir to their Predecessor, albeit the Seasin following thereupon be after the Term of the Warning, yet that the same ought to be drawn back, and would in such Cases sustain Pursuits of Removing moved thereupon. *Gibson* Clerk. *Vid.* 5 *March* 1624, *Cunninghame*. 22 *March* 1626, *Davidson*. 13, & 25 *November* 1623, *Marshall* contra *Marshall*. 20 *Novemb.* 1624, L. *Lagg*. 18 *July* 1626, *Wallace* contra Tennents. 14 *Decemb.* 1626, *Calderwood* contra *Smith*.

Ronald contra *Strang*, *January* 22, 1625.

Isobel Ronald Relict of *David Ritchie* being Decerned to remove from a Bake-house in *Edinburgh*, at the instance of *Strang*, for null Defence, pursues for Reduction of that Decreet of Removing, upon this Ground and Reason, which she alledged would have assoilzied from the Removing, to wit, because she and her umquhile Husband foresaid *David Ritchie*, had a Tack of the Bake-house Set to them, for a certain Duty, for certain years thereafter; which years, albeit they were all expired before the Warning, whereupon Removing was obtained; yet before the expiring thereof, diverse years, *John Young*, and *Strang* his Spouse, Setters of the said Tack, by their Bond bearing, "them to have borrowed a Sum of Money from the "said umquhile *David Ritchie*, and the said Pursuer his Spouse, and which "they bound them to repay to the said *David*, and his said Spouse, and "the longest liver of them, and their Heirs, Executors and Assigneys, at "the Term therein appointed; and failing thereof, they were contented "that the said umquhile *David*, and the said Pursuer his Spouse, should "bruik the said Bake-house, ay and while they were repayed of the said "Sum, borrowed as said is; for payment of the same Duty, contained in "the said preceeding Tack, detalking always, and retaining in their own hand "out of the Duty of the Tack, as much as was effeirand to the Annual of "the said Sum borrowed in the Bond. Likewise they consented, that the Bond should be to them as sufficient as a Tack, conform to the which Tack and Bond, the Husband was in continual possession during his lifetime; and since his deceate, his Relict, now Pursuer, had continued the same possession, which she alledged ought to be found, that lawfully she may retain the same, ay and while the Sum be payed. This Reason was found Relevant to Reduce the Decreet, and the foresaid Bond was found a good Title, to maintain this Pursuer against the Removing; and it was not found to be a naked personal Bond, but that it was a real Right, whereby the Pursuer might lawfully bruik, ay and while the Sum were payed; neither was this alledgance respected, proponed for the Excipient, who alledged, that that Bond ought not to militate against him who was a singular Successor, and had for great and onerous Causes, acquited the Heretable Right of that Land, and was

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Inseft therein, but that the same ought only to produce warrandice, or other Execution against the Parties, who would be obliged to fulfil the Bond, and who made the same; likeas he alledged, that that Bond could not be found a real Right, not being an Heretable Right, and that it could not be found as a Tack, seing it had not a certain defined space, for the which it should last, and at what time the same should Expire; but was in effect Perpetual, and so should not be respected as a lawful formal Right, to exclude a singular Successor; and so much the rather, by reason that the same was a Bond usurary, appointing the Pursuer to retain out of the Dutie of the first Tack, for the *Annual* of the money lent by the Bond, twelve for each hundreth, which made the whole Bond unlawful; and also it was alledged, that this Pursuer, being the Relict of the Husband, to whom the *Bond* was given, could not be heard to pursue upon this Bond, nor cloath her self therewith, seing she will not have Right to the Sums lent in the Bond, but falls under the Husbands Testament, and pertains to his Executors, and so she cannot have Right to Bruik thereby: all which was *Repelled*, and the Bond found a real Right to maintain the wife in Possession, while the Sum were Payed to any, having *Right* to receive the same; seing by the Bond it was so provided, that she should retain the *Possession*; and seing the Bond bore the Clause foresaid, *that it should be als Sufficient as a Tack*: And where it was alledged, that the Bond was Perpetual, wanting a certain time of Ish; It was also Repelled, by reason albeit it had not therein a precise Determinate time specially, yet it had a time of Ish, *viz.* at the payment of the money, sicklike as in Tacks Sett in Wodsetts, during the none Redemption, which has no other certain special time of Ish but Indefinite, when the Tacks-man pleases to Redeem; and this Right was found good, to defend against a singular Successor sicklike as against the Granters self, if he had been Pursuing *Removing*; and where it was alledged to be usurary as said is. The *Lords* Reduced the proportion of the *Annual* rent only to Ten for each hundreth, and the said Bond had a special dutie therein insert, and so differs from the other Decisions, here marked *Actor Hope & Mowat. Alter Beshes & Lermonth. Hay* Clerk. *Vid. July* 13, 1621. L. *Muckall. July* 2. 1624. *Mitchelsone* and *Law*.

Fairies contra *Johnston*, *January* 26, 1625.

IN an Action betwixt *Fairies* and *Johnston*, a Decreet Arbitral being quarrelled by the Partie, who was Charged for obtempering of the same upon this reason, because the Submission, which was the warrand of the Decreet, was Subscribed by two Nottars for the Parties: And there was only three Witnesses insert therein, whereas the Act of Parliament requires four, and so the same was null, and consequently the Decreet; which reason was not respected, but the Decreet, and Submission notwithstanding thereof, was found sufficient, and sustained, because the Decreet was filled in upon the Blank, upon the back of the Submission, which Blank was Subscribed by the same two Nottars, for the same Parties before five witnesses, and which Blank was Subscribed at the same time, when the Submission was Subscribed, and so was reputt as *unicus actus*, and consequently not to come under the Act of Parliament, for want of that Perfection requisit, of four witnesses. *Actor Beshes. Alter Burnet Junior. Gibson* Clerk.

Cowper contra La. *Halton*, *Eodem die*.

IN an Action betwixt *Androw Cowper*, and the Lady *Halton*, as Executrix to her husband, for payment of a Debt owing by him to the Pursuer; It being Alledged, that she could not be conveened as Executrix, because

the whole free Gear in the Testament was Exhausted, by lawful Sentences, recovered against her by the Defuncts Creditors, for just Debt owing to them, and whereof she had made Payment before the intenting of this Pursuit. This Exception was found Relevant to liberat the Executrix, albeit it was Replyed by the Pursuer, that long before the Payment made by her, and before the Sentence obtained by the Creditors against her, this Pursuer had Arrested the Defuncts wohle Goods in her own hands; which Arrestment being so Execute against her self, put her *in mala fide*, to have misknown the same, or to have made Payment to his prejudice; for albeit she could not imped the obtaining of the Sentences by the Creditors, yet she needed not to have made Payment, but ought to have Suspended upon double Poynding, against all the Parties, who made any Claim against the Defuncts Goods: In the which Proces his Pursuer behoved to have been called, and wherein he would have gotten his proportion of the Gear, effeirand to his Debt, which not being done by her own default, that voluntar Payment made by her cannot prejudge the Pursuer: This Exception was found Relevant, to liberate the Executrix, notwithstanding of the Reply; and the Payment made by her was Sustained, notwithstanding of the preceeding Arrestment Executed against her before the Sentence: which Arrestment the *Lords* found could not put her *in mala fide*, in respect that nothing followed thereupon; And that no Pursuit nor diligence was moved thereupon, at the Pursuers Instance at any time preceeding her Payment, for the naked Arrestment, without further diligence, would never have hindered the rest of the Creditors, to have obtained Sentences, and so cannot be a hinderance to the Execution thereof, and to make Payment conform thereto. Actor. *Lermonth.* Alter *Scot* Clerk. *Vid. June* 14. 1625. betwixt thir same parties, *Jan.* 14. and 28. 1625. Lo. *Kilsyth*, *Decem.* 5. 1626. *Jaffray* contra *Gray*.

Livingston contra *Abernethie*, & Lo. *Kilsyth*, *Jan.* 28. 1625.

IN an Action betwixt *Livingston* contra *Abernethie* and Lo. *Kilsyth*, whereof the Case was, that the Lo. *Kilsyth* being adebted to one *Lennox* in the Sum of 500. Merks, to which Sum *Lennox* makes *Balfour* his Assigney, And in the Assignation it is expreset, *that it is made for Sums of money adebted to him by the Cedent*, and which Assignation is Intimat to the Lo. *Kilsyth*, and that same day of the Intimation it is Arrested by *Abernethy* Creditor to *Lennox*, conform to his Band, which Band was long before the Date of the Assignation made to *Balfour*, upon the which Arrestment and Assignation so made by the said two Parties, the Lo. *Kilsyth* Suspends upon double poynding, wherein the two parties Compeirand, and disputing which of them had best Right to the Sum, the Arrester alledged, that he should be preferred to the Assigney, in respect of the Bond for Debt owing to him before the Assignation, and that he offered to prove, that his *Arrestment*, albeit Execute the same day of the Intimation, was yet Execute that day preceeding the hour and time of the said Intimation, and so was before the Intimation affected to him, by his *Arrestment*, as a lawfull Creditor verified by the Bond produced, whereas the *Assigney* ought not to be preferred, there being no preceeding cause in Writ, before the *Assignation* extant, which might constitute the Cedent Debitor to the *Assigney*, and so the said *Assignation* fell under the Statute of Dyvorie, seing it is made in his fraud and prejudice, who is a true and lawfull Creditor, and done to a Conjunct person, the Cedent being the *Assigneys* sister Son, and no Writ being extant to qualifie the Cedent his Debitor, and the Cedent being otherways altogether

altogether unanswerable to pay the Arresters Debt, being now Fugitive, and the Assigney having acquired beside this assignation, all other Means and Estate, pertaining to the Cedent his Debitor; This alledgance was Repelled, and the Assigney was preferred to the Arrester, because the Arrester had not done any more Diligence upon the Arrestment, and the Assigney had charged upon his *Assignation*, albeit the *Arrester* alledged, that he could do no more diligence, seing immediatly after the *Arrestment*, the Lo. *Kilsyth* had drawn in the matter, by Suspension and double poynding, the dependance whereof made all further Process and Charges to cease, which was not respected: And the *Lords* found, that it was sufficient to the *Assigney*, to qualifie the cause of his *Assignation viz*, that it was made to him, for sums owing to him by the Cedent, by the *Assigneys* own Oath; which Oath of his the *Lords* found, Sufficient to instruct the Debt, and cause of the making of the *Assignation*, and found, that it was no ways necessary to instruct, or qualifie the same by any preceeding Writ, made by the Cedent to him; but that it was enough, and sufficient, if he should swear by his Oath, that he was addebted to him at the time of the Assignation in as great Sums, as the Sum whereto he was Assigned, and Repelled the Alledgance proponed for the Arrester, in respect thereof. Actor. *per se.* Alter. *Nicolson* elder & *Primrose.* *Gibson* Clerk. *Vid:* 14 *January* 1625. Betwixt the same Parties. 22 *Jan.* 1630. *Mark Ker.* 6 *March* 1632. L. *Garthland.*

Nota. This Decision is contrary to that made betwixt *Duff* and *Kellie*, 23 *March*, 1624. And to another betwixt *Young* and *Denniston.* 12 *Feb:* 1622. and the cases there noted.

Stuart contra *Bruce*, *Feb:* 4. 1625.

IN a Suspension at the instance of *Stuart* of *Currie* in *Orkney*, against *Andrew Bruce* of *Balwharg*, for Suspending of the Charges Execute against the said *Stuart*, whereby he was Charged to pay a Sum of Money, upon a simple Charge of six days, conform to his Bond, consenting that Letters should be so direct; upon the which Charge he was Denounced to the Horn; which Letters were desired to be Suspended, because by the 25 *Act*, 16 *Parl. Ja.* 6. *Anno* 1600. It was ordained, that no Letters of Horning be direct against persons dwelling be-north *Dee*, upon shorter space than 15 days, and which if they are otherways used, the Hornings thereupon are declared null: Which reason being considered by the *Lords*, they found the Horning null, because the Charge of Horning was not Execute conform to the Act of Parliament foresaid, upon 15 days, the Party Charged dwelling in *Orkney*: Albeit it was answered by the Charger, that the Act of Parliament militat not in this case, which only was intended for Charges to be given to Parties for their compearance, and for citation, and such other Charges, which had no Warrand of the Parties own consent, as these which past upon Obligations consenting to such Charges, and authorized with Sentence interponed thereto: For it was alledged, that the preceeding Fact and Deed of the Party, whereupon these Charges depended, ought to sustain the same, and that he might have dispensed with the said Act of Parliament, if the Act had militat in this case, to which the said Act could not extend, as might be evident by consideration of the Narrative and intent thereof; notwithstanding whereof the Horning was found null, in respect of the said Act of Parliament, which was found to extend to all Charges of Horning, without exception. Actor. *Ayton.* Alter. *Hay* Clerk.

Cowper contra La. *Haltoun*, *June* 14. 1625.

IN an Action of Registration pursued by *Andrew Cowper*, against the Lady *Haltoun*, as Executrix to her Husband, who was Debitor to him in

the Bond, which he craved to be Registrat against her as Executrix; who compearing, defended her self by a Sentence of Exoneration. The Pursuer Replyed, that that Exoneration could not be sustained against him, because he was not called thereto, he being a lawful Creditor, and his Debt intimat to her before the Summons, whereupon the Sentence of Exoneration proceeded, in so far as before her said Summons and Citation, he had Arrested in her hands all the Goods and Gear which she had of her Husbands, to be made forth-coming for satisfaction of that Debt contained in that Obligation, which Arrestment was Execute by vertue of Letters raised upon that Bond, and so she was *in mala fide* to seek the said Exoneration, except that he had been called thereto with the rest of the Creditors, his Debt being notified and intimat to her by the said Arrestment. This Reply was found Relevant, & the Decreet of Exoneration, and payment made to the Creditors, of the Defuncts whole Goods, conform to their Sentences, was not sustained, in respect the Pursuer was not called with the rest of the Creditors thereto; and the *Lords* found the Arrestment foresaid a good and sufficient Intimation of his Debt, which was sustained to put the Excipient *in mala fide*, to have proceeded in her Exoneration, without citation of him as a Creditor, albeit when the said Arrestment was raised, the Defunct who was his Debitor, was deceased before, and no Sentence was given against him, neither was there any Dependance or Action intented, either against himself, or against any other upon that Bond, when the said Arrestment was raised and execute, which of reason ought to be the ground to sustain the Arrestment. Likeas he had done no diligence upon the said Arrestment, but that the rest of the Creditors having used greater diligence, and obtaining Sentences, she alledged that she was *in bona fide* to pay them conform to their Diligences and Sentences, and had no necessity to know the Pursuer, who did no further upon his Arrestment, which was Repelled, and notwithstanding thereof the Arrestment was sustained, as a sufficient ground against her, to put her *in mala fide* to have sought Exoneration, without calling of him, albeit there was no Sentence upon the Bond, nor yet dependance thereupon; and albeit the Arrestment was not Execute against the Party who was bound in the Bond, but against his Relict and Executrix, which was found sufficient. Actor. *Mowat.* Alter. *Cunninghame.* *Scot* Clerk, *Vid*: 26 *Jan.* 1625. betwixt the same Parties, 22 *March* 1628. *Pat. Elleis.* 2 *Decemb.* 1628. *Lyk.* 12 *July* 1625. *Troup* contra L. *Herreis.* 5 *March* 1628. *Binnie.*

L. *Kinaldie* contra *Kaldie*, *June* 17. 1625.

IN a Suspension at the instance of *Aiton* of *Kinaldie*, for Suspending of Charges Execute against him at the instance of one *Kaldie* in *Kirkcaldie*, for payment of a Sum contained in the Suspenders Obligation, whereof a reason was founded upon payment of 200 Merks, and a Discharge produced Subscribed by *Kaldie* for proving thereof; this Discharge was not found sufficient, because there was no Witnesses insert therein, and so the same was not sustained, in respect of the Act of Parliament *Ja*: 5, *Parl*: 7. *Act* 117. Ordaining that no Faith be given to Evidents or Writs wanting Witnesses; and albeit the Suspender offered to prove, that the Writ was Subscribed by the Charger, by the Witnesses who were present the time of the Subscribing thereof, and at the very date therein insert; yet the *Lords* would not sustain the same, because the sustaining thereof was alike, as if it were permitted to prove payment of 200 Merks contained in a Bond by Witnesses, which is not admissable of the Law, so the Letters were found orderly proceeded. Actor. *Aiton.* Alter. *Mcgill.* *Gibson* Clerk. *Vid*: 8 *July* 1623. Sheriff of *Cavers*, where the same was done; & 22 *January* 1635. *Bell.*

Brown

Brown contra *Hudelſtone*, *Eodem die.*

IN an Action of Spulziation of a Kow, purſued at the inſtance of *Brown*, Miniſter at against one called *Hudelſtone*. The Defender proponed this Exception, that he had Poynded 8 or 9 Oxen and Kine, amongſt the which the Kow Libelled was one, from one *Grier*, who was the Defenders Debitor, conform to a lawful Sentence obtained againſt the ſaid *Grier* his Debitor; which *Grier* had the ſaid Kow, with the other Goods foreſaid, Poynded by the Defender, in his poſſeſſion the time of this Poynding, and by the ſpace of two years preceeding the ſame, Paſturing by him upon his own proper Ground, and uſed in all manner of Deeds as his own, during the ſaid ſpace, by Milking, Graſing, and Herding, and uſed the ſame as the reſt of his Goods were uſed, and ſo alledged Abſolvitor; which Exception the *Lords* found Relevant, not only to Eleid the Spulzie, but alſo to Eleid the delivery again of the Kow, for the which the Purſuer inſiſted *Rei vindicatione*, though he paſt from all Spulzie, violence, and Profits; and albeit the Purſuer Replyed, that the Exception might have appearance to put the Defender *in bona fide*, and to aſſoilzie him from violence and ſpulzie, yet it ought not to be ſuſtained, to free him from delivery of the Kow to the juſt Owner, ſeing the Purſuer offered to prove that the Kow was Bred and Calved by his own Kow, upon his own proper Ground, and after the Calving was detained and Paſtured upon his own Ground, while ſhe was two years old, and then ſhe was put in Graſing to *Greir*; and albeit ſhe remained with *Grier* two years, yet that was not enough to make the Purſuers juſt Right to the Kow to become extinct, and to eſtabliſh the Right thereof in the perſon of *Grier*, who had only the keeping of the Kow to be Graſed, and thereby to make the Purſuers Goods to be ſubject to pay another mans Debt, to whom they belonged not; notwithſtanding of the which Anſwer, the *Lords* ſuſtained the Exception of Poynding to liberat the Defender, not only from the Spulzie and Profits, but alſo from the delivery of the Kow, which the *Lords* found to come under the Poynding, as *Griers* Kow, in reſpect of his two years poſſeſſion foreſaid, as the Exception foreſaid bears.

This Deciſion was hardly thought of by ſome, who were of opinion, that *in Rei vindicatione*, the Purſuer who was *Dominus rei ablatæ, poſſit rem ſuam vindicare à quocunque fuerit poſſeſſa, quæ actio datur contra quemcunque poſſeſſorem, etiam cum titulo poſſidentem:* And as *Grier* the Haver of the Kow, from whom the Excipient Poynded the ſame, could not have ſold the Kow, nor diſponed or given the ſame to the Defender, for payment of any part of the Debt owing to him, *quia dominium, quod quis non habet, non poteſt in alium tranſferre, & nemo plus Juris poteſt in alium tranſferre, quam ipſe habet*; even ſo none could Poynd from him, that which was not his own: And by the ſuſtaining of this Exception, it would appear, that no perſon who leaves any part of his Goods in a third perſons hands upon truſt, if he ſuffer the ſame to remain two years, but he tines his Right thereof, if the ſame be Poynded for that third perſons Debt, which is conſiderable in Goods laid in Paund, or Steelbow Goods, or in Goods put *in depoſito*, or ſuch like; and that for two years poſſeſſion the Poſſeſſor ſhould be counted Proprietar and Owner: But in this caſe the *Lords* reſerved to the Purſuer his Action againſt the perſon who received his Kow, for reſtitution of the ſame; wherein the *Lords* found that he was not, neither ſhould be prejudged, by admitting of the foreſaid Exception; and that the like ought to be done when the like caſes occurred. Actor: *Hope:* Alter, *Cunninghame*. *Hay* Clerk. *Vid.* 24 *Novemb.* 1624. *Ker* contra *Turnbull*. *Vid. plura* in my other Notes, *Fol.* 35. *Page* 1.

L. *Murdestoun* contra *Baillie*, *June*, 21. 1625.

AN Improbation being pursued by the L. of *Murdestoun* against Mr. *James Baillie*, for improving of an Obligation, wherein the Clerk of Register and his Deputs being conveened, for production of the Principal Bond, the same being Registrat in the Books of Council; and the Bond being produced by the Clerk; and the Party Defender being called, and not compearing, but being absent, the said Bond upon the second Summons of continuation, without further proceeding in the Cause, was decerned to make no Faith, and instantly was then cancelled in Judgment before the *Lords*, at their command; the Reason was, because the Party was twice Summoned to hear and see the same produced and improven; and albeit it was produced by the Clerk, yet seing the Party Summoned, as said is, compeared not to abide by the Bond, but was absent; therefore the *Lords* decerned the same to make no Faith, and caused cancell the same, and found no necessity that the Pursuer should be urged, to proceed any further to the tryal of the falshood thereof, nor that it was necessar to Summon the Defender to compear, and declare, and give his Oath, if he had just cause to use the said Bond, and that he would abide at the same, as a true Evident, but found, that his absence, and his not compearing after his Citation, by the Principal Summons of Improbation, and in the continuation by the second Summons, was sufficient to infer the foresaid Sentence. Actor. *Stuart*. Alter. Absent. *Hay* Clerk.

Wishart contra *Falconer*, *June* 23. 1625.

Wishart, Brother to the L. *Pittarro*, being charged at the instance of *Falconer*, Brother to the L. *Halcartoun*, to pay the Sum of 100 Pounds contained in a Decreet-Arbitral, made betwixt thir Parties; by the which Decreet he was decerned to pay that Sum, in case he did not remove such a Servant out of his company, named in the Decreet, and that he should never receive him again in his Service, and if he failzied, to pay the said Sum: this Charge being Suspended upon diverse Reasons, one whereof was, that the Decreet was null, because it proceeded upon an Act of Submission, alledged made betwixt thir Parties; which Act was only Subscribed by the Clerk to the Justices of Peace of the *Merns*, and was not Subscribed by the two Parties themselves, to be a warrand to the Act of Submission, without the which no Act could be made, whereupon Sentence could follow. This Reason was found Relevant, and the Decreet by way of Suspension found null, for the same reason; notwithstanding that it was Answered by the Charger, that the same ought to be sustained, in respect that it was a matter of small importance; and als in respect of the matter whereupon the Sentence is given, *viz*. For seeing of Servants, and Penalties depending thereupon, which is meerly proper to be cognosced by the Justices of Peace, and therefore might have been lawfully submitted in that Court, and the Submission might be testified by the Clerk of that Court, and his Act made thereupon, ought to be a sufficient warrand to sustain the Decreet, without the Subscription of the Parties; which Answer was not admitted; but notwithstanding thereof, the Decreet was found null, for the reason foresaid, *viz*, That the Submission was not Subscribed by the Parties. But thereafter the Submission was sustained, because the verity thereof was referred to the Oath of the Party, who now Impugned the same, which the *Lords* found sufficient to be a Supplement to sustain the Submission. Actor. *Belshes*. Alter. *Falconer*. *Gibson* Clerk.

Viscount

Viscount of *Stormont* contra his Vassals, *Eodem die.*

A Declarator being pursued at the Viscount of *Stormont's* Instance, against one of his Vassals, for the Vassals Liferent of certain Lands, holden of him: The *Lords* found, that that Summons should not abide Continuation, neither was it necessar that the Pursuer should prove, that the Defender held the Lands of the Pursuer; But that it was sufficient to sustain the Action, that the Pursuer produced his own Seasin, bearing him to be Infeft in the Lands specially, whereof he craved Declarator. Which the *Lords* found enough against the Defender, who, if he were not the Pursuers Vassal, he might Disclaim him to be his Superior, and thereby might free himself of this Declarator. In this same Process, the *Lords* found Letters of Horning null, whereby a Person was charged to pay a particular Stent, imposed by the Minister and Elders, and Session of the Kirk, upon the Parochioners, for intertaining of a Reader, and for not payment whereof the Person foresaid being one of the Parochioners Stented, was denunced, Because the Act of the Stenting, which was the Warrand of the Charge and Denounciation, was not subscribed by the Parochioners, and by this Person Charged particularly, without whose Consent and Subscription, the Minister, Elders and Session had no power to Impose any such Burden, upon any of the the Parochioners, to burden either themselves, or their Lands, and therefore found the Horning null, *ope exceptionis. Actor. Hope. Alter. Oliphant. Hay* Clerk. *Vid. July* 2. 1622. *Carmichael* contra L. *Kilspindy*, the same was also found *de novo* in a Declarator betwixt *Colmessy* and L. *Colding-knows*. *March* 11. 1628. *vid. March* 24. 1632. L. *Lochinvar*.

Pringle contra *Ker* and E. *Hume*, *Eodem die.*

IN a Reduction, pursued by *Pringle*, against Sir *John Ker*, and the Earl of *Hume*, for Reducing of Sir *John Kers* Right of some Lands of *Coldstream*, upon a Reason Lybelled against the same; and consequently, for Reducing of the Earl of *Humes* Right, depending thereupon, and flowing from Sir *John Ker*, *in consequentiam*. The *Lords* found, the Earl of *Hume* being Minor, ought not to be compelled to *Dispute*, upon this Reason, seing the Question was *super hæreditate Paterna*, whereupon he ought not to be called in question, during his Minority. And it being Replyed, for the Pursuer, that the priviledge of Minority, ought not to stay this Process, and that the Maxime foresaid, *viz. Quod Minor non tenetur disputare super hæreditate Paterna*, Militats not in this Case, for two Reasons. First, Because his Right, nor his Fathers, were not *primario*, nor principally called to be produced, and Reduced, but were desired to be Reduced in consequence, as depending upon Sir *John Kers* Right, which was principally quarrelled, and against the which Right, his Reason was conceived; and that the said Axiom had place only, where the Minor was pursued, when his Fathers Right was principally drawn in Question, which not being here, the Process ought not to be delayed, upon his Minority. 2*do*. The said Maxime had place only, where the Minors Father was Infeft in the Lands, which were Controverted; So that if the Father died, not Seased in the Lands, and that the Minor was not Infeft therein, as Heir to him, his Minority could not excuse him. These *Answers* were Repelled, and notwithstanding of the same. The *Lords* found, that the Minor, during his Minority, was not holden to *Dispute*, for albeit his Right was desired but to fall *in consequentiam*, yet it would take away from the Minor, the Benefit, and Commodity of his Land, which was alike, and als great a prejudice, as if his Right had been principally Quarrelled, and albeit that his Father was not Seased

in the Lands, when he died, yet seing the Minor was Infeft in the Lands, and was served Heir to his Father, who had acquired the Right from Sir *John* Ker, by vertue of a Contract of *Alienation*, & conform whereto, he was in Possession, the time of his decease albeit he was not Seased, yet it ought to be *Repute* his Heretage, seing his *Author*, *viz.* Sir *John Ker* was Seased, whose Right was his Right, and the Minors self being Seased, the not taking Seasing by his Father, ought not to make the Land to cease, to be his Fathers Heretage, and to be any Reason to debar the Excipient from the Benefit of the Law, competent to him through his Minority: *And* so it was found by the *Lords*, for it behoved to be repute Heretage to the Minor, the Father being the Conquesar thereof, and the Minor coming in the Right of the Lands, through the preceeding Right acquired, and conqueſt by the Father; for the Minor could not be repute to have Conqueſt the same, which if he had done, the priviledge of Minority would not have excused him, to have disputed, if he had been quarrelled thereupon, *nam Minor in conquestu à se ipso facto, si super eo quæstio illi fiat, tenetur disputare, quamvis Minor sit.* Actor. *Aiton* & *Nicolson* younger. *Alter. Hope* & *Belshes. Scot* Clerk. *Vid. Novem.* 25. 1624. *Hamilton* contra *Matheson*, *July* 14. 1626. *John Stuart.*

Town of *Stirvling* contra L. *Urthill*, *June* 24. 1625.

IN an Improbation pursued by the Town of *Striviling*, against the L. of *Urthill*, and others Defenders, who were called for production of certain Writs of some Lands, which Lands were not specially contained in the Charter produced by the Pursuers, for their Title of the Pursuit; And the Defenders compearing, *Alledged* that the Pursuers Title being a Charter of that Burgh, wherein no mention was made of these special Lands, for the which the Defenders were conveened, but only that the Lybel bore, That the same Lands were Part and Pertinent of that Burgage, the same ought not to be sustained, as a Title which might force any Person, to produce to them their Special Evidents, of these special Lands, by vertue of a naked assertion in the Summons, of *Part and Pertinent.* This *Alledgance* was *Repelled.* *And* the *Lords* found it sufficient to the Pursuers, being Infeft in their Burgh, with the Lands and Pertinents thereof, generally to Lybel, that the Lands specially Lybelled, were Parts and Pertinents of their Burgh, which Title the *Lords* sustained, against the Defenders, who clad themselves with no Right in their Person, which had a probability to exclude the Pursuers from the Right to these Lands; neither found the *Lords*, that it was necessary to the Pursuers to prove the Lands, to be Part and Pertinent of their Burgh, *in ingressu litis*; where the Defenders *Alledged* no Right in their Person, nor proponed any Argument, which might force the Pursuers thereto, but the Summons and Action was sustained, upon that Title, as Part and Pertinent, to force the Defenders, to take a day to produce, they not alledging any Original Right, to the Lands, better than the Pursuers.

In this same Process, the *Lords* found the Charter foresaid, a sufficient Right to produce this Action, being a Charter granted by King *Robert* the Second; against which the Defenders *Alledged*, that the same could not give the Pursuers Action against them, being a Charter whereupon no seasin was taken, and that the Pursuers were never sensyne, nor yet Seased in any of the Lands, or others contained in the said Charter, which Alledgance was also *Repelled*, in respect at that time of the Charter, *viz.* King *Robert* the second, Seasins were not in use, and sensyne, there is no necessity of Seasin, it being a Charter of an university. Actor. *Hope.* Alter. *Aiton. Hay* Clerk.

Crawfurd.

Crawfurd contra *Wallances* Heirs, *June penult.* 1625.

A Minut of Contract being made betwixt *Wallance* and *Crawfurd* of *Bedland*, anent the Alienation by *Bedland*, of some Lands to *Wallance*, for the Price therein contained, which being left in the hands of the Nottar, who Formed, and Wrot the same, after it was subscribed by both the Parties, *Bedland* Pursues for Production and Registration of the Minut, in the which Action, the Heirs of *Wallance*, who was the Party Contracter but then deceast, being Conveened, Compeared, and proponed an Exception, that the Minut ought not to be Registrat, because it was depositat by both the Parties consent, in the Nottars hands, who wrot the same, to remain with him, while such Conditions were perfected, by *Bedland*, which were appointed to be done, betwixt and a day appointed, by both the Parties to that effect; and in case the same were not done, the Minut should have taken no effect, but the Parties to have been free thereof, which Conditions took never effect; and this was offered to have been proven, by the Oath of the Nottar, haver of the Minut, and of the Witnesses insert therein, which was Repelled, and only found Relevant to be proven by Writ, or Oath of Partie, for the *Lords* found it not reasonable, to take the Depositions of the Writer, or Witnesses to destroy the Minut, against the consent of the Partie, albeit many times, they will take their Declaration to Confirm a Writ, and for Corroboration thereof, *Licet D. D. asserunt instrumentum reprobari posse per testes omni exceptione majores Mascard de prob. verb. testis.* In this Process also the *Lords* sustained this Action, at the Pursuers Instance, albeit the Defender Alledged, that he ought not to be found a Party, who of the Law can call for this Minut, because, neither has he Lybelled in the Summons, nor is he able to qualifie, and alledge, that this Writ ever was in his hands, or became his proper Evident; without the which he could have no Interest to Pursue therefore; which Alledgance was Repelled. In respect the Writ called for, was a mutual Contract, subscribed by both the Parties, after the Subscription whereof, any of the Persons might pursue therefore, albeit it had never been delivered; as is requisit in a simple Bond, which cannot be called for, except it had become the Parties Evident, in whose favour it was Conceived, either by Delivery, or Consignation to that end, *viz.* to be delivered to the Party, which was not necessar in Mutual Contracts. Actor. *Hope* & *Mowat.* Alter. *Stuart* & *Cunningham*, *Gibson* Clerk. *Vid. January* 22. 1624. *Lermonth* contra *Alexander*, *Novem.* 25. 1631. *Lander* con. *Dowglas*, and the Cases there cited.

contra *June ult.* 1625.

IN an Action of Registration of a Contract of Marriage, pursued at the instance of against who was Cautioner for one of the Parties Contracters. The *Lords* found the Contract, so far as concerned the Cautioner conveened, no ways obligator against him, because it was not subscribed by two Nottars for him, but only by one Nottar, the same being a matter of importance, and therefore assoilzied the Cautioner from Registration, *&c.* Actor. *Burnet.* Alter. *Davidson.* *Scot* Clerk. *Vid. penult March* 1626, *Grieve* contra *Cant.* 10 *Decemb.* 1630, *Nisbet* contra *Newlands.* 11 *March* 1628, *Muir.*

Falconer contra *Wishart*, *Eodem die.*

IN an Action betwixt *Falconer* and *Wishart*, whereof mention is made *June* 23. 1625. The *Lords* found the Decreet Arbitral null, because by the Submission, both Parties Claims *hinc inde* against others, were submitted, and in the Decreet, the Judges had decerned by their

Sentence, only upon one of the Parties Claims, and the Claim of the other Party was not decided, but remitted to the Judge Ordinar; which the *Lords* found to be a cause, to make the whole Decreet null, seing the Judges ought to have pronounced Sentence upon the whole Matters submitted; and this not being done, that which was done in part, was not effectual to produce Execution. The Parties compeared as is there noted. *Idem Decisum* 19 *March* 1630, *Stark.*

Goldman contra *Goldman*, *July* 1. 1625.

Goldman Daughter to umquhile *William Goldman* in *Dundee*, and her Curators, pursues *Charles Goldman* who was her Tutor, for payment to her of the Sum of 1400 Merks, which Sum *Margaret Fack*, Gooddame to the Pursuer, by her Bond, wherein this same Defender was bound as Cautioner to the Minor, for the said *Margaret*, was obliged to pay to the Minor, after the decease of the said *Margaret*, and in respect the said Defender payed not the principal Sum to the Pursuer, after the decease of the principal Party obliged in the Bond, the Defender being Cautioner for payment therof, as said is, and being her Tutor, who ought to have done diligence to seek her Sums from any of her Debitors, and of the Law who is obliged to have put the same to profite, *cum nummi pupillares non debeant esse otiosi*, and consequently who was far more oblig'd being her Tutor, and her Debitor, as Cautioner forsaid; and therefore she pursues the said Defender for payment of the said principal Sum, together with the yearly Anualrent thereof since the time of the Defuncts decease, who was principal Party oblig'd; which Annuals were acclaimed from the Defender for his Cessation to pay the Sum at the Term appointed by the Bond, he being her Tutor, who of the Law ought to have employed the money to the use of his Pupill; and which not being done, *propter cessationem & negligentiam tenetur ad usuras.* This Action was sustained by the *Lords* for the Profites, since the Term of Payment against the Defender, *propter cessationem*, and for his negligence, to pay the principal Sum at the Term of Payment in the Bond. Albeit the Defender alledged, that the Bond bore no Annual, and that he was but a Cautioner, who had probable cause not to pay the principal Sum, while he was interpelled or charged; far less ought he to be commanded to pay Annual, and how soon he was charged, he obeyed and made present payment of the Principal, which ought to relieve him of Annuals, especially seing he was destitute of all relief off the Principal, for whom he had payed, seing the Woman for whom he was Cautioner, by her Testament given up by her self, was not answerable to relieve him, for her Debt was much more than her free Goods; and albeit he was her Tutor, yet it was excusable to him, not to pay Annual for that which he never got, but which he behoved to pay out off his own Gear, without relief, especially where the Bond remained ever with the Mother to this Pursuer, and her Husband, who yet hath the same, and might have interpelled him thereby in due time, so that it cannot be compted his negligence. This alledgeance was Repelled, and the Defender being Tutor to the Minor, and she having no other Tutor, was found subject in payment of all the Annuals, since the Term of the Bond, *ob solam cessationem*, to pay at the said Term the principal Sum, albeit he was only Cautioner, and had no relief for his payment of the principal Sum, and albeit he was never interpelled. But the *Lords* found, after the years of the Tutory expired, he was not subject in any Annual to the Minor, but from the time, the Defender was charged by the Pursuer and her Curators, and not for any Terms preceeding the Charge, after she past her Tutory.

tory. Actor. *Nicolson* & *Aiton*. Alter. *Hope* & *Russel*. *Gibson* Clerk. *Debentur Usuræ ex Constitutione* Severi & Antonini *in Semisses, quando Tutor pecunias Minoris in suos usus converterit*, l. 1. *Cod. de usuris pupil. vel consuetudinarias si otiosas habuit. Apud nos indistincte consuetudinariæ tantum semper sunt prestandæ. Verum Jure Civili etiam finito officio donec rationes Tutor reddiderit. Quod est decisum* 24 *Feb.* 1627, *Guthrie* contra *Guthrie*.

L. *Raploch* contra Tennents, *July* 2. 1625.

AN Action was pursued at the instance of the Good man of *Raploch* against the Tennents of *Letham*, for Poynding of the Ground, in satisfaction of an Annualrent, disponed out of the Lands by *Hamilton* of *Letham*, Heretor of the Lands, under Reversion of a certain Sum of Money adebted to *Raploch* by *Letham*; after the which Infeftment of the Pursuers, the Defenders had acquired a Feu of the same Lands, which the *Lords* finding not to be sufficient, to exclude the Pursuers Right and Action, because they being both base Infeftments, the Pursuer's being anterior was preferred, neither was the Defenders Right respected, albeit they alledged, that the same was clad with Possession, and that the Pursuers Right, although prior some days to their Right, yet not having Possession, ought not to be preferred to give him Action to poynd the Lands feued to them, whereof they had real Possession, further than for the Feu-duty contained in their Charters. Which Alledgeance was Repelled, in respect that the Pursuers Right was prior, and that he had done all lawful diligence which was requisite to obtain Possession, by intenting Action to poynd the Ground, after the first Term was by-past, subsequent to his Infeftment, for there is no Action to poynd the Ground, while a Terms-duty be owing, and the Term by-past; for before the Term be by-past, and by-gone, he could not have any Action, and the Defenders being Tennents of the Ground, and so continuing Possessors thereof, as they were many years before, their Possession cannot be ascribed to their Infeftment of Feu, to derogate any thing to the Pursuers prior Right and Diligence foresaid; thereafter the Defenders alledging, that the Pursuer had accepted a posterior Right from *Letham* of the same Lands, whereout the foresaid Annualrent was first disponed, there being many more Lands both in his first and second Rights, beside these Lands feued to the Excipients, after his first Right foresaid, and after the Defenders Feu, whereby the Lands were disponed by *Letham* to him under Reversion, granted back again to *Letham*, containing a greater Sum than that whereupon the Infeftment of the Annualrent was redeemable; in the which greater Sum, whereupon the last Reversion foresaid was granted, the Sum contained in the first Security, for the which the Annualrent is now acclaimed, was expresly comprehended, and was a part thereof, by the which last Security the first Sum was in effect satisfied to the Pursuer, and the first Security was absorbed, and consequently the Pursuer could not return, and desire to poynd the Excipients Lands by vertue thereof. This alledgeance was found Relevant to assoilzie these Defenders; for the *Lords* found, that by the acceptation of this posterior Security by the Pursuer, *viz.* by the making of a Contract, perfected betwixt *Letham* and him thereupon, and subscribed by them, and delivered to the Pursuer, with a Charter conform thereto, albeit he was not seased, which he might do when he pleased, in the which last Security the first Sum was compted, the Pursuer could not misknow the same, and return to Poynd for the Annualrent of the first Security, so long as the last Contract stood and remained in its own force, especially seing in this last Security, the Pursuer had acknowledged, that the Excipients Lands were disponed to them in Feu before, and had therein

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oblig'd him to procure the Renounciations of their Rights, and to deliver them to *Letham* at the time of the Redemption of the Lands; and so the *Lords* found, that the posterior Security, wherein the Sum is comprehended, whereupon the first was granted, absorbed the first, that he could not return thereto, so long as the last stands; albeit it was alledged, that the last was not effectual, because before the same, all the Lands were overburdened with prior Wodsets, which exhausted all the Profits and Rent of the Land. Actor. *Nicolson*. Alter. *Hope*. *Gibson* Clerk. *Vid. ult. January*, 1623. La. *Dowhill*. 13 *Feb.* 1624. *Cors.*

Porteous contra *Elliot*, *Eodem die.*

IN a Reduction betwixt *Porteous* and *Elliot* of *Stobbs*, the *Lords* found, that an Inhibition served upon a Moveable Bond, for payment of Sums to the Creditor, was a sufficient ground of the Law, to reduce a posterior Heretable Disposition and Infestment of Lands, granted by the Debitor, who was prohibited, after that Inhibition. Albeit it was Alledged for the Defender, that an Inhibition upon a Moveable Bond, whereupon no more had followed, there being no real Right, neither by Comprising, or otherways, in the person of him who served the Inhibition, whereby the Land might be affected to him, could not besustained as any sufficient ground, whereupon the Defenders real and Heretable Right of the Lands might be reduced; which was Repelled by the *Lords*, seing the *Lords* found, that the Pursuer might pursue Reduction upon the said Bond and Inhibition, to the effect he might Comprise, and that he might remove the impediment that would hinder his Comprising, or stay him to obtain a real Right. But it is to be marked, that Inhibitions strikes not against Moveable Bonds, and such other Writs and Deeds done anent Moveables, by persons prohibite, after Inhibition, which are only subject to Arrestments, and Heretable Rights are subject to Inhibitions. Actor. *Sandilands* & *Hart*: Alter. *Nicolson*. *Hay* Clerk. *Vid.* 22 *March* 1623. L. *Braco* contra *Ogilvie*. 14 *March* 1626. L. *Westraw* contra *Williamson*.

Dr. *Kincaid* contra *Haliburton*, *Eodem die.*

IN an Action of Redemption betwixt Doctor *Kincaid* and *Haliburton*, for Redeeming of Lands Comprised by *Haliburton*, and which were thereafter Comprised by Dr. *Kincaid*, and who by vertue of his Comprising, and Legal Reversion, intented the said Redemption. In the which Proces the Parties compearing, and Disputing in the Cause, the Defender alledged, that the Pursuer ought to Exhibite and Consign the Sums, for the which he had Comprised, together with a years Rent of the Lands, due to the Superior, for admitting him his Vassal upon the Comprising, with the Expenses made thereupon, and Profits thereof, conform to the Act of Parliament, *Anno* 1621. which being consigned and given up to him, he was content to renounce the Comprising. It was Answered, that the Defender ought not to have the whole Sum consigned to him, whereupon Comprising was deduced, nor the years Dutie and Expenses, and Profits foresaids, in respect that by vertue of his Comprising, the Defender had intrometted with more of the Duties of the Lands, than would satisfie him of all his Expenses, made upon the deducing of his Comprising, and for the satisfaction to the Superior, and all the profits thereof; and als much as would pay him the half of his Principal Sum, conform to the Rental of the Land, which he offered to prove was Intrometted with by the Defender, by vertue of his Comprising; and the Defender contending, that this Tryal ought not to be taken in this way, but that the Pursuer ought to pursue thereupon by another Action, and that he ought to be compelled to Exhibite the Money before the *Lords*, as is usual in all Redemptions. The *Lords* found, that it was competent

competent in this same Action, *hoc loco & ordine*, to take tryal what quantity of the Duties of the Lands Comprised were Intromitted with by the Defender, and found no necessity to put the Pursuer to any other Action, or further Process for the same; and als found, that it was not necessar to the Pursuer now to Consign the Money, to remain idle in the Clerks hands, in respect that the Process would depend and ly over upon the Probation to be deduced by the Pursuer, for verifying of the Defenders Intromission with the Duties of the Comprised Lands; before the event of the which Tryal, neither could there be any Sentence given in this Process, neither could it be certain, how much the Pursuer should Consign: But before Declarator should be given to him, The *Lords* found, that he should Consign what should be found resting unpayed to the Defender; and in the mean time, during this dependance, the Defender might keep possession of the Lands, whereby he had no prejudice. In this Process also the *Lords* found, that nothing should be imputed to the Defender, as payment to him of any part of the Sums, except so much of the Duties of the Lands Comprised, as was really and actually uplifted and intromitted with by him; and the *Lords* found it not enough, to burden the Compriser with that wherewith he had no actual Intromission; albeit it was Alledged by the Pursuer, that what-ever he might have Intromitted with by the Right of his Comprising, it should be ascribed to him as payment of his Debt *pro tanto*, seing he having the Right to meddle therewith, no other person could take up the same; and his omitting to meddle with the same, ought not to cause the same be lost, and so prejudge the Debitor who was thereby hurt, and might be heavily prejudged; in the like case, if the Creditor who Comprised should uplift how much he pleased, and suffer the rest to ly unuplifted, which might thereafter perish, or the Tennents become *non solvendo*, and so might ever keep the Debt upon the Debitor, albeit he might pay himself by his Comprising, which was Repelled by the *Lords*; for they found in respect of the words of the Act of Parliament, that the Compriser could be burdened with nothing, but that wherewith he had real intromission, and not with that, wherewith he might have also intromitted; But this point is well to be considered, in respect of the sensible prejudice of the Debitor, if his Creditor please to prejudge him; for it would appear, at least necessary & requisite upon the Comprisers part, that if he should be comptable only for so much as he receives, that he should do all lawful and exact Diligence, to recover all whereto he hath Right by his Comprising, and what he cannot recover, no reason it should be ascribed to him for payment; but if he may recover it, it would appear to deserve another consideration, at least he ought to be denuded of the Right to that which he medles not with: And concerning this, the last part of the Act of Parliament, 1621. is to be considered, which appears to incline to burden Comprisers, who may intromett, where the Comprising is not frustrat by any deed, which will make it unprofitable. In this Process also, the *Lords* found, that the Pursuer ought not to repay to the Defender the years Duty adebted to the Superior, for receiving of him Vassal upon the Comprising, more than that which he payed to the Superior; albeit it was alledged by the Defender, that if the Superior had received him *gratis*, for respect of Blood or Favour, or such other respect, as might have moved the Superior, yet that was no reason that it should be profitable to this Pursuer, but that he ought to pay the whole Duty; which was Repelled by the *Lords*, in this case, where the Superior takes a moderat Composition from the Compriser; and where the same doth not proceed upon any personal respect born by the Superior to the person Compriser, more than to another per-

son; for it were hard to give the Compriser of Lands, holden of the King, any more than is deburſed to the King's Officers, for compoſition; and the like ought to be with the ſame reaſon in Compriſings of Lands, holden of other Superiors; but where there is Donation for perſonal reſpects to the Compriſer, it is of another nature, for then alſo I think the Judge may modifie, and the Compriſer ought not to have all.

This laſt part of this Deciſion was altered by the *Lords*, for they found upon the 17 of *July*, 1625. in this ſame Proceſs, that he who redeems from a Compryſer, ought to pay the years Duty of the Lands, which is due to the Superior by the Act of Parliament, albeit the Superior had given it *gratis* to the Compriſer; for if he had received him in the Lands for Service, or becauſe he was of Kin or Friendſhip to him, or for any other perſonal reſpects, that ought not to be profitable to the Redeemer. And ſicklike in the Expenſes made by the Compriſer, in deducing of his Compriſing, albeit he had gotten all done to him *gratis*, yet it is no reaſon that the Redeemer ſhould be free of paying to the Compriſer of the ordinary expenſes, which in ſuch caſes are in uſe to be payed ordinarly by others; and this the *Lords* found they would keep hereafter, alwayes when ſuch caſes occurred. Actor. *Hope* & *Lawtie*. Alter. *Nicolſon*. *Gibſon* Clerk. *Vid*: 15 *January*, 1624. Viſcount *Annandale* contra *Scot* of *Harden*. 1 *July*, 1624. L. *Rankeillor*. 11 *Feb*: 1636. *Colquhoun* contra L. *Balvie*, and the other caſes there.

L. *Drumlanrig* contra *Scot*, *July* 5. 1625.

THe L. of *Drumlanrig* as Heir to his umquhile Father, and Heretor, and Inſeſt as Heir to his Father, in certain Lands, purſues an Action of ſucceeding in the *Vice*, and for Removing, and for violent Profits againſt *Scot* of *Burnfoot*, as ſucceeding in the *Vice* of umquhile *Scot* of *Burnfoot* his Father, againſt whom umquhile the L. *Drumlanrig*, Father to the Purſuer, and to whom he is Heir, obtained Decreet of Removing. The Defender compearing, alledged this Proceſs ought not to be ſuſtained at the Purſuers inſtance, as Heir, againſt this Defender, to produce Removing againſt him, as ſucceeding in the *Vice* of the Defenders umquhile Father, who was decerned to remove, by vertue of an old Decreet obtained at the Purſuers Fathers inſtance, except that Sentence of Removing had been transferred in the perſon of the Purſuer, and als in the perſon of the Defender; which Alledgance the *Lords* repelled, and ſuſtained the order of this Proceſs, and found, that there was no neceſſity to the Purſuer, to ſeek that Decreet of Removing to be transferred in him *activè*, to repreſent the perſon of the obtainer of that Sentence, far leſs that it needed to be transferred in the perſon of the Defender, ſeing he was called as ſucceeding in his umquhile Fathers *Vice*: And the *Lords* found, that the Purſuer, as Heir to his Father, obtainer of the Sentence, and being ſo Inſeſt in the Land, might *hoc ordine* purſue this Action, without any other Action of transferring of the Sentence in him *activè*: Which Deciſion appears to diſagree from the Form kept of old.

This Interloquitor was thereafter altered upon the 18 of *March*, 1626: For then that Action being called, the *Lords* found, that the Decreet of Removing ought to be transferred in the Purſuer *activè*, before he could purſue this Action Libelled, albeit he was both Heir and Heretor of the Lands Libelled, and ſo found no Proceſs, while the Sentence was transferred *activè*, but found no neceſſity to transfer it *paſsivè*. Actor. *Nicolſon*. Alter. *Scot*. *Scot* Clerk *Vid*. 10 *March* 1626. L. *Capringtoun*.

L. *Aiton* contra Tennents, *Eodem die*.

IN a Removing purſued by the L. of *Aiton*, who had bought ſome Lands from the L. *Wedderburn*, againſt the Tennents of the Lands, for removing

ing therefrom. The *Lords* found, that albeit the Defenders, who had Rentals of their Lands, had put other Tennents in possession of the Lands, wherein they were personally Rentalled themselves; yet by the putting of others in possession thereof, they had not tint nor annulled their Rentals, except that they had expresly Disponed the Right of their Rental, and that the putting of others in the real possession of the Land, was not a sufficient cause, to debar them from the Right of their Rental: But the Setting Tacks by the Rentaler annuls the Rental, except they be only Set to his eldest Son, 19 *March* 1622. *Hadingtoun.*

And in the same Process, the *Lords* found, that albeit the L. of *Wedderburn*, Author to the Pursuer, had before the Pursuers Right, Written with his own hand, in his own Rental-Book; and had Insert therein, the Defenders to be Rentalled to him, Tennents and Rentallers of the Lands, during their Lifetimes; and that they offered to prove, that it was the Custom of the Barrony, that these who were so Rentalled, bruiked during their Life-time; yet that that was not sufficient, to maintain them against this Removing, for albeit it might maintain them against the Writer himself, so long as he remained Heretor: Yet it was not enough against a singular Successor, they never being Lawfully nor Formally Rentalled, by a perfite Writ Subscribed by the Heretor, before Wintesses, and delivered to the Party, whereby both the Setter and Receiver might be *hinc inde*, obliged to others, for that Writting in the Book would not Bind the Defenders, nor be a good ground, which would produce Action thereupon, against the Defenders, if they pleased to refuse the same: And so that Alledgance was Repelled. In this same Process also, the *Lords* found, that a Rental Perfected, and Delivered to the Defenders, bearing the Defenders to be Rentalled to the Setter, and his Heirs, without adjecting therein of any Certain, Special and Definit Time, for the which the Rental should endure, was sufficient to maintain the Defenders, in the Right and Possession of the Lands contained in the Rental, so long as the Setter and Receiver were on Life both together: and that the same expires with the Death, either of the Setter, or the Receiver; so that how soon any of the two died, the same became extinct, with the death of the first of the Two Deceasing, and endured no longer; and it was found, that the Excipients needed not to prove, that it was the Custom of the Barrony, that Rentals Set after that manner, should endure, during the space foresaid; but that albeit there had been no such Custom, yet that such Rentals should be sufficient to maintain the Rentaller, during that space, but no longer, albeit the Rental bore, *them and their Heirs to be Rentalled to the Setter, and his Heirs*; Likeas the *Lords* found, that albeit the Rental was but personally Set to the Receiver, and that no mention was made, neither of the Setters Heirs, nor Receivers, yet the same, albeit containing no definit time, should last during the same space. Actor. *Hope* & *Belshes*, Alter. *Nicolson*, *Gibson* Clerk. *Vid. March* 15. 1631. E. *Galloway*, where a Rental to one and his Heirs endures to the first Heir. *Novem.* 13. 1622. *Bonar*, *March* 21. 1623. L. *Craigie-Wallace*. *March* 5. 1629. L. *Lee*. *July* 7. 1625. betwixt thir same Parties. *March* 2. 1626. Sir *John Hamilton*: *March* 11. 1626, L. *Corshill*. *June* 26. 1627. E. *Galloway* contra *Telziefer*: *January* 26. 2627. *Agnew*.

Also upon *February* 4. 1629. It was found betwixt *Maxwel* and *Graham*, that a Rental set by the Master of *Nithisdale*, having power from the Earl to set Rentals, insert in the Earls Court-Books, and Extracted by the ordinary Clerk, who was the Earls Servant, was enough to defend from a Removing pursued by a Tacksman, acquiring Tack from the Earls self,

after that Rental, *viz.* The Defender therewith proving, that about the time of his Rental, there is other Rentals insert in that same Court-Books, by vertue whereof the Rentallers bruiks, and found the Rental sufficient, albeit it was not Subscribed by the Setter.

Mowat contra *Mclellan*, *July 6.* 1625.

IN an Action of Spulziation of six Kine, pursued by *James Mowat* Writer, against *Mclellan*; it was alledged, that he cannot be heard to pursue that Action, being a Member of the Session, and being pursued only by him, as Assigney made by that Person, from whom the Kine was alledged to have been Spulzied, and so not competent to be pursued by a Member of the Session, being a bought Pley, conform to the Act of Parliament. The *Lords* sustained this Action at the Assigneys Instance, notwithstanding of the Alledgance, and Act of Parliament; In respect that there was never any Action intented upon that Spulzie, at the Cedents own Instance; and that the Pursuer was not made Assigney to an Action, but to the Deed of Spulziation. *Vid. March* 22. 1626. *Collace: penult July* 1635. *Cranston Riddel* contra *Sinclar.*

Morton contra *Scot* of *Hardin*, *Eodem die.*

IN a Suspension betwixt Mr. *Robert Morton* Minister at *Etrick*, and Sir *William Scot* of *Hardin*, who was charged by the Minister, to pay the Stipend modified to the Minister, by Decreet of Parliament, *Anno* 1617. In respect that *Scot* of *Thirlston*, who had Right to the whole Teinds, out of the which the Stipend should be payed, and who was subject thereby in payment thereof, had disponed a Part of the Teinds to *Hardin* the Suspender, and who, by vertue of that Alienation, intrometted with the Teinds Disponed, and consequently, who was, and became obliged to the Minister. The *Lords* found, the Minister had good Right to seek compleat payment of his whole Stipend from *Hardin*; albeit that *Hardin* alledged, that he ought to be found Debitor in no further part of the Stipend, but according to the Proportion of so much of the Teinds of the Parochin, as was Disponed to him by *Thirlston*, and bruiked by the Suspender, which extended not to the tenth part of the Teinds, and that *Thirlston* should be subject to pay the rest, who remained in the Right and Possession of the whole rest, for it were against Equity, as he alledged, that he should pay all, who had so small a Part of the Teinds, and that the rest of the Teinds should bear no Burden; which Alledgance and Reason was Repelled, and *Hardin* found Debitor to the Minister in the whole; Reserving to him his Relief *pro rata* against the Possessors of the rest of the Teinds of the Parochin, but it was found necessar to be proven, that *Hardins* Right and Intromission with the Teinds, extended to als great a quantity as would satisfie the whole Stipend, adebted to the Minister; which being proven, the Charge was sustained against him, at the Ministers Instance, for the whole Stipend. Actor. Alter. *Scot.*

L. *Aiton* contra Tennents, *July 7.* 1625.

IN the Action of Removing pursued by L. *Aiton*, mentioned in the preceeding page, *July* 5. 1625. The *Lords* found, that a Rental, which was set to any Person, and had no Duty insert therein, neither in special quantity, nor yet in general Terms of Service, and Duties accustomed to be payed, and so wanted all Duty, was null and was not to be sustained, which was found by way of Exception.

Son

Son of *Innerwicks* contra *Shaw*, *Eodem die*.

IN an Action of Reduction of a Bond and Obligation of some Money, made by a Son of the L. of *Innerwicks*, pursued at the Instance of these to whom he was Interdicted, against *John Shaw* Burges of *Edinburgh*, to whom the Bond was given, upon a Reason of the said Debitors Interdiction, published before the granting of the Obligation. The *Lords* found, that an Interdiction, voluntarly made by the Person Interdicted, without any necessity of a Cause Impulsive, or Cognition and Tryal of any Judge, preceeding the same, ought not so to exeem the Interdicted Person, and liberat him at the hands of his Creditors, but that his Moveable Goods may be Poynded, and Distrenzied for his Debt; but this was done in respect of the Tenor, and expres Clause contained in this Interdiction Lybelled, which had that end designed therein, *viz.* that he had Interdicted himself to these Friends, to the effect, that he should not do any Deed, whereby his Lands and Heretages might be evicted from him, and he prejudged therein, by the which Clause, his Moveables, if any he had, was not exeemed, but were lyable to his Creditors. In this Process also, the *Lords* found, that such Interdictions ought not to exeem the Person Interdicted, from the Execution of Horning and Caption, Personally to be execute by his Creditors, against him, for this being his own Deed, he could not by his own Deed done in his Favours, and by himself, exeem himself from Caption, for that is to bind himself to himself, whereby the Creditor cannot be hurt. Actor. *Necolson* & *Stuart*. Alter. *Hope*. *Scot* Clerk. *Vid. December* 11. 1622. *H. Seaton*, *December* 20. 1622. L. *Glenurchie*. *Decem.* 4. 1623. *Hay* contra *Geichan*. *July* 29. 1624. L. *Collington*.

Falconer contra *Irvin*, *Eodem die*.

IN an Action betwixt *Falconer* and *Irvin*, *Falconer* Relict of umquhile *Wishart*, having pursued *Irvin* for Registration of an Obligation made of a Sum, bearing to have been payed to her Husband and her, and the longest liver of them two, at the Term therein appointed; and in case of their Decease, to the Heirs therein nominat; in the which Cause, notwithstanding of the Tenor foresaid of the said Obligation: The *Lords* found, that the Relict could not pursue for Registration thereof, but that it came under her Husbands Testament, and so would pertain to his Executors, against whom the Relict had her Action, for her payment of the said Sum, which would fall to her by the Law, by her Husbands Decease, but that she had no Action Competent to her against the Debitor, but only against the Executors of her Husband, albeit her Husband died before the Term of payment, whereby she alledged, that she had right to seek the Sum, and to pursue for Registration of the Bond, she being that Person contained in the Bond, with her Husband, to whom payment was Contracted to be made, which was Repelled by the *Lords*; and albeit the Relict desired, that the *Lords* would grant her Execution, for her own third, upon this Obligation, to the which she restricted her Pursuit, yet the *Lords* refused the same, and ordained her to seek the same from her Husbands Executors. Actor. *Aiton*. Alter *Hope* & *Mowat*. *Gibson* Clerk. *Vid. March* 11. 1623. *Dougall* contra *Henderson Febr.* 14. 1622. *Bessie Steven*.

The contrair was done, *July* 21, 1635. betwixt two Parties, to which *Hay* was Clerk, where Execution was given to the Relict, on a Bond bearing, the Debitor to be obliged to pay the Sum, to the Husband, and his Wife, and the longest liver of them two, at the Term appointed, and in case of Failzie, to pay Annualrent to them; and the Husband dieing before

fore the Term, Charges were sustained to the Wife, for payment of the Annual to her, during her Life-time, albeit the Sum as Moveable may appear to pertain to the Husbands Executors.

Stalker contra *Nemo*, *July* 8. 1625.

IN a Double Poynding betwixt *Stalker* and *Nemo*. The *Lords* found a Decreet *cognitionis causa*, recovered before the *Lords*, for a Debt owing by a Defunct, wherein there was called certain Defenders, to represent the Defunct, as Executors to him, at least universal Intromettors, to be null, because none of the Defenders in that Sentence compeared, neither to Defend, or to Renounce; and there was no Probation adduced, to verifie the Defenders either Executors, or Intromettors, neither were they Charged to enter Heirs; therefore the Decreet was found null. Actor. *James King*. Alter. *Nicolson*. *Gibson* Clerk. *Vid. July* 8. 1623. *Thomson* contra *Edgar*.

Gray contra *Burgh*, *July* 8. 1625.

AN Action of Registration was pursued at the Instance of *William Gray*, against *William Burgh*, who was conveened to hear an Obligation Registrat, Which was made by his umquhile Father, and was desired to have Execution against him, as Successor to his Father, in the Lands of *Davidson*, whereto he was provided by Contract of Marriage, after the making of the Bond, craved to be Registrat *eo nomine* against him; in the which Action, the *Lords* found, that albeit the Defender was only conveened, as Successor to his Father, in the said Particular Lands, wherein he was Infeft, by vertue of a Contract of Marriage, and so for a Cause Onerous, he being Minor, the time of the granting of the said Infeftment to him, and being but presently of the Age of 21 Years, and so *intra annos utiles*; and that he being Personally present, renounced all benefit, which he could have by that Infeftment, and was content, that the saids Lands should be Compriſed, by the Creditors from him, he never receiving any other benefit from his Father; yet the *Lords* found, that he remained subject to pay all his Fathers Debts, for the which the Creditors might both use Personal Execution against him, as universal Successor to his Father, he being Successor in the Particular Lands foresaid; as also Execution against him, in any other Lands, or Moveables, which he had Acquired, or should Acquire *aliunde*, than from his Father; and found, that his renouncing of any Benefit, which he could have by his Father, could not liberat him, seing he being once Infeft *post contractum debitum*, in the special Lands foresaids, pertaining to his Father, to whom he was *alioqui successurus*, made him lyable to the whole Creditors. But the *Lords* reserved to him his Action of Reduction upon his Minority, and his Lesion, as accords of the Law. Actor. *Nicolson*. Actor. *Aiton*, *Gibson* Clerk. *Vid. February* 23. 1637. L. *Kinaber*, and the Cases there Cited.

Henrison contra Earl *Linlithgow*, *July* 12. 1625.

THE Earl of *Linlithgow* having borrowed from one *Henrison* the Sum of 2000 Merks, he gave to the Party Infeftment and Possession of some Lands, for the security of the Money, which he was obliged to pay upon Requisition; and being required to pay it against *Whitsunday*, and after the Term being Charged therefore, The *Lords* Suspended that Charge, because they found, that the Charger had possessed the Land, which was given to him in Wodset for the Money, by eating of the Grass, and Pasturage of his Goods thereupon, after the Term of *Whitsunday*, against the which the requisition of payment was made; whereas if he had expeded, that payment was to have been made to him at that Term, conform to his Requisi-

tion

tion, he should have left the possession of the Roum: And albeit that the Party offered to make satisfaction for the Gras eaten by his Goods, since the Term of *Whitsunday*, yet that was not respected, but repelled by the *Lords*; for they found, that by the said Pasturing, and retaining of that manner of Possession, he had *tacitè* past from his Requisition. Actor. *Nicolson*. Alter. *Gibson* Clerk.

Troup contra Lo. *Herries*, *Eodem die*.

IN an Action betwixt *Troup*, one of the Musicians of the Chappel-Royal, and the Lord *Herries*; the *Lords* found, that an Inhibition raised upon a simple Gift of the Defenders Liferent-Escheat, albeit there was neither Sentence nor Summons raised upon that Gift, the time of the raising of the Inhibition, and albeit that the Inhibition was only raised upon the said naked Gift, and not upon any Sentence or Dependence, yet that the same was a sufficient Inhibition, and raised upon a sufficient ground, *viz.* the Gift foresaid, and sustained an Action of Spulzie of Teinds pursued thereupon, against the Intromettors with the Teinds of the Rebel, he being Tacksman thereof; and consequently the right of his Tack pertained to the Pursuer as Donatar to his Liferent, seing after the Inhibition he had obtained a Declarator and Sentence against the Rebel. Actor. *Nicolson*. Alter. *Belshes*. *Scot* Clerk. *Vid.* 14 *June* 1625. *Andrew Cowper*. 20 *July* 1633. E. *Annandale*.

Lo. *Cathcart* contra L. *Carsi*, *Eodem die*.

IN an Action of Improbation at the instance of the Lord *Cathcart*, against the Laird of *Carss* and his other Vassals; The *Lords* found, that in such Improbations the Pursuer may call the Defenders, for production and Improbation of Retours, whereby they are served Heirs to their Predecessors in the Lands controverted, and that they have sufficient interest to insist, for production of such Retours, because if the Pursuers may quarrel the same, and impugn them, and if they fail, so that there be no such Retours, the Lands may thereby be in Non-entry, whereby the Pursuer will have the right and benefit of the Land by the Non-entry. Actor. *Hope*. Alter *Nicolson* & *Belshes*. *Gibson* Clerk.

E. *Morton* contra his Tennents, *July* 14. 1625.

IN an Action betwixt the Earl of *Morton* and his Tennents, a Tack being Set by the Earl to a Tacksman therein named, and to his Heirs, for the space therein contained; and the Tacksman being by vertue thereof in possession of the Lands, and thereafter the Tacksman making another Subtacksman to him for the years of the Tack, and disponing his Right to the said Sub-tacksman, who sicklike became in actual and real possession of the saids Lands, by Labouring of the same by himself, with his own Goods; after the which Disposition and Possession, acquired by the said Sub-tacksman divers years, the Principal Tacksman renounces his Tack in the Earls favours, who seeks Removing from the Lands. In which Action, many of the *Lords* were of opinion, that the Sub-tack foresaid was not a sufficient Title, to maintain the Sub-tacksman against the said Removing, albeit it was clad with Possession, and that it preceeded the Renounciation foresaid, made by the Principal Tacksman, in respect that the said Principal Tack was not Set by the Earl to the Tacksman his Heirs and Assigneys, but only Set to him and his Heirs; so that they thought, in respect of the Tenor of the Tack, which bore not Assigneys, that the said Tacksman had no power to Dispone this Tack to any other, and that the Pursuer was *in bona fide* to accept a Renounciation from his own Tacksman, of the said Tack at any time, and that

the same would exclude the Sub-tacksmans Right; but others of the *Lords*, and the greatest part, were of a contrary opinion, and so it was decided in favours of the Defender. Actor. *Hope*. Alter. *Hay* Clerk. *Vid.* 28 *July*, 1625. betwixt the same Parties. *Ult. Feb.* 1637. *Hume* contra *Craw*, *ubi idem Decisum est.*

Knox contra *Brown*, *July* 16. 1625.

KNox, Relict of *James Brown* Chirurgeon, having charged her Son, as Heir to her Husband, conform to her Contract of Marriage, to fulfill the same to her upon that Clause thereof, whereby the Husband obliged him and his Heirs, to provide her to her Liferent of all Sums which he should conquish, and imploy the same upon Lands, or Annualrent, to himself and his Heirs, during the time of their Marriage. This Clause the *Lords* found obligatory against the Heir of the Defunct, to bind him to imploy and give the Relict her Liferent of all Sums of Money, which the Husband had conquished during his Lifetime, after the date of that Contract, and which he had given out in Heretable manner, and remained in that case, and of that nature, the time of his decease; and found, that the Relict by vertue of that Clause, had right to seek her Liferent of the Heretable Sums conquished by her Husband, which was provided by him to his second Son; albeit the Clause of the Contract was conceived in thir terms, *viz. Obliging him and his Heirs to provide her to the Liferent of the Sums, which he should Conquish to himself, or to his Heirs*; which Clause they found extended also to such Sums, as he had imployed to his second Son, and which was found prestable for her Liferent by the Heir, of these Sums conquished to the second Son. Actor. *Stuart*. Alter. *Hope* & *Cunninghame*. *Hay* Clerk. *Vid.* 3 *July*, 1627. La. *Dumfermling*. 10 *Feb.* 1629. *Oliphant* contra *Finnie*.

Nairn contra *Naper*, *July* 19. 1625.

IN an Action of Declarator at the instance of *Nairn* contra *Naper*, whereby the Pursuer craved the Right of the Land, Wodset to him upon a certain Sum, under Reversion, to be declared to pertain to the Pursuer Heretably and irredeemably, because of a Clause irritant contained in the Contract, that if that Sum were not payed to the Pursuer at any Term whereat he should seek payment, after requisition made to the Defender by him, upon ninescore days preceeding the Term, that then the Land, in case of failzie, to pay at the Term, should pertain Heretably and irredeemably to the Pursuer; which Action and Clause irritant was sustained, albeit it was alledged, that *Pactum legis Commissoriæ* was rejected *in Pignoribus*, and that this Wodset of Lands was *Pignus* or *Hypotheca*, which was Repelled, and the Clause irritant was allowed; neither would the *Lords* assign a day to the Defender, as he craved to purge the failzie, and pay the Sum, in respect of the Requisition, preceeding upon so many days, but decerned in the Declarator, seing the Defender offered not instantly, to consign the Sum at the Bar, to be delivered to the Pursuer. *Hay* Clerk. *Vid.* 8 *July*, 1636. *Cleghorn*.

Ker contra *Ker*, *Eodem die.*

IN a Suspension betwixt *Ker* and *Ker*, the Suspender offering in his reason to compense the Sum charged for, with the like Sum contained in a Sentence obtained at the Suspenders instance, before the Commissars of and the Sentence being produced to verifie the Compensation; the same was found null *ope exceptionis*, because it was not given upon a Subject proper to the Ecclesiastical Jurisdiction, and where it might appear to be sustainable, because it was referred to the Defenders Oath, who was holden as confest; the Sentence was found null, because it exceeded the Sum of 40 Pounds,

Pounds, and so beyond the Instructions given to Commissars, who may not judge in Civil Matters, albeit referred to the Parties Oath, where the Sum is above 40 Pounds. *Hay* Clerk. *Vid. 6 Feb.* 1624. *Gordon. Item*, 18 *June*, 1634. *Richardson* contra *Maxwell*, where their Jurisdiction is extended to 100 Pounds in favours of the Commissars of *Edinburgh*, but others Judge only under 40 Pounds.

Walwood contra *Taillor* and the E. of *Dumfermling*, *Eodem die.*

IN a Suspension betwixt *Walwood* in *Dumfermling* against *Taillor* and the E. of *Dumfermling*, Suspending a Decreet obtained by *Welwood* against the said *Taillor*, for Removing from a Coal; in the which Suspension the Right of the Coal being disputed betwixt *Walwood* and the E. of *Dumfermling*. The *Lords* found, that albeit *Walwood* was Witness to a Tack of that Coal, Set by the E. of *Dumfermling* to *Taillor*, against whom *Walwood* had obtained a Decreet of Removing from the said Coal, yet his being Witness to that Tack, did not prejudge him of his Right to the Coal, nor yet of his Decreet obtained after that Tack against *Taillor*, but that notwithstanding of his Subscribing as Witness to the Tack, Set by the E. of *Dumfermling* to *Taillor*, he might thereafter seek, and pursue, and obtain Decreet of Removing against *Taillor*, upon his Right to the Coal, and that he needed never to have warned the Earl of *Dumfermling*, Setter of the Tack, nor his Heirs, in that Process of Removing, because *Taillor* was Tennent of that Coal to him diverse years before that Tack, Set by the Earl of *Dumfermling*. *Nam quando aliquis subscribit tanquam testis non videtur se obligare*, *l. Titia* §. *Lucius*, *ff. de Legat.* 2°. *Ratio videtur quia subscribere possum ut testis, licet non vidi, quæ subscripsi, quo casu non obligor*, *Socin. Reg.* 477. Actor. *Stuart.* Alter. *Hope* & *Belshes.* *Hay* Clerk. *Vid.* 26 *July*, 1631. *in fine*, B. of the Isles contra *Shaw*, where one of the Chapter Subscribing as Witness, is holden as a Consenter. *Vid.* 28 *July*, 1625. betwixt thir same Parties.

Hay contra *Eodem die.*

IN an Action of Removing pursued by a Woman called *Hay* in *Burntisland*, against another Indweller there, who had bought a Tenement of Land from her Husband, whereof she was Liferenter, before the Right acquired by the Defender, an Exception being admitted to the Defenders Probation, and he using Incident Diligence for production of the Writs of that Land, which were made to his Author. The *Lords* would not sustain the Incident, for any Writs made to the Excipients Author; because the Excipient being Infeft by his Authors Disposition, and having a publick Infeftment holden of the Superior, it was presumed probably, that his Authors Evidents behoved to be in his own hands. Actor. *Aiton.* Alter. *Mowat: Hay* Clerk. *Vid. 6 Feb.* 1622. *Grier* contra *Maxwell.*

Weemses contra *Davidson*, *July* 23. 1625.

IN an Action betwixt *Weemses* and *Davidson*, whereby they as Executors to their Father, pursued the Defender for a Debt owing to the Defunct, and which they pursued upon a general Licence, granted by the Bishop of *Glasgow*, giving Licence to them to pursue for all Debts owing to the Defunct, by any of his Debitors; wherein no mention was made of any special Debt. The *Lords* found this general Licence null, and would not sustain this pursuit moved thereupon, because no special Debt was therein contained, albeit the Pursuers Action was for a special Debt, which he alledged was warranted by the said general Licence, giving him power to pursue for all Debts, *&c.* which was not sustained, as said is. Actor. *Cunninghame.* Alter. *Stuart.* *Gibson* Clerk.

Minister of *Kirkliston* contra *Whitlaw*, *Eodem die*.

IN an Action betwixt the Minister of *Kirkliston* and *Patrick Whitlaw*, a Pension being granted by the umquhile Bishop of *St. Andrews* to Mr. *John Arthur*, Commissar of *Edinburgh*, *cum potestate transferendi eidem in articulo mortis*, with power also to that Assigney, to transfer the same at any time, before that Assigneys death, in the person of any other, who should also bruik the same, during the lifetime of him, who should receive the last Translation; which Pension being transferred by umquhile Mr. *John Arthur* before his decease, in favours of his Wife, and she having transferred the same in favours of her Son, who pursuing Letters conform to the said Pension. The Bishop of *St. Andrews* compearing, and alledging the nullity of that Pension, as being given in prejudice of the Successors of the Granter thereof, and in diminution of the Rental of the Benefice, and to the hurt of the Kirk. This alledgeance was Repelled, and the Pension Sustained. Actor. *Hope*. Alter. *Mowat & Primrose*. *Gibson* Clerk.

In this above-written Process of *Patrick Whitlaw*, there was produced for the Minister of *Stow*, a Decreet given by the Commissioners of Parliament, appointed for Modification of the Ministers Stipends, conform to the Act of Parliament *anno* 1617; by the which Decreet, the foresaid Pension of 100 pound, granted to the said Mr. *John Arthur*, *cum potestate transferendi*, as said is, was appointed to remain with the said Mr. *John Arthur* during his lifetime, and after his decease, so much of the said Pension as was payed out of the Paroch of *Stow*, *viz.* 50 pound thereof, was ordained to be payed to the Minister of *Stow*, for a part of his Stipend in all time coming; which Decreet being quarrelled by *Patrick Whitlaw* Assigney foresaid, as null, because before that Sentence, the said Mr. *John Arthur* had transferred his Right of the said Pension to his Wife, he being oblig'd to do the same to her, by an expres Clause contained in the Contract of Marriage made betwixt them; and so she not being called to that Sentence, who was Party hurt thereby, and having Right to the said Pension, the said Decreet could not be Sustained, especially seing the Commissioners, Givers of that Sentence by the Act of Parliament, which was the Warrand of their Proceedings, had no Power granted to them, to take any mans Right from them. Which alledgeance was Repelled, in respect Mr. *John Arthur* the Husband, was called, and compeared in that Decreet, and the *Lords* finding that this was a Decreet of Parliament, they thought themselves not Judges to annull a Sentence of Parliament so summarly by way of Exception. *Vid.* 25 *July* 1623, E. *Nithisdale*, and the Cases there.

Aitkin contra *Hewart*, *Eodem die*.

IN an Action betwixt *Aitkin* and Mr. *Peter Hewart*, who was conveened as being one of three Executors to umquhile *Janet Wood*, to make payment of a Legacy left by the said *Janet* to the Pursuer, to be payed by her Executors. The *Lords* found, that where there is moe Executors confirmed to any Defunct, and all the rest are deceas'd but one, that that one surviving, hath good Right to pursue for the whole Gear pertaining to the Defunct, even as if all the other Executors were living, and might pursue; Likeas, that Executor surviving may be lawfully pursued at any of the Defuncts Creditors or Legatars instance, for the whole Debt or Legacy *in solidum*, in case his part of the Executry would extend to as much as would satisfie that Debt acclaimed, albeit the rest of the Executors deceased, had intromitted with their own parts of the Defuncts Goods, and that the said Executor was not subject in his own part of that Legacy only, as if it should

should divide proportionally among all the Executors, but that he was subject *in solidum* for the whole, if his part of the Executry would be so much as might satisfie the whole Debt, which whole Debt, in case foresaid, the one Executor foresaid was holden to pay, albeit he had not intrometted with as much of the Defuncts Goods as might pay the same, if there was as much in the Testament belonging to his part, as would extend thereto, and so had Right to Intromet with and seek the same, for he ought to do diligence to recover the same, and not doing diligence, he is alike answerable to the Creditors and Legatars as if he had uplifted the same, and all the Defuncts Goods are affected for payment of the Defuncts Debt, the payment whereof may be sought out of any part thereof, either from all the Executors, or any one of them who hath intrometted, or may intromet with as much as may satisfie that Debt, and albeit one of more Executors had payed out to other Creditors or Legatars, as much as would exhauste his own part of that Legacy, yet that he remains Debitor to any other Creditor or Legatar of the Defuncts, so far as the rest of the Gear of the Testament, pertaining to the other Executors deceas'd, will extend to, if any part thereof remain unexecuted, and unmedled with by them, or for the which diligence is not done, and that the said Executor surviving, stands Debitor to the Creditors in place of the other Executors deceas'd, if they have not intrometted or done diligence as said is, seing the said Executor surviving hath Right to all which was not execute; but if the other Executors hath intrommetted fully with their own parts, or done diligence therefore, the Executor surviving is not lyable, but for the proportion of the Debt acclaimed, according to his own part of the Executry, and the other Executors stands Debitors likewise for their parts thereof. Actor. *Aiton* & *Lermonth*. Alter. *Hope* & *Lawtie*. *Scot* Clerk. *Vid.* 13 *January* 1625, *M'mitchel* contra *Meghuarg*. 18 *July* 1628, *Peacock*.

L. *Rankilor* contra L. *Aiton*, *July* 26. 1625.

IN an Action of Poynding of the Ground for an Annualrent, pursued by the Laird of *Rankilor* against the Laird of *Aiton*, who was a Minor, and was conveened with his Tutors and Curators generally, who were summoned at the Mercat-Cross of the Head-burgh of the Sheriffdom, where the Minor had his actual Remaining and Being, and at the which the Minor's self was summoned; was sustained by the *Lords*, and found it a sufficient Citation of the Minor's Tutors and Curators; neither was it found necessary, that the Tutors and Curators should be summoned at the Head-burgh of the Sheriffdom, within the which themselves dwelt, nor that they or the Minor himself should be summoned at the Mercat-cross of the Head-burgh of the Regality, or the Stewartry, within the which the Lands lay, which were desired to be poynded, so that the Citation of the Minor, and of his Tutors and Curators, generally used at the Mercat-cross of the Head-burgh of the Sheriffdom, within the which the Minor dwelt, was sustained, seing the Minor dwelt not then within the Regality. Actor. *Lermonth*. Alter. *Aiton*. *Vid.* 10 *March* 1626, Bishop of *Dumblane*.

Heirs of Provision *contra* Heirs of Line of L. *Haddo*, *July* 28. 1625.

James Gordon of *Haddo* having married a second Wife, and having granted a Charter of certain Lands therein-mentioned, to the Heirs to be gotten of that Marriage, to be holden of the said *James* his Heirs. This Charter, albeit there was no Fiar specially therein design'd, but that the same was given in general Terms *to the Heirs of that Marriage*, there being none then Procreat, was sustained in favours of the Daughter thereafter Procreat

creat of that Marriage, and who had obtained her self served Heir of the same Marriage, in the saids Lands, to produce Action as Heir, by that Provision, against the General Heir, of the said umquhile *James*, granter of the Charter, for obtaining himself Infeft in the same Lands, holding of the immediat Superior, to the effect, that thereafter he might Infeft her as Heir foresaid, by Provision in these Lands to be holden of him, conform to the Tenor of the said Charters which Order and Security was found good, albeit the Charter had no expres Fiar therein constitute, but only the Heirs generally of that Marriage, which might have seemed to be a ground, to have produced an Action against the Heirs General, of the Granter, and not to have been so summar a warrand to obtain Infeftment, but in respect of the Retour foresaid, the Charter and Action, was found good, and sustained. Actor. *Lawtie*. Alter. *Hope* & *Mowat*. *Vid. July* 9. 1630. *Veitch* contra *Robison*.

Tennents of *Hayning* contra *Scot*, *Eodem die*.

IN a Double Poynding, at the Instance of some Tennents of the Lands of *Hayning*, against *Laurence Scot* Advocat, and *Sutie*, wherein *Sutie* being Cautioner for *Scot* of *Hayning*, and being charged to pay to the Creditor, to whom he was Cautioner; And for his Relief, having recovered Sentence against thir Suspenders, for Payment of the Duties of the Lands Possessed by them, as adebted by them to *Scot* of *Hayning*, for whom the said *Sutie* was Cautioner. And on the other Part, *Laurence Scot* claming the same Duties, as pertaining to him, who was Infeft in the same Lands, by Comprysing from *Hayning*, and upon this Comprysing, publickly Infeft by the Superior, before the Term of Payment, of that Year, which was Controverted, whereby he Alledged, the Tennents were his Tennents, and so should only be Astricted in Payment to him. The *Lords* found the Charge given to *Sutie*, by *Hayning's* Creditors, to whom *Sutie* was Cautioner for *Hayning*, as said is, was a sufficient Distress, whereupon *Sutie* might, for his Relief, seek Payment, and recover Sentence against the Suspenders, *Hayning's* Tennents, albeit the time of that Sentence, he had not made Payment of the Sums, for the which he was bound; for it was found sufficient to obtain Relief, and seek this Payment for his Relief, and so recover Sentence therefore, that he was charged, before the Sentence obtained against the Suspenders, albeit he had not payed the Sum, for which he was Cautioner, since that Sentence obtained by him; and that there was no necessity, that payment should have preceeded the Sentence: Likeas the *Lords* preferred *Sutie* to *Laurence Scot*, notwithstanding of his Publick Infeftment, in respect of the Sentence foresaid, recovered against the Tennents. Actor. Alter. *Stuart*. *Laurance Scot per se*. *Hay* Clerk. *J. C. Fide-jussor potest agere contra principalem antequam solvat, si Condemnatus fuerit ad solvendum, & Bald. & hac dicitur interpretativa solutio, Vid. Bartol. Concil* 159. *Vid. December* 13. 1627. Sheriff of *Forrest* contra *Dryhope*: *March* 1. 1623. L. *Blair*: *March* 25. 1623. Sir *James Baikie*.

E. *Morton* contra *Hamilton*, &c. *Eodem die*.

IN a Removing at the Earl of *Mortons* Instance, against *Hamilton*, wherein the Defender alledging him to be Sub-tacksman to *James Douglas*, who had a Tack of the Lands Lybelled, set by the Pursuer, to him and his Heirs, for years yet to run, the time of the warning; It being controverted, if this Sub-tack could defend the Excipient, because the principal Tack was not set to the principal Tacksman, his Heirs and Assigneys; neither bore the same Power to set a Sub-tack, nor to in-put, or out-put Tennents; in respect

ſpect whereof, the Purſuer alledged, that he could not ſet a Sub-tack, which Point was not diſcuſt, albeit many of the *Lords*, appeared to incline to think, that he could not make a valid Sub-tack, for the Reaſons alledged; But the *Lords* Repelled the Exception foreſaid, founded upon the Sub-Tack, becauſe the Principal Tackſ-man being Debitor to the Purſuer, in certain bygone Duties of the Tack, for the not payment whereof he was denounced Rebel, he for ſatisfying of the ſaids Duties, had renounced the Right of the Tack to the Purſuer; which Renounciation, albeit it was made after the Sub-tack, made to this Defender, yet the *Lords* ſuſtained the ſame, becauſe the Sub-tack was never Intimat to the Purſuer, ſo that he could not know the ſame, but might lawfully take a Renounciation from his own Tackſ-man, for ſatisfying of the Debt, and Cauſe foreſaid, whom he could never have known by any Legal Deed, to be denuded of that *Right*, in favours of any other; and whereas the Defender Alledged alſo, that he was in Poſſeſſion, by vertue of the Sub-tack, which was enough to maintain the ſame, being ſo clad with real Poſſeſſion of the Lands, and which was als ſufficient, as an Intimation; ſo that after the ſaid Sub-tack, the Tackſ-man could do no Deed to the Purſuer, which could derogat to that Right Acquired lawfully before. The *Lords* ſuſtained the Renounciation foreſaid, albeit done after the Sub-tack, notwithſtanding of the alledged Poſſeſſion, becauſe the Sub-tackſman, was in Poſſeſſion of the Lands, diverſe years before he acquired the ſaid Sub-tack; ſo that the continuation of that Poſſeſſion, which he had before, could not be aſcribed to the Sub-tack, to be any impediment, to hinder the Purſuer to receive the ſaid Renounciation, and to make it unprofitable to him, except the Right of the Sub-tack had been Formally and Specifically Intimat to him, as ſaid is. Actor. *Hope*. Alter. *Stuart* & *Cuningham*. *Hay* Clerk. *Vid. July* 14. 1625. betwixt thir ſame Parties. & *July* 8. 1626. *Turnbull* contra *Turnbull*. *Febr.* 14. 1623. *Graham*.

Walwood contra E. *Dumfermling*, *Eodem die*.

IN an Action betwixt *Walwood* and the Earl of *Dumfermling*, a Tack Set by the Earl of *Dumfermling*, of a Coal, to one called *Tailzeor*, which Tack was ſubſcribed by *Walwood*, as Witnes. It being controverted, and alledged, that *Walwood*, who pretended Right to the ſaid Coal, ſet by the foreſaid written Tack, by the Earl of *Dumfermling*, as ſaid is, could not come againſt any thing contained in that Tack, ſo ſubſcribed by him, as Witnes, ſpecially alſo, ſeing in that Tack, there was a Clauſe contained in his Favours. The *Lords* found, that the ſaid *Walwoods* ſubſcribing that Tack as Witnes, was not of that force to prejudge him of any Right he had to that Coal, which was ſet in Tack, as ſaid is, notwithſtanding of any Clauſe therein contained; And that his Subſcription, as Witnes thereto, was not Obligator againſt him, neither induced any Conſent of his, to that Tack. Actor. *Hope*. Alter. *Stuart*. *Hay* Clerk. *Vid. July* 19. 1625. betwixt thir ſame Parties.

contra *July* 29. 1625.

THis ſame day, in an Action betwixt two Parties. The *Lords* found, that any Perſon, who had a Tack for certain Years enumerat in the Tack; As a 19 Year, or 15 Year Tack, or ſicklike, and where the Tack was not ſpecially for the Tackſ-mans Liferent, he might not be Witnes to him who Set the Tack; But if the Tack were a Liferent-Tack, he might be Witnes wherein I perceive not any great Reaſon of Difference. *Scot* Clerk.

Earl *Winton* contra Tennents, *Eodem die.*

IN a Removing, at the Instance of the Earl of *Winton*, as Donatar to the L. of *Touchs* Ward, against certain Tennents. The *Lords* found the Gift of Ward, which was the Title of this Pursuit was dated before the Warning, but was not Sealed while after the Warning, and could not be a Ground of Title, whereupon Warning might be used, and that the Sealing thereof, could not be drawn back, to the time of the date thereof, seing it was not a perfected Gift before it was Sealed; Therefore found no Process upon that Warning, as wanting a Warrand to make the same. Actor. *Craig.* Alter. *Gibson* Clerk. *Nam Jus superveniens actori Lite pendente regulariter ei non prodest. Socin: Reg.* 269. *Vid. Novem.* 20. 1624. L. *Lagg:* and the Cases there cited.

Touris contra *Dowglas*, *Eodem die.*

IN an Action betwixt *Touris* and *Dowglas*, a Decreet was desired to be transferred, and this nullity being proponed against the same, by the Defender, *viz.* that it was given without Probation, in respect that the Pursuer referred his Summons to the Defenders Oath, who being Summoned by the Pursuer, to compear to Depone, and he compearing to give his Oath, the Pursuer produced Horning, and so debarred him to Depone, whereupon the Sentence was pronounced, and so in effect, wanted Probation, by the Pursuers choising of that manner of Probation, and then not suffering him to Depone, which could not be the ground of a lawful Sentence, specially where the Process and Action was deduced, before an Inferior Judge, *viz.* the Commissars of *Edinburgh*, which Alledgance was Repelled, and the Decreet found Lawful, and sustained as good; for the debarring by Horning was alike, as if for non-compearance he had become Contumax, and as Sentence in that respect had been pronounced against him. Actor. Alter. *Mowat*, *Hay* Clerk. *Vid. July* 15. 1624. *Dickson*, which appears contrare to this Decision.

Sir *Robert Ker* contra *Eodem die.*

SIr *Robert Ker*, as Donatar to the Escheat of umquhile *Robert* Earl of *Lothian*, for putting hand in himself, and Self-murther, having obtained a General Declarator, thereupon Pursues a Special Declarator, to hear the Right of the Tacks under-written, decerned to pertain to him, as falling under the said Escheat, which Tacks being of the Teinds of *Nisbet* were set to Sir *John Hume* of *Hutton-hall*, and umquhile Mr. *Samuel Hume*, his Brother now deceast, during their Life-times, and for 19 years thereafter, which Tacks were Assigned to Sir *John Ker*, by the said Sir *John Hume*, and his Brother; and from the which Sir *John Ker*, the said umquhile Earl *Lothian* had comprised the same: In this Process, the Defender Compearing, and Disputing, that the Right of this Tack could not fall under the E. *Lothians* simple Escheat, for Self-murther, no more than if he had been at the Horn, by Single Rebellion, not remaining thereat year and day; In respect of the Act of Parliament, *Anno* 1617. which declares, *that Life-rent Tacks (as are the Tacks controverted) shall not fall under simple Escheat.* The *Lords* found, that thir Tacks, albeit they were Life-rents in the first Tacksmen, yet after they were Assigned by them, would fall under the Assigneys simple Escheat by simple Rebellion, and so thereafter would fall under the Earl of *Lothians* simple Escheat, who had Comprised them, either by his simple Rebellion, or through the cause Libelled, or any Cause which might make his Escheat to fall, for the saids Tacks being Assigned, were not to be considered, as if they had been originally Set to the Assigney, for his Life-time, and were not respected as Life-rents, in the Person of the Assigney

Assigney; but if the Tacks had been originally Set to the Earl of *Louthian*, for his Life-time, and to his Heirs and Assigneys, for the space of 19 years thereafter, the Question remains untouched, by that Act of Parliament, *Anno* 1617. If such Tacks will fall under the Escheat, if the first Tacksman should commit Self-murther; and that his Donatar had *Right* to that 19 years Tack, or if his Heirs only had the *Right* thereof, which appears pertains to the Heirs, and not to the Donatar of his Escheat, no more than if he had been simply *Rebel*, in which case the Donatar, upon his simple *Rebellion*, by the Act of Parliament foresaid, is excluded from all *Right* thereto; and in *Reason* it appears, the same ought to be observed, in the other case, for no more can fall under the Escheat, falling for Self-murther, but that which pertained to the Delinquent, and which was *in ejus bonis*; but this 19 years Tack was not so, because it had no beginning, while after his decease, and began in the Person of his Heirs, or Assigneys, and so could not fall by his Fault. Actor. *Hope*. Alter. *Aiton*, *Lawtie* & *Nicolson* younger. *Hay* Clerk. *Vid. March* 10. 1631. *Francis Stuart*.

Guthrie Supplicant, *Penult July* 1625.

A Supplication was given in to the *Lords* by *Richard Guthrie* Servitor to Mr *John Sharp*, who had deduced a Compriſing against *Somervel* of *Humby*, which Compryſing he desired to be *Allowed* by the *Lords*. This Supplication was not granted; For the *Lords* found, that after the death of the Party, against whom the Compriſing was Deduced, such Compryſings ought not to be *Allowed*, nor given in, nor received by the Clerk, and *Somervel* of *Humbie* was deceaſed, before this Compryſing was craved to be *Allowed*. In thir cases it is to be considered, what should be done by the Compryſer, to make his Compryſing effectual, and to be *Allowed*; for it is not reasonable, that the interveening, or subsequent death of his Debitor, should fruſtrat his Right or Diligence, but he has competent Action thereupon, against the Superior, to enter him, albeit not by such Summar Charges upon Deliverance. *Vid. Novem.* 20. 1624. L. *Lagg*: 22. *March* 1626. *Collace*. *January* 23. & 27 & *February* 3. 1624. *Stevinson*.

La. *Stonyhill* contra her Son, *Eodem die*.

THe Lady *Stonyhill*, Relict of Sir *Robert Dobie*, pursues *Regiſtration* of her Contract of Marriage, against her *Son*, as Heir to his Father and the Defender Compearing, and Alledging, that she being left Tutrix Testamentar by her Husband, to the Defender *sine qua non*, she could not pursue her own Pupil, her Son, whom of Law, she ought to Defend, untill the time she had intented a Pursuit, to hear Curators given to him, to defend him; which Alledgance was *Repelled*, and the Pursuit was sustained at her Instance; albeit it was also alledged, that she had accepted a Tutory, by subscribing of sundry Writs, as Tutrix to the Defender, which was also *Repelled*, in respect that she renounced the Office of Tutory, and that the Pupil had received no prejudice by her Subscribing of any Writs, and that it was very favourable to give her Action, to seek *Regiſtration* of her Contract Matrimonial; And the *Lords* found it not necessary, to Intent Action, to give Curators to Defend her Son, seing they found, that any Person, either of the Father-side, or Mother-side, of Kin to the Pupil, might seek Tutors to the Minor, to Defend and Authorize him, who being so sought, the *Lords* would give them Curators *ad hanc litem* summarly, without any further Proceſs; And also there was moe Tutors in the Testament. Actor *Hope*. Alter. *Nicolson* younger. *Gibson* Clerk. *Vid. March* 7. 1623: Lo. *Barganie* contra his Sons.

contra *Dowglas*, *February ult.* 1626.

IN an Action of Suspension betwixt contra *Dowglas* of *Cashogill*, for Suspending of a Decreet obtained against the Heir and Executor of a Defunct, Debitor to the obtainer of the Sentence; in this Process and Summons whereupon that Sentence was pronounced, both the Heir, and the Executor of the Defunct were called *Unico contextu*, without distinction, to pay the Debt owing by the Defunct, *viz.* the Heir as Heir, and the other who was Executor, was *hoc nomine* called; and the Summons was referred to the Defenders Oaths, *viz.* that the one was Heir, and the other was Executor, and they both were holden as confest, being Summoned to give their Oaths, and not compearing, whereupon Sentence followed, Decerning them to pay, conform to the Tenor of the Summons, whereby, as said is, they were both called, and desired to make payment; and wherein it was not Lybelled, that ilk one of them, was Debitor *in solidum*, and that therefore they, and every one of them, was holden to make Payment of the whole, but the Tenor of the Summons, and Conclusion thereof, bore only, *That they should be decerned to pay the Debt*; Likeas the Words of the Sentence was so conceived; and it being Disputed in this Suspension, if the Sums should divide betwixt the Heir and the Executor decerned, and that ilk one of them, was subject to pay the half of the Sum, or if the Creditor might exact the whole, either from the Heir or the Executor, seing they were both Debitors to him, and every one of them, by the Law, in the whole Sum. The *Lords* found, that albeit, by the Law, the Heir, or the Executor; and ilk one of them remained subject to the Creditor, in the whole Debt; yet in respect of the Conception of the Summons and Pursuit, and of the Sentence following thereupon, being of the Tenor foresaid, neither the Heir alone, nor yet the Executor alone could be Charged for the whole Debt, but that in respect of the same Sentence, ilk one of them was only subject to pay the equal half of the Sum decerned, whereas the Creditor might of Law, have craved the whole, from any of them, if the Pursuit had been so intented and conceived, and Decreet so given. Actor, *Mowat* & *King*. Alter. *Gibson* Clerk. *Ita I. C. Si plures una sententia condemnati fuerint, tenentur tantum pro virilibus, licet antea in solidum tenebantur. Vid. December 9.* 1628. *ubi sententia non inducit Novationem. vid. Novem.* 16. 1626. *Chalmers.*

contra *T.* of *Edinburgh*, *March* 1. 1626.

IN an Advocation of an Action from the Town of *Edinburgh*, the Cause being Advocat. It was questioned, if the Caution found before the Town Court should stand, after the Advocation. The *Lords* found the Caution, found by the Party pursued, ought not to stand, seing the Party could not have been lawfully urged *ab initio*, to have found that Caution by the Town of *Edinburgh*, as their use is, to cause otherwise to be done to Burgesses, seing the Party, to whom Caution was given; albeit he was their Burgess, yet the cause of the Debt was not owing to the Burges himself, but only to a Stranger, without the Jurisdiction, and whereto the Burges was only made Assigney; and if that be sustained, every man, by such Assignations, might be troubled with finding of Caution, in that sort, which were a great vexation, and in it self unreasonable. *Scot* Clerk.

Hamilton contra *Tennents*, *March* 2. 1626.

SIr *John Hamilton* pursuing a Removing against some Tennents of *Bargenie*, wherein one Compearing, and Alledging, that there were Tacks Set

Set of the Lands to his Father and Mother, during their Life-times, in the which Tack, the Setter obliged him to receive the Bairns to be procreat betwixt the Tacks-men after their deceases, kindly Tennents to him, in the said Roum, so long as they were able to pay the Duty contained in the Tack; in respect of the which Clause, the eldest Son of the Tacks-man Alledged, that he had sufficient Right to bruik, at least during his Life-time, seing he had ever payed, and was content to find Security to pay the Duty of the Tack. The *Lords* found the Clause foresaid, could give no Right to bruik longer than Warning was made, because it was neither Tack, nor Rental; and it had no special time therein limited, for the which it should endure; and found it ought not to maintain the Defender, for his Life-time, albeit he restricted the space to his Life-time; and though the Clause was conceived in favours of the Bairns *indefinitè*, and not in favours of any special Person, named in the Writ, but uncertain, and therefore Repelled the Alledgance; but here a Singular Successor pursued. *Actor. Hope. Alter. Miller. Gibson* Clerk. *Vid. July* 5. and 7. 1625. L. *Aiton*: *March* 11. 1626. L. *Corshill* contra *Wilson. Feb.* 6. 1633. *Gordon* contra *M'culloch.*

Gray contra Tennents of *Farnistat*, *Eodem die.*

IN an Action, to make Arrested Goods forthcoming, Pursued against *Graham* of *Farnistat*, and the Tennents of the Lands, in whose hands the Farms, adebted by them to the Master, was Arrested, and desired to be made forth-coming to the Creditors. *Gray*, who was Pursuer of this Action, for satisfying of the Principal Debt, and Annuals thereof, owing by the said *Graham*, Heretor of the Lands, wherein Charges being execute upon an Heretable Bond, for Payment of the Principal Sum, and Annual-rents, conform to the Bond, after Requisition made, conform to the Clause of the Bond, and the Party Charged contending, that after the Charge, he was not subject in any Annual, for any Terms subsequent, after the Charge. The *Lords* found, that notwithstanding of the Charge, the Debitor was still subject, in the Annual-rent, for all Terms after the Charge, continually while payment was made of the Principal Sum; and so that the Defender might Arrest, both for his Principal Sum, and the Annuals thereof. Actor. Alter. *Hope. Gibson* Clerk. *Vid. March* 24. betwixt thir same Parties, *July* 25. 1626. *Anstain* contra *Hume* and Ker. *Penult Feb.* 1623. *Haliburton.*

Wilson contra *Aitkin*, *March* 3. 1626.

IN an Action of Reduction of a Bond betwixt *Wilson* and *Aitkin*, upon a Reason of Minority, and Lesion. The Pursuer produced a Testimonial, bearing the time of his Baptism, subscribed by Mr *Patrick Henderson*, Keeper of the Session Books of the Kirk of *Edinburgh*, to prove his Minority. The *Lords* found it could not prove, because neither was that Register of that Authority, that the Extract thereof alone, ought to make Faith *per se*, much less could it prove Minority, for the time of the Baptism ought not to be reput, as if the Child had been born at that time, seing he might have been one or moe years of Age, before he was Baptized, and so the Minority could not be proven thereby, to compt from his Baptism, but such Testimonials may have greater Respect and Faith to prove Majority, and that to compt from the time of his Baptism, for he must be Born ere he be Baptized, Actor. *Lermonth.* Alter. Absent. *Hay* Clerk

Dowglass contra *Eodem die.*

IN an Action of Spulzie of Teinds pursued by Mr. *William Dowglass*, as Prebendar and Titular of the Teinds. The *Lords* found, that the Defender being Sub-tacksman to one, who had a Tack standing unexpired, the year of the Spulzie Libelled, albeit the Sub-tack was expired before, and bruiking after the years of that expired Sub-tack *per tacitam Relocationem*, could not be pursued for Spulzie, the said Principal Tack being that year unexpired, as said is; albeit the said Principal Tacksman was deceased, and that none compeared for his Heir, or any others who might claim Right to the said Tack, to cloath themselves with the Right of the same; and therefore it was answered, that it was *Jus tertii*, which could not defend the Excipient, who had no standing Right in his own person, notwithstanding whereof the Exception was sustained. *Vid.* 14 *Feb.* 1623. *Ratray* contra *Grahame.* 21 *Jan.* 1636. *Buchannan.* 12 *Decemb.* 1621. L. *Lagg.*

Law contra La. *Balgony*, *Eodem die.*

Law in *Kirkcaldie* pursuing the Lady *Balgony*, for Poynding of the Ground for an Annualrent, wherein the Pursuer was Infeft, to be holden of the L. *Balgony*, and which Infeftment was clad with Possession diverse years, before the year for which the Action was pursued. The Defender Alledged, that he was Infeft by a publick Infeftment, following upon a Compriſing; which Infeftment and Compriſing, albeit it was posterior to the Pursuers Right, yet the same depended upon a Contract of Marriage, whereby the Author of the Pursuers Right was obliged to provide the Bairns of that Marriage to a certain Sum of Money; upon the which Contract, Inhibition was served at the instance of the Laird of *Dury*, Father to the *La: Balgony*, who was a special Contracter with the L. of *Balgony* in that Contract of Marriage, and which Inhibition was Execute before the granting of the Infeftment by the L. of *Balgony* to the Pursuer; for not fulfilling of the which condition of the said Contract by the L. *Balgony*, he being now deceased, the Lands controverted desired to be Poynded, were Compriſed by the eldest Son of that Marriage, in whose favours the said Contract, anent the Provision of the Sums therein contained, was conceived; and upon which Compriſing he was publickly Infeft, so the said Compriſing and Infeftment publick, albeit posterior to the Pursuers Right, ought to be drawn back to the said Contract of Marriage, in respect of the nature thereof, and favour by the Law due to the same; and in respect of the said Inhibition before the Pursuers Right, especially seing now by vertue of the said publick Infeftment the Defender was in possession. The *Lords* found this Exception Relevant, and preferred the publick Infeftment posterior to the Pursuers prior Infeftment, in respect of the preceeding Contract of Marriage, and Inhibition Execute before the Pursuers Right and Possession had, conform to the publick Right; which Exception founded upon the prior Inhibition, was received in this same Judgment; And the *Lords* found no necessity, that the Defender should be put to reduce the Pursuers Right, upon the ground of that anterior Inhibition, but received the same in this Action; albeit the Pursuer Replyed, that his Infeftment clad with Possession could not be so summarly taken away by the said Inhibition, neither could the Possession alledged by the Defender be respected, because the Lands falling in Ward, by the decease of his Author, and the Ward being only expired this year controverted, what ever possession was acquired from the Donatar of the Ward, who was conjunct Person, Friend, and Kinsman to the Defenders, ought not to be respected in the Pursuers prejudice; but the matter ought to be handled, as if the Parties were Disputing before the Ward fell; at which time

time the Pursuer was in actual Possession of his Annualrent; which Answer was not respected, but the publick Infeftment, Contract, and Inhibition, and Possession, and Exception proponed thereupon, was admitted, as said is. Actor. *Hope* & *Baird*. Alter. *Aiton*. *Gibson* Clerk.

E. *Kinghorn* contra *Collace*, *March* 8. 1626.

IN an Action of Removing of Tennents Defenders, pursued at the instance of the Earl of *Kinghorn*, from the Lands and Barony of *Dods*, wherein one called *Robert Collace* was conveened; who being Minor the time of his Citation, and then having his Father living, who was Administrator to him of the Law. The *Lords* sustained the Process, and the Summoning of the said Minor, being Summoned by the Principal Summons, and Executions thereof, with his Tutors and Curators generally, and they being generally Summoned, albeit that his Father was not specially Summoned by the Execution, who was then living, whom the *Lords* found needed not to be specially Summoned, as said is, seing the Tutors and Curators were generally Summoned. Actor. *Hope* & *Rollock*. Alter. *Aiton* & *Nairn*. *Gibson* Clerk.

L. *Capringtoun* contra *Bartilmeo*, *Eodem die*.

IN a Suspension betwixt the L. of *Capringtoun* and *Bartilmeo*, wherein L. *Capringtoun* being charged to pay *Rebekah Bartilmeo* for her self, and also as Heir Served and Retoured to *Masie Bartilmeo* her Sister, the Sum of 600 Merks, which by Contract he was obliged to pay to them two, & their Heirs equally betwixt them; and so the one Sister being dead, and the other being Heir to her, charged for the whole Sum. The *Lords* Suspended the Charges Execute for that half pertaining to the deceased Sister, notwithstanding that the Charger was Heir to her; because the *Lords* found, that that Contract, concerning the Sum pertaining to her who was dead, could not be so summarly Execute, and that Sum charged for at the instance of her Heir, except the Contract had been first transferred in her person, as Heir, and so the Charge was not sustained, except the Right of the Contract had been lawfully and formerly established in her person by a preceeding Sentence. Actor. *Cunninghame*. Alter. *Hay* Clerk. *Vid.* 5 *July*, 1625. L. *Drumlanrig*.

Monro contra Dr. *Kincaid*, *Eodem die*.

IN a Suspension at the instance of *Hector Monro*, against Dr. *Kincaid*, who having acquired the Right of certain Sums, which the said *Hector* was obliged to pay by an Heretable Bond, *viz. the Annualrent thereof to* Margaret Vaus *and Mr.* Adam King *her Spouse, Liferenters of the Sums, during their lifetime, and after her decease to* Margaret Mawer *Fiar thereof, and in case of her decease unmarried, to the other two Sisters, named in the said Bond.* In the which Obligation it is specially set down, that notwithstanding of the Heretable Clause therein contained; the said *Margaret Vaus*, and her said Spouse, might charge for the payment of the Principal Sum conjunctly, they being both on life, and after the decease of the said Mr. *Adam* and his Spouse, that the said *Margaret Mawer* might charge for the same; and the Right of this Bond and Sums being disponed to the Doctor, by the said *Margaret Vaus* Liferenter (her Husband being dead) And by the said *Margaret Mawer* Fiar, the charges, at his instance, as Assigney, were Suspended upon these Reasons, *viz.* in respect of the Tenor of the Bond, which provided, that the Liferenters conjunctly, they being both on life, might charge for the same; and after both their deceases the Fiar might charge; and seing Mr *Adam King*, Husband to *Margaret Vaus* Liferenter was dead, the Relict could not charge her self for the Principal Sums, seing the Bond provided

vided, that the Charges for the same should be Execute by them both conjunctly, being both on life, and so the one being dead, as she could not, no more could her Assigney charge therefore: And sicklike the Bond provides, that the Fiar should not charge while after both the Liferenters decease; so that *Margaret Vaus* yet living, the Fiar nor the Assigney could not seek the same. And further, that the Fiar, or her Assigney could not seek the Principal Sum, in respect of the Tenor of the Bond, providing the Sum to be payed to her, and failzieing of her by decease unmarried, to her two Sisters; and so she being yet unmarried, she could not Assign nor *Dispone* the same in prejudice of her other Sisters. The *Lords* notwithstanding of both these Reasons, sustained the Charges for the Principal Sum, at the instance of the Assigney, seing they declared that that Clause anent the not charging for the Principal Sum, during the life of the Liferenters, was introduced in favours of the Liferenter, and Fiar, and not set down in their prejudice or in favours of the Debitor; and therefore seing both Liferenter and Fiar had made an Assignation, the Assigney having both their Rights, might Charge therefore, seing the Bond provided not that the Fiar might not Charge while the Liferenters decease, but bore, *that she might Charge after both their deceases*, albeit in effect both the words be one; and also found, that the Substitution foresaid, was not any impediment which could hinder the first person, Fiar, to transmit effectually the Right of the Sums in the person of the Assigney, albeit she was unmarried, and therefore sustained the Charges at the Assigneys instance. Actor. *Lawtie*. Alter. *Hope*. *Gibson* Clerk. *Vid:* For this last part 14 *January* 1631 *Helen Sharp*.

This matter being called *in præsentia Dominorum*, 10 *March* 1626: Major *Monro* compearing, and claiming the Sum: This same Decision was allowed, and Dr. *Kincaid* preferred, and his Assignation found good and lawful, albeit his Gedent died unmarried.

Traquair & *Robertson* contra *Blushiels*, *Eodem die*.

James Traquair having received a Bond from umquhile *Thomas Traquair* his Brother, whereby the said *Thomas* disponed to him certain particular Goods and Gear, with Provision, that the same should not be delivered till after his own decease, and the decease of his Daughter, she dying unmarried; to which Bond *James Traquair* having made one *Robertson* Assigney, after the decease of the Maker of the Bond, and his Daughter who died before her Father, and unmarried; he pursues *Eupham Blushiels*, Relict of the said umquhile *Thomas*, for delivery thereof. In the which Action, it being alledged, that that Bond was *donatio mortis causa*, and that the Giver of the Bond survived six or seven years after the making thereof, and retained the use and possession of the Goods disponed to the time of his decease: Likeas, the said Bond being *donatio mortis causa*, as said is, was revockable, and was in effect revocked, in so far as the Maker thereof made his Testament, wherein he nominate his Executors, and left his whole Goods and Gear to them, which makes the Executors to have Right to the saids Goods, contained in the said Bond, seing he left his whole Goods to the Executors, and so must extend to the special Goods disponed in that Bond, and render the said Bond ineffectual, and the same is thereby Innovate and become null. And it being further alledged, that the Goods contained in the said Bond, was Heirship Goods, and could not be disponed after that manner, in prejudice of the Heir of the Defunct, *viz.* another of his Brethren, who was retoured Heir to him, and so had the best Right thereto, wherein he could not be prejudged by that preceeding Disposition, which took never effect, but ceased and became void by the

retention

retention of Possession six years thereafter, and the Defuncts being in Possession when he died as said is, whereby the Heir had good Right to the same. Which Alledgances were Repelled; for the *Lords* found, that the retention of the Possession, and the Clause foresaid, whereby the delivery was suspended to the time of the decease of the Maker, and of his Daughter, did not derogate from the Bond, but that it ought to be effectual at the time destinate therein, neither found they the Bond was revocate by the posterior Testament, especially seing therein no mention was made of any of the Goods mentioned in the Bond, but only that he left his Goods and Gear generally to his Executors, which behoved to be understood only of such Goods as were not Disponed before; and sicklike found, that the Heir had no Right to the same; but by the contrary, that if the Heir had these Goods, he might be compelled by the foresaid Bond to deliver the same. Actor. *Mowat.* Alter. *Hope. Hay* Clerk. *Vid.* 2 *March* 1624, L. *Curriehill.*

Bishop of *Dumblane* contra his Vassals, *Eodem die.*

IN an Improbation pursued at the instance of the Bishop of *Dumblane* against his Vassals, an Exception being proponed for the Laird of *Kers-Crawford,* who was Minor, that he was not lawfully summoned, because his Tutors and Curators were not summoned at the Mercat-Cross of the Head-burgh of the Sheriffdom where the Minor dwelt, nor where his Land lay, but at the Mercat-cross of another Sheriffdom, where neither they nor the Minor had any Lands or Dwelling, which was alike as if they had not been summoned at all, and who if they had not been summoned, Process could not be granted against the Minor. This Alledgeance was Repelled *hac loco*; for the *Lords* found, that they could not in this Process take tryal, where the Minor or his Curators dwelt, or his Lands lay, and so would not receive this Exception of *alibi* in this Cause, but reserved to the Defender his Action to Reduce thereupon as Accords. Actor. *Aiton.* Alter. *Belshes. Hay* Clerk. *Vid.* 26 *July* 1625, L. *Rankilor.*

Liberton contra *Adamson*, *March* 11. 1626.

IN a Suspension betwixt *John Liberton* and *Adamson* for suspending a Decreet obtained by *Adamson* against *Liberton* before the Town of *Edinburgh*, for payment of 40 pound, referred to his Oath, and for Contumacy decerned against him; the reason of Suspension bearing, *that* Liberton *was not an Indweller within* Edinburgh, *neither the time of the Sentence, nor at any time before, nor sensine*; so the Provost and Baillies were not Judges competent to him, he not being subject to their Jurisdiction, and so the Decreet being *à non suo judice* was null. The *Lords*, notwithstanding of this Reason, sustained the Decreet, seing it was referred to his Oath, and was a matter of small moment, but prejudice to Reduce the same upon that Reason *prout de jure.* Actor. *Lermonth.* Alter.

L. *Corshill* contra *Wilson*, *Eodem die.*

IN an Action betwixt *Wilson* Defender against the Laird of *Corshill*, for Removing from Lands, the Defender alledged, that this same Pursuer had set a Tack of the Lands libelled to his umquhile Father for his Lifetime, in the end of which Tack the Pursuer had oblig'd himself, to accept the Bairns of the said Tacksman, kindly Tacksmen to him before all others, and this Defender being the eldest Son of his umquhile Father who was Tacksman. This Bond ought to defend him against this Pursuer, Granter of the Bond: This Alledgance being considered by the *Lords*, they found, that this Bond ought to work against the Pursuer, to cause him give to the

Defender a Tack upon the like Conditions, to be done therefore by the Defender, as are in use to be done to the Pursuer by others his Tennents, and Tacksmen of the like Lands in quality and quantity, answerable proportionally to the Lands libelled; and therefore if the Defender subsumed in his Exception, and offered to perform this Duty to the Pursuer for a Tack, as others doth for the like, They sustained this Exception upon the Bond, to the effect, that a Tack might be presently perfected to the Excipient, and for that end they ordained the Pursuer, to condescend upon the Conditions, which others his Tacksmen payed for the like Lands, which being condescended, they found, that they would admit the same to the Pursuers Probation, that after the end of the Probation, the like Conditions being performed to him by this Defender, the Pursuer might perfect to him a Tack of the like nature, containing the like Duty and space of Endurance, as he is in use to grant to others his Tennents for the like Conditions; which Conditions, if the Defender, after Probation as said is, should not perform, the *Lords* found that the Bond could not furnish a Defence against the Removing, seing thereby the Tennent was bound to do the same in effect, if he claim'd to a Tack to be set thereby to him, otherways the Defender might ever clothe himself with that Bond, and never seek a Tack, which was against all reason that the Tennent should ever bruik the Land in respect of the Bond, and should pay nothing for the same: But this Bond was found could not defend, if the Pursuit had been made by a singular Successor to the Pursuers Right; and this was found as said is, albeit the Pursuer alledged, that the Clause of the Bond being adjected to a Tack which expired, should not furnish any ground of Defence, because it neither contained time of entry, nor term of endurance, nor duty, and was no real Right; and if a Tack, albeit it had been given to him, yet wanting time of Entry, Ish, and Duty, it could not defend him, far less such a Bond; which was Repelled by the *Lords*, and Interloquitor given *ut supra*. Actor, *Cunningham*. Alter. *Hope*. *Scot* Clerk. *Vid.* 2 *March* 1626, *Hamilton*, 5 and 7 *July* 1625, L. *Aiton*, 26 *January* 1627, *Agnew*.

L. *Westraw* contra *Williamson* & *Carmichael*, *March* 14. 1626.

A *Lison Nisbet* having recovered Decreet against *Marion Williamson* and *James Carmichael* her Spouse, for payment of certain Sums of Money, she constitute *James Johnston* of *Westraw* Assigney thereto with Power to him, either to charge for the Sums in her Name, or in his own Name as Assigney. Whereupon Charges being execute in the Cedents Name, the *Lords* found the Reason of Suspension Relevant against the Assigney, bearing, that the saids persons Suspenders who were charged, had made payment of the Sums wherein they were decerned to the Cedent, before any Intimation of the Assignation; which Payment made to the Cedent before any Intimation, the *Lords* found sufficient to liberate them at the hands of the Assigney, notwithstanding that the Assigney alledged, that the Suspenders knew that the Laird of *Westraw* was made Assigney before their payment, and that they offered to transact with him thereanent, so that they could never be repute to be in *bona fide* in reporting of that Discharge, as done before Intimation of the Assignation, the same being known to them, as said is: Likeas, the Assigney alledged, that he had lawfully execute Inhibition upon the said Assignation, before the obtaining of the said Discharge, by the which the Suspenders are constitute in *mala fide* to have made payment to the Cedent, since the time of the executing of the said Inhibition, which was raised upon the said Assignation, whereby all the Leidges were constitute in *mala fide* to do any Deed, which might make

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the said Assignation in-effectual, notwithstanding whereof, the Payment made, and Discharge Reported, before any lawful Intimation of the Assignation, was sustained, seing the *Lords* found, that the knowledge of the Assignation, put not the Defenders *in mala fide* to pay the Cedent, which ought to have been Intimat to them, after a Legal manner, and so made known to them Legally; and the Inhibition not being *specificè* execut, and Intimat to the Suspenders, could not be reput an Intimation, especially seing also that Inhibitions properly had force against Immoveables, and did not strick upon this subject controverted. And therefore the Letters were Suspended *simpliciter*. Actor. *Oliphant*, Alter. *Vid. ult March* 1624. *Patrick Sandis. Novem. ult.* 1622. Sir *James Durham*, *March* 22. 1623. L. *Bracko* contra *Ogilvie*. *July* 2. 1625. *Porteous* contra *Elliot*, & *January* 27. 1624. *Stevinson*.

E. *Cassils* contra *Simpson*, *March* 18. 1626.

THe Earl of *Cassils*, as Heir to the deceast Mr. of *Cassils* his Uncle, pursues *George Simpson*, Tailzor in *Edinburgh*, for delivery to him, as Heir to the said umquhile Earl, of his Parliament Rob, which was within a Trunk, and which Trunk, having the said Rob within the same, was put by the said umquhile Earls Servant, at his Command, in the said *George* his Dwelling-House, and was committed to the said *George's* custody and keeping. This Summons was not found Relevant, seing it was not therein lybelled, that the Key of the Trunk, where the said Rob lay, was delivered to the Defender, and that he took upon him the custody thereof, and to be answerable therefore; without the which had been specially Lybelled, The *Lords* found, that the Defender could not be conveened, nor be found answerable therefore, albeit the Summons bore, *That the same was put in his House, and expresly was committed to his custody, and keeping*. For the *Lords* found, that such Persons, as was this Defender, being common Servants to Noble-men, as this Excipient, who was his Tailzor, ought not to be answerable for Coffers and Trunks, and Boxes with Writs, and such other Wairs, pertaining to Noble-men, which their Servants would set in within the Dwelling-house of their Merchants, or Tailzors, at the Noble-mens coming, or being in *Edinburgh*; for they would take the same out, and put the same in again, at their own pleasure, as they had occasion to use the same, without the knowledge of the Owner of the House, so that it were great iniquity, to burden the Master of the House with the same thereafter, except that it could be Proven, and that it were Lybelled, that they had medled with the same, and done any Deed prejudicial to the Owners therein. Actor. & *Nicolson*. Alter. *Mowat*. *Scot* Clerk.

Paterson contra Executors of *Paterson*. *Eodem die*.

A Pursuit being moved at the Instance of *John Paterson*, as Donatar to the Bastardry of umquhile *Robert Hunter*, and as having Right from the King as *Ultimus Hæres* to umquhile *James Hunter*, Son to the said Bastard, which Son died without Bairns, and unteſtat, against the Executors of umquhile *Thomas Paterson*, Debitor to the said *James Hunter*, Son to the said Bastard, in a special Sum of Money, for the which they were conveened, by a special Declarator, to make payment to the Donatar. The said *Thomas Patersons* Executors alledged, that they had made payment of the Sum, and Debt Lybelled, to the said umquhile *James Hunter*, Son to the Bastard his Executor Confirmed, before the Intenting of this Cause, or granting of that Gift to the Donatar. Which the *Lords* found Relevant, to Liberat the Defender at the Donatars hand, seing the Defender had no necessity to

enquire, or to know the Condition of the Creditor, if he was the Son of a Bastard, or not; or if the King would have Right, as *ultimus Hæres*; but that there being a Testament Confirmed, by the which an Executor Dative was decerned to the Son of the Bastard, the Debitor was *in bona fide* to pay the Debt to the said Executor Confirmed, notwithstanding that the Executor was not nominat by the Defuncts self, who died untestat, and within the Age of Pupillarity. And the *Lords* sustained the said payment, made to the said Executors Confirmed; albeit it was voluntarly done, and without any Sentence recovered against them, to that effect, by the saids Executors, before the payment, as the Donatar alledged ought to have preceeded, before they could have payed, which the *Lords* Repelled, and found no necessity of a Sentence; but that the Debitor might lawfully pay to the Executor Confirmed voluntarly, without any Process or Sentence. The *Lords* nevertheless, reserved to the Donatar his Action for the said Sum, against the Executor, to whom the payment was made, *prout de Jure*. Actor. Alter. *Burnet minor. Hay* Clerk. *Vid. July* 7. & 13. 1626, *Somervel* contra *L. Halcro.*

Davidson contra *Gordon*, *March* 22. 1625.

IN a Removing of Mr. *Thomas Davidson*, contra *Gordon*. The *Lords* sustained a Seasin, albeit given after the Warning, and also after the Term; as a sufficient Title to sustain that Action, and to produce Removing thereupon, notwithstanding that the same was after that Term, to the which the Warning was made, because it proceeded upon a Retour, done before both the Term, and also before the Warning; And which the *Lords* found, ought to be drawn back to the date of the Retour, which was before the Warning, and so was found sufficient. Actor. *Lawtie.* Alter. *Gibson* Clerk. *Vid. January* 20. 1625. L. *Selmes*, and the Cases there cited.

Collace contra L. *Elphinston*, *Eodem die.*

MR. *Patrick Collace* Servitor to Mr. *Robert Nairn* Advocat, being made Assigney to a Compryfing, by one *William Henderson*, who was Son, and served General Heir to *John Henderson*, and which *John Henderson* had deduced that Compryfing, against umquhile Mr. *Robert Johnston* of *Leuchie*, for a Debt owing by the said umquhile Mr. *Robert*, to the said umquhile *John*. The said Mr. *Patrick*, as Assigney Constitute to that Compryfing, by the Heir Generally Served to him, who Deduced the same, pursues the L. of *Elphinston*, Superior of the Lands Compriſed, to hear him be Decerned, to give him Precepts, for obtaining of Infeftment, according to the Compryfing; Which Action was sustained by the *Lords*, albeit it was Alledged for the Defender, *viz.* the L. *Elphinston*, that the Pursuer was an Advocats Servant, and so not capable of an Assignation to a Compryfing, in respect of the Act of Parliament, *prohibiting Members of Session to take Assignations topleys*; which was Repelled, because Compryfings comes not under that Act; and also it was Alledged, that the Pursuer could not seek Infeftment, by vertue of his Assignation to that Compryfing, while the said Sentence of Compryfing were first transferred, both in the Heir of the Obtainer, and Deducer thereof, and also in some Person to represent him, against whom the Compriſing was deduced; seing this Compriſing was a Sentence, and behoved to be ruled, as all other Sentences, which ever requires Transferring, before any Execution follow thereupon, when the Party Obtainer of the Sentenee dies, which was Repelled; and the *Lords* found no necessity of Transferring, in regard thir Precepts, for obtaining of Infeftment

ment, were desired to be granted, by Pursuit, and way of Action, and not by a summar Charge of Letters of Horning, to command the Superior to Infeft; which summar Execution, if it had been either sought, or used without Pursuit, The *Lords* found, that they would not sustain the same, but sustained the Pursuit and Execution, without Transferring, *ut supra*. *Actor. Nairn. Alter. Gibson* Clerk. *Vid.* for this first Part *July* 6. 1625. *Mowat:* for the last Part, *Novem.* 20. 1624. L. *Lagg. January* 23. & 27. and *Feb.* 3. 1624. *Stevinson: penult July*, 1625. *Guthrie. Feb.* 11. 1629. *Frazer: Decem.* 5. 1628. L. *Cersbie: Decem:* 22. 1626. *Gordon.*

Lennox contra Tennents, *Eodem die.*

IN an *Action*, at the Instance of *Lennox* of *Branshogill*, against certain Tennents of *Balfron*, for payment of the Rental Teind-bolls, of the Lands possest by them, upon this Reason, because they were in use to pay the same diverse Years, preceeding the Year Lybelled. The *Lords* sustained the *Action*, and found the Tennents astricted to pay the Rental Boll; albeit it neither was Lybelled, nor offered to be proven, by the Pursuer, that there grew als many Corns that Year lybelled, as would extend in the Quantity of the Teind, to the Rental-Bolls acclaimed, without the which the Defenders alledged, that they could not be subject to pay the Rental Bolls; albeit they had payed the same before, which was but voluntarily done, and could be no Reason to make it thereafter necessary. Which was Repelled, and the *Lords* found them subject, to pay the said Rental-Bolls; albeit the Teinds of the Corns growing, extended not to that Quantity; for the *Lords* found them still Debitors thereof, ay and while they made timeous Intimation to the Pursuer, or the Person having Right to the Teinds, that they would not remain obliged to pay the saids Bolls, and offer him Teinding of the saids Corns; and so in this Case, the Defenders are in worse estate than where Spulzie is pursued; for in Spulzies the quantitie of necessity must be proven, either by Witnesses, or the Pursuers Oath, or the Defenders. *Gibson* Clerk. *Vid. Feb.* 20. 1633. *Colledge of Glasgow.*

Somervel Donatar to the L. *Edmiston's* Escheat, contra *Eodem die.*

IN a Declarator pursued of the L. of *Edmistons* Escheat, at the Instance of *Lewes Somervel*, Servitor to the Lo. *Erskin*; it being alledged, that the Horning was null, because the Denounciation bore not, *that three blasts of the Horn was used*, and the Pursuer Replyed, that the Execution bore, *that he duely and lawfully denounced*; that word, *duely and lawfully*, must be understood to comprehend all Solemnities requisit, specially where there is no Law requiring, that the Execution should bear that Clause, or that it is necessar to be done. The *Lords* Repelled the Alledgance, and sustained the Horning, but found it necessar, that the Pursuer should prove, tha three Blasts were given by the Officer, at his Denouncing of the Defender, which being proven, to have been truely and actually done, albeit it was not so expresst in the Written Execution, The *Lords* found it sufficient, and that the want of these Words was no ground of nullity; and this was ordained to be Proven, because the Witnesses and the Messenger Executor of the Denounciation, was on Life presently; but if the Witnesses were dead, in any of the like Cases, when it occurred, The *Lords* inclined to sustain the Horning without necessity of such Probation, the Execution bearing, *that the Officer lawfully denounced*, seing there was no Law requiring that Solemnity specially to be recorded in the Execution. *Actor. Hope. Alter.*

Gibson Clerk. *Vid. March* 4. 1624. L. *Sornbeg* contra *Drysdale.*

Erskin contra Tennents, *Eodem die.*

ROBERT *Erskin* being Infeft in a Tenement in the *Cannongate*, upon Resignation made by *Joseph Cunningham*, who is Infeft therein, proceeding upon a Compryſing, againſt Sir *James Erskin*, who was Heretor thereof, Purſues the Poſſeſſors, for the Mails and Duties; Compeared in this Proceſs the Lo. *Erskin*, and defends the Tennents, as his Tennents, and who had payed him, in reſpect of his Infeftment thereof, granted to him by the ſaid Sir *James*, for an Onerous Cauſe, being a Debt owing by the ſaid Sir *James*, which Debt was before the Debt owing to the Purſuers Author, for the which he Compriſed the Lands; Likeas his Infeftment was before the Compriſers Infeftment, and it being Replyed, that the Lord *Erskins* Infeftment, was after the Denounciation, made by the ſaid *Joseph Cunningham*, for Appryſing of the Lands from *Sir James*, and ſo the ſame could not be ſuſtained as lawful, to exclude his Right, proceeding upon a Compriſing, the Denunciation whereof was anterior to his Infeftment, neither could the Priority of the Excipients Debt be reſpected, ſeing he had done no Diligence, to recover the ſame from the common Creditor, but only by his voluntar Reſignation, had obtained the ſaid Infeftment, which ought not to prejudge the Purſuers Right, and more timely Diligence; and it being controverted, that this Reply could not come to be Tryed in this Judgement Poſſeſſor, ſo ſummarly to take away the Excipients Right. The *Lords* found, that ſeing the Excipients Right was made before the Purſuers Authors Compriſing and Seaſing, albeit after the Denunciation thereof, that in this Judgement Poſſeſſor, the ſaid Excipients Heretable Right foreſaid, being clad with Poſſeſſion, they would not annul the ſame *hoc ordine*, by way of Exception, upon that Reaſon of the preceeding Denunciation, and voluntar Deed of the common Debitor, and the not doing Diligence by the Excipient; but reſerved the ſame to be diſcuſſed by way of Reduction, *prout de Jure*; and the *Lords* declared, that if the Compriſing was expired, before the Infeftment granted to the Lo. *Erskin*, albeit the Compryſers Seaſin was after his Seaſin, in that caſe they would prefer the Purſuers Infeftment, and Repel the Exception foreſaid in this ſame Judgement, if the Compryſing was compleited before the Excipients Infeftment, for the Compryſing ſo denuded the Debitor, that he could not by any Deed thereafter prejudge the ſame. *Actor. Hope. Alter.* *Gibſon* Clerk. *Vid. July*, 1. 1624. L. *Balveny*. *July* 22. 1626. contra Where a Land is twiſe Diſponed to ſundry Parties, *Ult. January* 1628. *Mark Hamilton.*

Foulis contra *Allan*, *March* 23. 1626.

GEorge *Foulis* Heretor of a Tenement of Land in *Edinburgh*, raiſes Letters, and Charges upon the Act of Parliament, Ja. 4 *anno* 1491. and another Act Ja. 5. *anno* 1535. againſt *Iſobell Allan*, Life-renter of that ſame Tenement, to entertain that Tenement, in the Caſe wherein ſhe received the ſame, and to find Caution to that effect; which Charges being Suſpended by her, upon a Reaſon founded by her, upon a Poſterior Act of Parliament, Ja. 6. *anno* 1594. *chap.* 226. By the which Act, it is Provided, *That ſuch Caution ought not to be found, while firſt a Precognition had preceeded, and been taken concerning the eſtate of the Tenement*; So that nothing being done, which is preſcribed by that Act of Parliament, wherein the Order which ſhould be obſerved in ſuch Caſes, in all time thereafter, is expreſly ſet down, & the former Acts are explained, whereby Caution cannot be ſought, nor found, while that be performed; Likeas by the ſaid Act, it is Provided, *That the Heretor may enter to the ſaid Lands, in caſe of not finding of Caution, and poſſeſſe the ſame, he finding Caution to the Life-renter, to pay to her*

the

the Maills yearly, during her Lifetime, as the Land preſently gives; and ſhe is content, conform to the *Act*, that he enter, finding Caution to her to that effect foreſaid. The *Lords* found the Charges orderly proceeded againſt the Liferenter, for cauſing of her to find Caution, according to the foreſaid firſt *Act* of Parliament, *Ja.* 4. Which *Act* they found not to be prejudged by the ſaid laſt *Act*, 1594, in any ſort, but to be Ratified thereby; and that any Order therein ſet down, which appears to differ from the preceeding *Acts*, is appointed only for decayed and ruinous Lands, which are Liferented, that the Heretor may repair and big the ſame; which Reparation cannot be made by a Liferenter, nor ſhe cannot be urged thereto, ſhe only bruiking by a Temporal Right, *quo caſu* the Heretor entering to the ſame for that end, Caution ſhould be found by him to pay the Maills to the Liferenter, as that decayed Land preſently payed; and that *Act* concerned not other Land which was not ruinous, which the Liferenter was holden by the preceeding firſt *Act* of Parliament to preſerve in als good eſtate, as it was when ſhe entered thereto; of the nature whereof this Tenement controverted was: For that laſt *Act* was alſo in favours of the Heretor, who thereby hath the priviledge of Reparation of burnt, ruinous, and decayed Lands, given to him, in reſpect of Policy had and to be kept within Burgh. Actor. *Fowlis.* Alter. *Burnet* Minor. *Gibſon* Clerk.

Gray contra Tennents, *March* 24. 1626.

IN the Action betwixt *Gray* and the Tennents of *Fairniflat*, whereof mention is made 2 *March* 1626. one *Andrew Grahame* Compeared and Alledged, that the Farms of the Mains of *Fairniflat* ought not to be made forthcoming for the Cropt 1625. which was controverted to *Gray* the Arreſter, becauſe *William Grahame* of *Fairniflat*, the Arreſters Debitor, and for whoſe Debt the ſaids Farms were Arreſted, was Denuded of the Right to the Lands, in favours of the ſaid *Andrew*, by Contract in *May* 1624. Annailzieing the ſaids Lands to him, and Charter and Seaſin following thereon, in *July* 1624. and real Poſſeſſion had, conform thereto, by holding of Courts, and uplifting of the Farms the ſaid year 1624, from thir ſame Tennents, who became his Tennents. Likeas, they Acted themſelves to pay their Farms to him of the Cropt 1625, which is now controverted, and ſo the Tennents cannot be conveened therefore by the Purſuer, as if the Farms pertained to his Creditor, who was denuded of his Right to the Lands before the Arreſtment, as ſaid is. It was Replyed, that the Tennents behoved to be repute Tennents to his Debitor, notwithſtanding of the Excipients Right; becauſe the Seaſin alledged by the Excipient was not Regiſtrat within 60 days after the date thereof, conform to the Act of Parliament, and ſo was null, and cannot therefore give him real Right to the Land, but the Heretor remained Maſter to the Tennents, and they are Debitors to him of their Farms, and conſequently to this Arreſter. The *Lords* notwithſtanding of this anſwer, found the Exception Relevant, notwithſtanding of the not Regiſtration of the Seaſin within 60 days, becauſe *quoad Grahame* of *Fairniflat*, the Right was ſufficient, and he could never alledge that nullity; and this Excipient alſo could not obtrude the ſame, who had no lawful Right to the Land, but only a perſonal Right from his Debitor, of a Sum of Money owing to him by Obligation: And the Act of Parliament provides, that this nullity may only be proponed by a third Party, who hath acquired a perfect Right of the Land, which is not alledged in this caſe. *Vid.* 13 *Novem.* 1623. *Marſhal* contra *Marſhal*. *Item* 25 *March* 1623. L. *Dunnipace.*

In this ſame Proceſs, another compearing for his Intereſt, who had acquired an Heretable Right of an Annualrent out of other Lands, whereof the

Farms were also Arrested, and craved to be made forth-coming the same Cropt, 1625. Which Infeftment of Annualrent was granted also before the Arrestment, by vertue whereof he alledged, that he ought to be preferred to the Arrester, for so many of the Farms Libelled as would satisfie his Annualrent; and the Arrester answering, that the Infeftment of Annualrent could not meet this pursuit which was made for the Farms of the Lands, which the Annualrenter could never crave by vertue of his Right, especially the same being for an Annualrent of Silver, and the Farms being Victual: Likeas, his naked Infeftment will never give him Action against the Tennents, as having Right by vertue thereof to thir Farms, but will only produce Action for Poynding of the Ground; which Action remains intire to him, and is not prejudged by this Process, albeit Decreet were given to the Pursuer; neither hath ever the Excipient done Diligence, nor Intented any Summons or Action upon his Infeftment, so that the same, without any other Diligence, can never exclude him who hath Arrested, and pursued thereupon this Action, to recover the Farms from the Tennents, so that the Parties Rights are not *circa idem*. The *Lords* notwithstanding of the Infeftment of the Annualrent, preferred the Arrester to the Right of these Farms, seing the Annualrenter might notwithstanding of this Sentence poynd the Ground, and the Goods being thereon: And it being alledged for the Excipient, that by this Sentence in favours of the Arrester, the Tennents would be greatly prejudged, who hereby will be obliged in the Farms to the Arrester, and also will have their Goods Poynded by the Annualrenter, and so will be twice distrest for the Farms and Duties of one Cropt, whereof they will not be liberat by payment made to the Arrester: And also it being alledged, that albeit he had a real Right to Poynd the Ground for his Annual, yet he was not thereby prejudged of his Right to the Farms *pro tanto*; and that it was in his option to elect any of thir two Actions and Rights, as he pleased to claim the same, seing he could not be urged to take him to the one, and forsake the other: All this was Repelled, and the Arrester preferred *ut supra*; for the *Lords* found, that in respect of the 36 Act, 5 Parliament, *Ja.* 3. that the Tennents were *in tuto* to pay to the Arrester, and that their Goods could not be Poynded again by the Annualrenter, for thir Farms once payed, and so could not be distressed for that Annualrent, but that the Annualrenter might Poynd his Authors Goods, or Comprise the Lands therefore, as the said Act proports. But by this Decision, the Right of the Annualrenter is greatly prejudged, and he forced to seek the Lands, which might be affected with other great burdens. Actor. *Nicolson* & *Mowat*. Alter. *Hope*. *Gibson* Clerk. *Vid.* 11 *July*, 1628. L. *Ednem*, 15 *July*, 1629. *Hamilton*. 23 *March*, 1624. *Brown*. 24 *Novemb.* 1626. *Glen* contra *Bruce*. 13 *Decemb.* 1628. *Huntlie*. 13 *Decemb.* 1627. Sheriff of *Forrest*.

Greenlaw contra *Galloway*, *Eodem die*.

IN a Reduction betwixt *Greenlaw* and *Galloway*, wherein *Greenlaw* Pursues for Reduction of a Bond, made by her umquhile Husband to *Kinloch* and his Spouse, conjunctly and severally, for a Sum of Money to be payed by them to the said *Galloway* Defender, at the Term contained in the Bond, and failzieing thereof, obliging them to pay Annualrent therefore out of their Lands, as well not Infeft as Infeft; the Wife after the death of her Husband desiring this Bond to be reduced, with the Compriseing which was deduced thereupon against her Lands, pertaining to her in Heritage, because it was made by the Husband & her *stante Matrimonio*, which could not oblige her to pay after the Husbands death, and for the which no Execution, either

ther personal or real could follow against her, her proper Goods or Lands, but only against the Husbands Goods and Lands; and it being Excepted, that seing she was bound conjunctly and severally with her Husband, that as the Husband might sell her Land with her own consent effectually, so he might give an Annual out of the same with her consent, and therefore might with her consent burden the Land with Sums of Money, and borrow Money which might affect the Land, albeit she might not be personally compelled to pay the same. Likeas the Defender declared, that he craved not her to be personally Decerned, to pay the Principal Sum, but only restricted the force and Execution of his Obligation against the Tenements pertaining to her, for paying of the Annualrent of the said Principal Sum, and not for the Principal Sum; notwithstanding of the which Restriction, the Reason was sustained, and the Exception repelled, and the Obligation and Compriſing of the Wifes Land was Reduced; and the *Lords* found that the Bond was not obligatory, neither personally against the Wife, nor against her own proper Goods nor Lands, neither for the Principal Sum, nor for any Annuals thereof; for albeit the Wife and the Husband may Annailzie or Wodset the Wifes Lands *Stante Matrimonio*, if it be legally done; yet being done after another manner and form than is allowed of the Law, as this Bond was, which contained no Clause to Infeft in the Wifes Land, but was drawn up in a Bond to pay the Principal Sum, and failzieing, to pay Annualrent out of their Lands generally, not obliging formally to Infeft in this Land controverted; therefore the same was not sustained, for the Bond controverted was made for payment of borrowed Money.

In this Process there was an old Practick produced betwixt Mr. *William Naper* and *Margaret Mowbray*, wherein she having consented to grant an Infeftment with her Husband to a Creditor, of an Annualrent out of the Lands, wherein she was Infeft in Conjunct-fee, after her Husbands decease; she being personally conveened for payment thereof, seing she possessed the said Land, conform to her Right foresaid of Conjunct-fee, The *Lords* Decerned her to make payment of the said Annualrent in time coming, so long as she bruiked by her Right, albeit she only was Consenter to that Contract made by her Husband, seing she then had the Right of Conjunct-fee in her person when she consented, and after the Husbands death possest the Land; which the *Lords* found did not agree with this case now controverted. Actor. *Hope*. Alter. *Aiton* & *Lawtie*. *Gibson* Clerk. *Vid.* 19 *Decemb.* 1626. *Sibbald* contra *Mathew*.

Keith contra *Robertson*, *March* 29. 1626.

IN an Action betwixt *Keith* and *Robertson*, an Assignation being made by one who was Bankrupt to his Creditor Pursuer, which being Intimate to the Defender, who was conveened for the Debt; and the Defender offering to improve the same, as false in that Date, whereof it was when it was produced; and the Pursuer answering, that that Improbation of the Date, ought not to be admitted to be of that force and consequence, to make the whole Assignation to fall, seing the Date was not essential, neither was the Defender prejudged by the Date, the same being of any Date before it was intimate: likeas, he was content to abide at the same, as truely done and perfected before the said Intimation, which ought to be enough, if he use the same of any Date preceeding the Intimation, seing the Defender had no prejudice, if it be of a Date anterior to the Intimation, as said is. The *Lords* found this Alledgance of Improbation in the Date to be Relevant, notwithstanding of the Answer, and notwithstanding that the Pursuer alledged, that he might fill up any Date therein

as he pleased, before the Intimation; which the *Lords* found could not be changed, being once used, and produced, of a filled up Date by the Pursuer in Judgment, and being Intimate; and so found, that if the Defender improved the same in the Date, albeit the Defender had no prejudice by the said Date, yet that it was sufficient to make the whole Assignation to fall, seing of the Law, what is found not to be truly done of that Date, as it bears, and as it is used, must be presumed not to be done at all. Actor, *Burnet major*. Alter. *Burnet minor*. *Gibson* Clerk. *Nam quando non est orta quæstio, inter partes, Notarius emendare potest ea quæ sunt sui officii per se, ut dies, nomina testium; sed si orta sit quæstio, non potest nisi parte adversa ad hoc citata, ubi autem redarguitur instrumentum falsi, tum post intentionem litis, nec per se, nec per judicem, nec in iis quæ sunt sui officii, nec in aliis corrigere potest*. Lantr. *de fid. instr*. *Vid.* 4 *Decemb.* 1629, *Winraham*, 10 *Feb.* 1636, *Edmiston*.

Causton contra *Stuart*, and *Wylies* Bairns contra *Hay*. *Eodem die*.

THere was two Actions before the *Lords*, one betwixt *Couston* and *Stuart*, and the other betwixt the Bairns of *Alexander Wylie* and Sir *John Scot* their Tutor against *Hay* and the Laird of *Grant*, wherein the Defenders being conveened for Registration of Bonds and Obligations for Sums of Money; which Bonds bore, *to pay Annularent after the Term of the Bond*, but no Clause proporting Infeftment, nor Obligation to give Infeftment, neither to pay, as well not Infeft as Infeft, but simply bearing, to pay ten for each hundred yearly, after the Terms of Payment; thir Bonds were found to be Heretable, and to pertain to the Heir of the Creditor; and the Action therefore was sustained at the instance of the Heirs of the Defuncts, to whom the Bonds were given, and the same was found to be Heretable, and not to be Movable, and consequently that the Executors of the Defuncts had no Right thereto. And in the foresaid Process of *Couston*, the Bond was desired to be Registrat at the instance of the Heir of the Creditor, which was sustained, because it was Heretable, as said is, and against the Executors to the Debitor, Maker of the Bond; which the *Lords* also sustained, and found, that albeit the Bond was Heretable, yet the Executors might be conveened for Registration of the same against them, and that Execution might follow against them, for payment of the principal Sum to the Heir at his instance, and also that they might be conveened at the instance of the Executors of the Creditors deceas'd, for all the Byruns, resting, owing, preceeding the said Creditors decease; which was so found, because the Bonds contained no Clause concerning any Infeftment to be given for the said Annualrent, which if it had been, then it behoved to have been sought to have been fulfilled by the Heir of the Debitor; but bearing as said is, only to pay Annual, and that the Creditor might charge for his principal Sum, it was found to be a Fact prestable by the Executors of the Debitor. But in this Process, the *Lords* were of the mind, that if the Pursuer should seek payment of the Annualrent from the Executors of the Debitor, for any Terms after the Defuncts decease, and before he should seek the principal Sum, and charge the Executors for the principal Sum, whereby it might become Movable, and so prestable by the Executors, that in that case, *viz.* where the Executors are not charged for the principal Sum, but only to pay the Annual, according to the Bond, for Terms, as they should yearly thereafter run and fall out to be owing, and the principal Sum remaining in the mean time Heretable, and not sought; that *hoc casu*, the Executors could not be found adebted in these Annuals, but the same should be craved from the Heir; but this Point was not Decided, for it was not

drawn

drawn in question *hoc loco*. Actor, in *Couston*'s Process *Oliphant*, *Hay* Clerk. In the other Process, Actor, *Cuhninghame*. Alter. *Belshes*. *Scot* Clerk. *Vid. penult. June* 1624, *Edgar*, and the Cases there cited. 7 *Dec.* 1627, *Porteous*. 13 *June* 1621, *Inglis*. 17 *Feb.* 1632, *Kinaird*. 19 *July* 1637, L. *Smeitoun*.

King contra *Tailor*, *Eodem die*.

IN a Suspension of *James King* against *Tailor*. The *Lords* found, that the Acceptation of a new Bond by a Creditor, made by other Persons, for payment of the same Debt to him, wherein others his Debitors were obliged by their other former Bond of before, the said posterior Bond bearing none of these who were first obliged, to be of new again bound in that last accepted Bond, but, altogether different in the persons oblig'd; and that the receiving of a part of payment of the Debt from the last Debitor, conform to the said last Bond, did not take away the prior Bond, nor liberate the persons bound therein; but that the Creditor might have recourse as he pleased to the prior Bond, seing the Creditor had not expressly discharged the first Bond, when he received the last, without the which, that is, that the first had been *specifice* discharged, the same was not prejudged by the said Acceptation of the new Security, and receiving of partial payment conform thereto, from the last Debitor. *Idem l. ult. C. de Novat. & §. pen. Inst. quibus mod. toll. obligatio*. Actor. *Nicolson*. Alter. *Stuart* & *Primrose*. *Scot* Clerk.

Grieve contra *Cant*, *penult March*, 1626.

IN an Action betwixt *Grieve* and *Cant*, for payment of the Sum of 1000 Merks, wherein the Defender was oblig'd, by vertue of a Contract of Marriage, as promised for Tocher. It being alledged, that the Contract was only subscribed by one Nottar for him, who was oblig'd in that Sum; and so being a matter of Importance, could not be sustained to produce Action thereupon, in respect of the Act of Parliament. This alledgance was Repelled, in respect that Marriage followed betwixt the Parties, according to the Contract; which the *Lords* found to supply that defect. Actor. *Oliphant*. Alter. *Hay* Clerk. *Vid. ult. June* 1625, and first Case there. 20 *Nov.* 1627, *Lackie*. 10 *Decemb.* 1630, *Nisbet* contra *Newlands*.

Gemmil contra Baillies of *Glasgow*, *Eodem die*.

IN an Action betwixt *Gemmil* and *Wallace* against the Baillies of *Glasgow*, for payment of a Sum adebted to the Pursuer by his Debitor, who for not payment, was committed to their Tolbooth in Ward, and was thereafter put to Liberty by them. It was Excepted for the Baillies, that they did no wrong, to put the Debitor to Liberty; because before he was suffered by them to go to Liberty, he had suspended the Pursuers Decreet whereupon he was Warded; so that the Debt being so suspended, and this Suspension seen by the Baillies, they had no ground whereupon to detain him any longer, but might lawfully enlarge him. This Exception was Repelled, seing the Suspension gave no Warrant to put the Party to Liberty, without which, and that they upon that Warrant, had been orderly charged to do the same, they could not at their own hand have put him to Liberty; for the Suspension might have been discuss'd against the Debitor, and so the Creditor greatly prejudged; and they were not Judges to consider of that Suspension, neither ought to have done any Deed, prejudicial to any of the Parties before it had received a Decision, or that they had received a specifick Warrant for their proceeding, or had been charged to put him to Liberty by the *Lords* Letters. *Gibson* Clerk. *Vid.* 27 *March* 1623, *Smith* con. Baillies of *Elgin*. & 14 *July* 1626, *Adam*.

E. *Kinghorn* contra *Collace*, *March ult.* 1626.

IN an Action of Removing, pursued at the instance of the Earl of *Kinghorn* against *Collace*, an Exception was admitted to the Defenders Probation, up-

on a Right made to the Defender of the Lands libelled, or to his Father or Goodsire; and at the Term of Probation an Incident being produced, raised at the Defenders instance, against certain persons, called as Havers of these Evidents, whereby he behoved to prove his Exception, This Incident was sustained, albeit the Evidents called for thereby, were the Defenders own Evidents, seing the Defender, User of the Incident, was a Minor; and so it might be probable, that he was not Master, nor haver of his own Writs. Actor. *Hope* & *Rollock*. Alter. *Aiton* & *Mowat*. *Gibson* Clerk. *Vid.* 19 *July* 1625, *Hay*, 6 *Feb.* 1622, *Grier*.

Donatar of the L. *Foulis* Escheat, *June* 14. 1626.

IN a Declarator sought of the Laird of *Foulis* Liferent, the Gift being granted upon divers Hornings, therein specially mentioned, whereof some were produced and used by the Donatar, whereupon he craved the Declarator; and another was produced to debar the Defender *à defendendo*, which he declared, he used only to that effect to debar him, because he was Rebel unrelaxed, and used it not to recover Declarator thereon, albeit it was also expressed in the Gift, and the Defender offering to improve the same, and alledging, that so he could not be debarred thereby, till it was tryed, if it was false or true; and the Pursuer answering, that he could not be heard to compear to propone, either Improbation, or any other alledgance, so long as he stood Rebel unrelaxed. The *Lords* found, that he ought to be relaxed or ever he could be heard to propone Improbation, seing that Horning, albeit it was contained in the Gift, yet it was not used by the Pursuer to recover Declarator thereon, but only to debar him. Actor. *Russel*. Alter. *Lawtie*. *Gibson* Clerk.

Stirling contra Tennents, *June* 15. 1626.

James Stirling Pursues the Tennents of *Old-bar*, in whose hands the Farms addebted by them to the Lady were Arrested, & the Lady being called for her Interest, for making of the Farms forth-coming to the Pursuer, for satisfying of a Debt addebted to him by the Lady. Litis-contestation being made in the Cause, and the Probation renounced, before the advising the Lady dies; whereupon the *Lords* found, that the Process could not be advised, until the same should be transferred in some person, to represent the Lady, who was principal Debitor; and therefore the Transferring being raised at the Pursuers instance against her Son, who was conveened only as appearand Heir, And the Defender alledging, that the Process could not be transferred *hoc nomine* against him, as appearand Heir, seing he was neither charged to enter Heir, nor called as charged to enter Heir, but only as appearand Heir, which was not *nomen juris*. The *Lords* sustained the Transferring against the appearand Heir, in respect of the state of the Process, which was concluded before the decease of the Lady; and that no Execution was craved against the Lady, or her Heirs, but only upon the Arrestment against the Tennents; and found no necessity of a Charge, nor any other Title in the person of the Defender, but Adjudications are not so sustained against appearand Heirs. Actor. *Hope*. Alter. *Gibson* Clerk. *Vid.* 8 *July* 1623, *Thomson* contra *Edgar*, 13 *March* 1628, *Somervel*.

Prior of *St. Bathans* contra *Carmichael*, *June* 16. 1626.

A Declarator of Escheat being sought at the instance of the Prior of *St. Bathans* against *Carmichael*. The Horning was quarrelled by the Defender, because the Party was not denunced Rebel at the Cross of *Greenlaw*, which was appointed to be the place, whereat all Hornings should be execute against persons, Indwellers within the Sheriffdom of *Berwick*, conform to the Act of Parliament 1600, whereby the same is Statute, and which Act declares all Hornings otherways execute at any other place or Mercat-cross to be null; and this Horning controverted, was execute at *Dunce*, and not at *Greenlaw*, conform to that Act, and therefore was alledged to be null. This Alledgance was Repelled,

led, and the Horning execute at *Dunce*, and not at *Greenlaw*, was sustained, notwithstanding of the said Act of Parliament, in respect of the frequent use observed since the said Act, in executing of Hornings and denuncing Rebels, since that Act of Parliament at the Cross of *Dunce*; which contrary consuetude against the said Act, the *Lords* found Relevant, and admitted the same to the Pursuers Probation, to sustain the said Horning, and found the same should be proven by Hornings execute since the Act: Likeas, there was a Practique produced before the *Lords*, betwixt *Mellerstanes* and *Hume* of *Eccles* in *anno* 1606, where the like was so decided before. Actor. *Belshes*. Alter. *Boid*. *Gibson* Clerk.

Murray contra *Dishington* and *Scot*, *June* 21. 1626.

SIr *John Murray* of *Philiphaugh* having payed as Cautioner for Sir *Thomas Dishington* some Sums of Money, for his relief thereof, he arrested in Sir *William Scots* hands some Moneys, adebted by the said Sir *William* to the said Sir *Thomas*, as resting of the price of the Lands of *Ardros*, and upon the Arrestment, pursues Sir *William* to make the same forth-coming to him. The Money was alledged by Sir *William* and Sir *Thomas* Defenders, not to be subject to Arrestment, seing it was Immovable, being employed upon Land to the said Sir *Thomas* his behove, to whom the said Sir *William* had given Charter and Sasin for his Security of the said Money. It was answered by the Pursuer, that that Infeftment was under Reversion, and that Sir *William Scot* had used an order of Redemption, and made consignation of the Money, whereupon the Lands were redeemable; likeas, after the Consignation, he had apprehended Possession of the Wodset Lands, the same being before that order of Redemption, possess'd by the said Sir *Thomas* himself; and the Money being consigned, became Movable and was arrestable after the said Consignation. Notwithstanding of this Reply, the Money was found not to be Movable, nor subject to Arrestment, albeit that the preceeding order was used, and the Money consigned before the Arrestment, except that after either Decrect of Redemption had followed upon that order, or else that the Wodsetter had renounced and granted the Lands lawfully redeemed: And the *Lords* found, that without a Grant of Redemption, or a lawful Sentence, the Money became not Movable, nor subject to Arrestment as said is; albeit it was also Replyed, that this tended greatly to the prejudice of true and lawful Creditors, who by the Collusion betwixt thir Parties being conjunct, *viz.* Father in Law, and Good-son, they might make a Redemption and Renunciation at their pleasure, and use it, or not use it, as they found expedient, which could not be known to the Creditor: Likeas, that Collusion appeared the more probably in this case, where after the Consignation, the Consigner acquired real Possession of the redeemed Lands, which he had not before. Which Answer was not respected as said is, except *positivè* it had been alledged, that there was either a lawful Grant of Redemption, or a Sentence, seing either the Consigner might pass from the order, or the order might not be sustained by the *Lords*. In either of the which Cases, the Money returned to the nature again wherein it was before the order; for Reversions are counted among things Immovable, whereof no Disposition can be made upon Death-bed, but after the Declarator, the Money, which before Declarator is repute also Immovable, becomes then to be Movable, and pertains to the Executors of the Defunct, and not to his Heir. And so affirms *Craig*, lib. 2. Feud. fol. 60. but in the same second Book, fol. 251, & 252. he says, *That if any man die in the Wodset of Land that is under Reversion, the Land being redeemed, the Wodsetters Wife will have the use of her third of that Money, whereupon it was redeemable, upon Caution to make it forth-coming to the Heir after her decease; but if any Tacks be after the Redemption, she will have no part thereof, but the same pertains only to the Heir.* By the which it would appear rather that the Money is not Movable, seing the

Relict hath the Liferent of her third thereof; but it may be answered, that the Redemption there, is made after the Husbands deceate.

In this same Process, the *Lords* found, that a Sum appointed to be payed by the Debitor to the Creditor, (as Sir *William* was oblig'd in this case to Sir *Thomas*,) where the Debitor was oblig'd to pay the Sum to his Creditor, to the effect the same might be employed by the Creditor upon Land, for Warrandice of the Land bought by him, who was oblig'd for the Money to him, to whom it was oblig'd to be payed; yet notwithstanding of that destination, it remained Movable, and might be arrested by his Creditor, to whom the Money was oblig'd to be payed, where the Money was not employed upon Land before the Arrestment, conform to that destination, seing the Party who was oblig'd to pay, was simply oblig'd and was not subject in any Heritable condition or Obligation, nor holden thereby to pay Annual, but when the payment was made, either to the Party to whom he was bound, or to his Creditor Arrester, or any other. So the *Lords* found it was affected with the same condition and ought to be employed upon Land for the Parties Warrandice; and therefore found, that this Arrester, for his Debt due to him, had Right to the Sum as Sir *Thomas* had, and might seek the same, but that he ought to employ it upon Land for Warrandice to Sir *William*, conform to the destination and condition of his Bond. Actor. *Lermonth* & *Cunninghame*. Alter. *Stuart* & *Nicolson*. *Gibson* Clerk. *Vid.* 23 *March* 1624, *Hamilton*. 10 *July* 1628, *Cant* contra *Edgar*. 20 *March* 1623, *Simson* contra *White*. 7 *Feb.* 1635, Captain *Watson*. 7 *March* 1628, *Wilson*.

Lo. *Balmerino* contra L. *Lochinvar*, *Eodem die*.

IN an Action at the Lord *Balmerino's* instance against L. *Lochinvar*, who was pursued to make a Sum of Money forth-coming to him, which was Arrested in *Den-miln's* hands, as owing by him to the L. *Balfour*, who was decerned to pay to the Lo. *Balmerino* a Sum of Money decerned against him, and for payment of the which Sum, decerned by that Sentence to be payed to the Pursuer by the L. *Balfour*, that Sum was Arrested in *Den-milns* hands, and he Pursued to make it forth-coming, for loosing of the which Arrestment, the L. *Lochinvar* became acted Cautioner, and who as Cautioner was convened for payment of that Sum Arrested. In this Process the *Lords* found the L. *Lochinvar* could not be pursued as Cautioner foresaid, while it was first tryed, and found by Sentence that *Den-miln*, in whose hands the Arrestment was laid was debitor to the Laird *Balfour* in the Sums Arrested; for if he was not addebted the time of the said Arrestment, in the Sums to the Laird *Balfour*, the becoming of *Lochinvar* Cautioner at the loosing of the Arrestment, could not make him to be Debitor; and so the *Lords* found no Process against him, as Cautioner foresaid, while Sentence was recovered, finding the person Debitor, in whose hands the Arrestment was made.

In this Process the *Lords* found, and were of the mind, that the loosing of the Arrestment, by finding Caution, freed the person in whose hands the Arrestment was made, of all actions which the Arrester could move against him upon that Arrestment; and that by the loosing thereof, he remained not subject to the Arrester, but might pay the Debt Arrested to his Creditor, notwithstanding of the said Arrestment, albeit it was in his hands at the time of the Arrestment, seing the loosing thereof could have no other effect, but to remove that impediment anent the Arrestment, which only stayed the payment, which being removed, he might lawfully pay the same; and the Arrester had only Action competent against the Cautioner: But in thir cases it is considerable, that the Party Arrester may be greatly eluded and prejudged, if an irresponsal Cautioner be received, and the Principal Debitor being otherwayes *non solvendo*, seing by our Law there is no Subsidiary Action against the Judge or Clerk who

receives

receives the Caution. Actor. *Lermonth* & *Stuart*. Alter. *Aiton* & *Belshes*. *Hay* Clerk. *Vid.* 10 *Decem.* 1623. what is noted there. 2 *Feb.* 1627. betwixt thir Parties.

Maxwell contra L. *Drumlanrig*, *June* 23. 1626.

IN a Suspension betwixt *Maxwell* of *Hill* and L. *Drumlanrig*, whereby he charges for payment of some Moneys, contained in an Obligation made by the Suspender to *Drumlanrig*, it was desired to be Suspended, because the Suspender had never borrowed any Sums, neither was there any cause of Debt, whereby the Suspender could be found Debitor to the Charger at any time, either at the making of that Bond, or before, which was referred to the Chargers Oath, and that the said Bond was made upon hope and expres condition, that such deeds should have been done by the Charger to the Suspender, and no otherways, which deeds and conditions were never fulfilled; and which point anent the said condition, whereupon the Bond was granted, was offered to be proven, by the Witnesses insert in the said Bond, who were all *Testes omni exceptione majores*. The *Lords* would not admit the same to be proven by the Witnesses insert, but only found that the condition whereupon the said Bond was made, ought to be proven by the Oath of the Party, to whom the Bond was given, or by Writ, and no otherways. Actor. *Stuart* & *Cunninghame*. Alter. *Hope* & *Nicolson*. *Scot* Clerk. *Vid.* 26 *July*, 1622. L. *Erskinont* contra L. *Bukie*.

Haliburton contra Provost of *Jedburgh*, *June* 29. 1626.

IN an Action pursued by *Haliburton* of *Mertoun* contra the Provost of *Jedburgh*, who for not taking of Mr. *John Hume* Rebel, by vertue of Letters of Caption at the Pursuers instance, was conveened for payment of the Principal Sum, and of the Annualrent thereof, since the time of his Rebellion, conform to the Act of Parliament 1621. The *Lords* found, that the Summons bearing, *The Rebel was in the Provosts company the time of the Charge given to him, to take him*, ought to be otherways proven than by the Officers Execution; which Execution they found no ways sufficient to prove the same, and therefore admitted the Summons to probation, to be otherwise proven, as accords of the Law. *Item*, In this Process the *Lords* sustained the Action against the Magistrat, only for payment of the Principal Sum, and not for the Annual thereof since the Rebellion, in respect the Provost could not be Debitor for any more than for that Sum, for the which the Rebel was Denounced, and for the which Caption was Execute; for if the Rebel or Magistrat had payed that Sum, neither could the Rebel then been taken for the Annual since the Rebellion, the same not being contained in the Horning, nor no Caption against him therefore; neither could the Magistrat then have been Charged to take him therefore, and so the *Lords* assoilzied the Provost from that part of the Summons, but prejudice to seek the same from the Rebels self, as the Pursuer might best do of the Law. Actor. *Haliburton*. Alter. *Sandilands*. *Gibson* Clerk.

L. *Glengarnock* contra L. *Musbet*, *Eodem die*.

THis same day in a Removing at the La. *Glengarnocks* instance, compearance being made in the name of L. *Musbet*, who had sold the Land to the L. *Buchanan*, and an Exception admitted to his Probation, at the Term a Discharge being produced from *Musbet* to his Procurators, to compear for him; The *Lords* found, that *Buchanan* who had bought the Lands from him, might compear in that same state of the Process, and repeat that same Exception, and Deduce in his own name probation thereon, notwithstanding of *Musbets* Discharge, who in the Act only compeared, and proponed the Exception, and so that *Buchanan* might stay the circumducing of the Term, which the Pursuer sought, in respect of the said Discharge. *Vid.* 27 *Novemb.* 1627. L. *Drum*.

Lo. *Kildrimmie* contra *Eodem die*.

IN an Action of Reduction and Improbation pursued in one Summons, as usually is done, at the Lord *Kildrimmies* instance, against The Defender com-

compearing, produced the Writs called for, and declared, that he produced the same, for satisfying of the Summons and Action, so far as concerns the Improbation, but not for the Reduction, seing he declared, that he would not compear concerning the Reduction, but be absent, so that a Certification in absence might be granted upon the Reduction, decerning the Writs to be Reduced for not production, and which he alledged he might conveniently do, seing the Reduction and Improbation were two distinct Actions, of different natures; and which being pursued by two several Actions, it would have been then in his liberty to be absent in any of them, or to compear in any of them, as he pleased; so that the pursuing of the same in one Summons, could not alter the nature of the Actions, but the same remained in themselves two distinct Actions, albeit both Libelled in one Paper, and could not thereby force the Defender to any other compearance, than if they were severally pursued; this was not permitted by the *Lords*, but they found, that either he should compear, and satisfie the Production in the whole Cause, as well for the Reduction as for the Improbation, or else that he should be absent *in totum*, and would not suffer him to divide his Compearance and Production, so that he should be absent, and not produce, and in that same Process to compear and produce. Actor. *Hope.* Alter. *Nicolson.* Hay Clerk.

Scot and *Inglis* contra *Junkine*, *July* 1. 1626.

IN an Action of Deforcement pursued by *George Scot* for himself, and as Assigney constitute by *William Inglis*, against *David Junkine*, who had taken away certain Goods pertaining to *William M'kean*, Debitor to the said *George Scot* and *William Inglis*, and which they were Poynding for satisfying of the said Debt; at the deducing of the which Poynding, the said *David Junkine* Deforced the Officer. In this Process the *Lords* sustained the Pursuit also moved by the Assigney, constitute by *Inglis* to his part, albeit the *Assignation* was dated after the intenting of this *Action*; and so it could not be a Title to instruct that Pursuit and Summons, whereas the same was dated after the intenting of that Pursuit by him as *Assigney*; which alledgance was Repelled, and the *Assignation* sustained, to instruct that Pursuit, seing the same had relation to another *Assignation* of an anterior date, which was lost; and also the Cedent present concurred at the Bar in this Pursuit with the *Assigney*, and affirmed the *Assignation*. *Vid. July* 29. 1625. E. of *Wintoun*. 20 *Jan.* 1625. L. *Selms.* 20 *March* 1623. Lo. *Tester.*

Nisbet contra *Whitelaw*, *Eodem die.*

ONe *Whitelaw*, being pursued at the instance of Mr. *Patrick Nisbet* and his Bairns begotten upon his Wife, Daughter to Mr. *John Arthure*, for Exhibition of certain Writs and Bonds, pertaining to the said Mr. *John*, and which they desired to be Produced, and Delivered to them, to the effect that they might Advise and Deliberat, if they would enter Heirs to their said umquhile Grand-father, or not, in this Pursuit the Defenders Compearing, Alledged, that this Pursuit, for Delivery of Evidents to the Pursuer, to the effect she might Advise, if she would enter Heir, ought not to be sustained, because albeit an *Appearand* Heir might call for Production of Writs, yet the Delivery thereof, or Decreet being given for Delivery, makes the Pursuer Heir: So that the craving of the Writs to be Delivered *ad hunc effectum*, *viz.* to advise, if she would enter Heir, ought not to be sustained. This Alledgance was Repelled against the Exhibition, and the Pursuit was sustained by the *Lords*, to crave the Production, to the foresaid effect, albeit it was Year and Day past, since Mr. *Johns Arthurs* decease, whereby the Defenders Alledged, that the Pursuer could not crave Exhibition, for the foresaid effect, to deliberat, seing the time given by the

Law,

Law, to Advise, was expired; and in respect whereof she could not Pursue, but to the effect that she might enter Heir, which was Repelled, as said is, against the Exhibition; but was Reserved after the Evidents were produced, to be Disputed against the Delivery thereof. Actor. *Stuart*. Alter. *Hope*. *Hay* Clerk. *Vid. July* 26. 1626. betwixt the same Parties. *July* 19. 1643. *Hamilton*.

The like was thereafter sustained, *July* 18. 1626. *Innes* contra where the *Lords* sustained the Pursuit, for Exhibition, for the same effect, the Pursuer being Major. *Hope* for the Defender. *Hay* Clerk.

Hay contra *Eodem die.*

IN a Spulzie pursued by one *Hay* in *Hadingtoun* contra an Exception of Poynding being proponed. It was Replyed, that the Annualrent of a Term, after the Poynding, was payed by the Pursuer, to the Excipient, for that Sum, for the which the Poynding was deduced, whereby he could not Poynd for the principal Sum before that Term, for the which the Annual was payed; and which the Pursuer offered to prove by Witnesses, and contended, that the same was probable by Witnesses, seing the matter was of smal Importance; for the Principal Sum, whereupon the Poynding was Deduced, was only 100 Merks, and the Terms Profit received was allenarly 5 Merks; and so was very admissable to be Proven by Witnesses. The *Lords* nevertheless found, that that Payment was only probable by Writ, or Oath of Partie, seing it tended to take away the Poynding, and frustrat the Execution of the Obligation, whereupon the Poynding was used, and to make the Excipient a Spulzier, and would not sustain the Payment to be proven by Witnesses. Actor. *Cockburn*. Alter. *Hay* Clerk. *Vid. July* 26. 1626. *Rusel*.

Haliburton contra *Stuart*, *Eodem die.*

ONe *Haliburton* being Assigned by Sir *George Hume* of *Manderstoun*, who was Donatar to the L. of *Coldinknow's* Escheat and Life-rent, in and to a part of the said Escheat and Life-rent, so far as concerned an Obligation, granted to the *L.* of *Coldinknows*, by *Francis Stuart* Son to the late Earl *Bothwel*, upon a Sum of Money, which was an Heretable Bond, bearing, *the Debitor to be obliged to Infeft the Creditor in an Annualrent, in case of failzie to pay the Principal Sum, at the Terms appointed by the Bond*, It being controverted in this Cause, how far this Escheat, or Life-rent should extend to, anent this Sum and the Profits thereof. The *Lords* found, that the Principal Sum (the same being owing, as said is, by an Heretable Bond) fell not under the said Escheat, neither Simple, nor Life-rent; but found, that all the by-run Annuals owing, preceeding the date of the Gift, fell under the Rebels *Simple* Escheat; and sicklike, that the Annuals adebted, in time to come, after the Gift, fell since the expiring of Year and Day, after the Rebellion, under the *Liferent* Escheat; and found, that the same pertained to the Kings Donatar, and not to the Debitor, granter of the Bond, who was obliged to give the Infestment of the Annualrent, seing the said Bond bore not to grant that Infestment of the Annualrent, *to be holden of the Annuitziars self*, but being granted indefinit, without mention of any Superior, of whom the same Annualrent should be holden; it was presumed for the King, that he behoved to be Superior, of whom the said Annualrent should be holden; and so to belong to his Donatar. And this was found, albeit no Infestment followed upon the Bond; and so albeit there was no holding, and albeit that it was alledged, that there could be no Liferent-Escheat, where there was no holding, As was clear by the 31. Act 4. Parl. *James* 5. *anno* 1536. Which requires an holding, before there can be any Liferent Escheat; which Alledgance was Repelled, and the Annualrent since the expiring of Year and Day, was found to come under the said Liferent Escheat, as said is, and to pertain to the King; and this was found, albeit the Bond bore on-

ly thir Words, *To Infeft the Creditor in an Annualrent correspondent to ten for ilk hundred of the principal Sum*; and bore not *to Infeft him in an Annualrent out of his Lands, nor of what Superior to be holden.* In this Process it came under the *Lords* Consideration to advise, how the said Annualrent in time to come, could fall under the said Liferent Escheat; wherein this difficultie offered it self, that seing the Debitor, who was obliged *ut supra* by an Heretable Bond, might nevertheless pay the Principal Sum to the Creditor Rebel, whereby the Bond, and the Clause for the Annualrent would become extinct, that therefore the Donatar could no further bruke the Liferent of that Annualrent, which was louſed, by the paying of the Principal Sum thereupon; And it being questioned, if the Donatar should have the use and benefit of the Principal Sum, so long as the Rebel lived, or if the Liferent Escheat, concerning the Annual of that Sum, expired by the said payment of the Principal Sum. The which Doubt also offered in the case of Wodsets, where the Receiver of Infeftment of Land, under Reversion, is Year and Day Rebel, and that the Land be Redeemed, and the Sum payed, or Consigned, if the Donatar to his Liferent after Redemption, can have any Right to the Profit of that Principal Sum, which may appear, should succeed in the place of the Profits of the Lands Wodset, to the which Profits, so long as the Wodset stood, the Donatar to the Wodsetter had good Right. This Point was not determined, *viz.* If the Donatar should have the Profit of the Money, in any of the two Cases foresaid; albeit most part of the *Lords* seemed to be of the opinion, that after payment of the Principal Sum, in an Heretable Bond, or after Redemption in a Wodset, the Donatar to the Liferent could pretend no Right to the Profit of the Sums thereafter; which Opinion may be also conroverted, albeit the same may be probably disputed, for where there is not a standing and extant Right of Liferent, there can be no Liferent sought; and where any thing which is lawfully constitute by Right of Liferent, if the same perish, the Liferenters or his Donatars Right thereof *perit cum interitu rei ipsius*; or if the Sum therein, or the Land wherein the Liferent is constitute, be otherways exhausted, or evicted, so also in this case; but it may be thought, that the Principle Sum being payed, or redeemed, as in other Cases contoverted, if the Party remain still Rebel at the Horn, the payment will pertain to the King & his Donatar, by vertue of the simple Escheat, and may so be of new Gifted again others think, that albeit the Debitor cannot be stayed to pay the Sum, yet the Profit of the Money must ever pertain to the Donatar of the Creditors Liferent, so long as the Creditor lives; for they put the Donatar in the same Case, as any to whom the Creditor, if he had not been Rebel, had disponed his Liferent Right of these Sums, so that they think, if the Sum be secured, to be made forth-coming after the Liferenters decease, to his Heirs, Executors or Assigneys, the Donatar has the use thereof, during the Rebels Life-time; But it was found by the *Lords*, as the Sum of the Heretable Bond, remained unpayed by the Debitor, or that the Wodset remained unredeemed, that the Donatar to the Liferent had good Right to the Profit of the Sum, adebted by the Bond, and to the Profit of the Lands Wodset, so long as the same remained un-redeemed, the Creditor being on life, who was Rebel; and it was so found in the foresaid Process. **Actor.** *Craig.* **Alter.** *Hay* Clerk.

L. *Kerse* contra *Reid* Minister, *July* 5. 1626.

IN a Suspension raised by the L. of *Kerse*, against Mr. *Andrew Reid*, Minister at *Alvah*, for his Manse and Gleib. The *Lords* sustained a Designation of the Gleib, albeit the same was not Met nor Measured, to be four Aikers of Land, because the Designation bore, *That the Metting was hindered, by the Servants of the* L. *Kerse, who boasted the Metster, and would not suffer the Commissioner appointed to design, to use the Order of Metting, required by the Act of Parliament*; And

And whereby they were forced, to make the Designation of the Gleib without Metting, according to their Estimation of the Land especially Bounded within the Designation, which they esteemed to be within, and not to exceed four Aikers, neither did the Suspender Alledge, that the same exceeded four Aikers; And the *Lords* also found, that there was no necessity to prove, that the Metting was hindered, as said is, by Witnesses, or otherwise than by the Designation it self, which proports and bore the same; and which they found sufficient to prove it; and in respect thereof sustained the same, without any other necessity of Probation. The *Lords* also would not admit the Alledgance of Improbation of the said Designation, which the Suspender proponed in this Process; and would not receive Improbation of the same, by way of Exception, seing thereby Ministers might be in the like cases prejudged in their bruiking of their Gleibs, if this should be admitted, for the same might and would ever be proponed against them; but reserved to the Suspender his Action, to Call and Improve the same *prout de Jure*; In this Process also, the *Lords* found an Alledgance proponed for the Minister Relevant, bearing, *That the Gleib-Land controverted, was Kirk-Land, in so far as the Abbots of* Cambuskenneth *had received yearly these thirty years by-past together, twenty shilling*, as the Duty of thir same Lands, from the Suspender and his Predecessors, which Receipt of Duty that space, the *Lords* found sufficient, being proven, to infer that the same was Kirk-Land, without any other qualification; and in respect thereof, they Repelled the Reason, bearing, *that the Suspender was Infeft in the Barony of* Alvah, *holden of the King; and that this Land has ever been bruiked, these many Ages past all memory of man, as a special part of his Barony*, in all the particular parcels whereof he cannot be *per expressum* Infeft, but may bruik the same that way, *as part and pertinent*; which was Repelled, in respect of the foresaid Reply, consisting only in the paying of the said Duty to the *Abbot* 30 years. The *Lords* also sustained this other Exception proponed for the Minister against this Reason, *viz.* That the same Land was Mortified to the *Abbacy* of *Cambuskenneth*, by one *Stirling*; which Mortification was confirmed by the King, which Alledgance was also sustained, and admitted *per se*, as a several Exception, and found no necessity, that the Minister should with the Mortification alledge also, that some Possession was had of that Land by the *Abbot*, since the Mortification, or Confirmation, neither was it found necessar, that he should alledge, that that Person, *viz.* *Stirling*, who mortified the Land, was Heretor of the same, and had Right thereto, whereby he might validly and lawfully mortifie it, or that the Suspenders Right to the Lands of *Alvah*, flowed from the said *Stirling*; and that he had been Author in the same, to the Suspender, without one of which had been alledged, and joyned with the Mortification, the Suspender contended, that the naked Mortification, done by one who had no Right to the Lands Mortified, and lying ever obscure, and never heard of thir many Ages, and never taking effect by any Possession, since the date thereof, could never take away the Suspenders Heretable Right, seing he also produced, where the Suspenders Predecessors, had Wodset the same piece Land controverted *per expressum* under Reversion, which Reversion he produced, which evidently shew'd, that this same Land pertained to him Heretably, as a part of his Barony, which the *Lords* Repelled, in respect of the two several Exceptions foresaids, which were *separatim* found Relevant, and admitted to the Ministers Probation. Actor. *Nicolson*. Alter. *Hope*. *Hay* Clerk.

Guthrie contra *Guthrie*, *July* 7. 1626.

IN a Suspension betwixt *Guthrie* and *Guthrie*, where the Executrix to a Defunct being charged to pay the Debt, owing by her Husband, contained in a Sentence recovered thereon; and the Executrix suspending upon a Reason, that all the Goods contained in the Testament were exhausted. In the quali-

fying of which Exoneration, an Article being given in, desiring allowance of 2 years Mail for the Dwelling-house of the Defunct, the said Defunct dying shortly after the Term of *Whitsunday*; and the House-mail being desired to be allowed to the Executrix, for the whole year after that *Whitsunday*, in respect of the alledged custom of taking of Houses within *Edinburgh* for Mail, which was alledged to be for a year, *viz.* from *Whitsunday* to the next *Whitsunday*, whereby the Suspender alledged, that albeit the Defunct died shortly after that *Whitsunday*, at which he entred to the said Dwelling-house, yet the whole years Mail thereafter ought to be found his Debt, and the same ought to be a necessary exoneration to the Relict *pro tanto*. This Reason was not found Relevant, albeit it was given up and allowed by the Commissars in the Testament, which was but a Testament Dative, seing it was not tryed nor proven in any lawful Judgment, that the Defunct promised to pay the whole years Mail, and that he took the House from the Owner for a year thereafter, without which had been proven, and that seing it was confessed that the Relict remained all the year thereafter, and dwelt in the House; The *Lords* found the whole years Mail could not be defalcate to the Executrix as a Debt of the Defuncts, and therefore the *Lords* sustained that Article of Defalcation only for the half years Mail, as a Debt of the Defuncts to import exoneration, *viz.* from the *Whitsunday* before his decease, unto the *Martinmiss* thereafter, notwithstanding that the whole years Mail was given up as said is, as the Defuncts Debt in the said Testament Dative, which not being the Defuncts own Deed, not being given up by himself, and no Decreet being given against his Executrix at the Owners instance, trying and constituting the Defunct Debitor therefore, the exoneration was only sustained for the half year. Actor. *Hervie*. Alter. *Hay* Clerk. *Vid.* 24 *July* 1623, *Foulis*.

Somervel contra *L. Halcro*, *Eodem die*.

A Declarator being sought by *Alexander Somervel* of the Bastardy of one *Somervel* against *L. Halcro*, as Debitor to the Bastard. The *Lords* found the Exception Relevant, *viz.* that the Father and Mother of the alledged Bastard cohabite together by the space of ten years as married Folks, and were repute to be married Folks. Which Exception was sustained, notwithstanding of a Reply, bearing, that the person whose Bastardie he sought, was repute and esteemed by all the persons in the whole Countrey, where the Parents of the said Bastard, and also himself dwelt and conversed, a Bastard, which being *profisco*, he ought to be preferred. This Reply was Repelled, and the Exception sustained. *Vid.* 13 *July* 1626, betwixt these Parties.

Brown contra *Pitcairn*, *Eodem die*.

John Brown and *Elizabeth Mercer* being Executors confirmed to *Matthew Allan*, recovers Decreet against *Patrick Pitcairn*, and certain other persons bound with the said *Patrick*, for a Sum of Money adebted by them to the Defunct; and the said *Patrick* being charged thereupon, he Suspends upon these Reasons, *viz.* that the Decreet foresaid was recovered upon the Charges of *John Brown* the other Co-Executor; likeas, *Elizabeth Mercer* promised to him, before ever she should seek any Execution thereupon, that she should pay to the said *John Brown*, the half of the Expenses bestowed by him in obtaining of the said Sentence, and also to refound to him, what she had received of the Defuncts Goods more than her own half, it being of verity, that she had medled with more than her part would extend to, so that she could seek nothing by vertue of this Sentence, she being full handed as said is, of her own half, and far more; and the said *John Brown* compeared in this Process, and adhered to this Reason, and desired Compt and Reckoning of the said *Elizabeth Mer-*

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cer Co-Executor with him. The second Reason was, that another of the persons bound conjunctly and severally in the said Bond with the said *Pitcairn* Suspender, had suspended the Charges before any Charge given to this Suspender, which Suspension ought to be first discuss'd before any new Charges can be execute against the Suspender. These two Reasons were both Rejected, for the *Lords* found, that *Mercer* the other Executor, now Charger, might charge for the one half of the Debt acclaimed, albeit the other Executor should not charge for his half, and albeit that the one Executor had intrometted with more than her half, but prejudice of the Action, which any of them might move against others for Compt and Reckoning, which they found was not proper to come in this Suspension, concerning the paying of the Debt owing to the Defunct, and acclaimed by one of his Executors, which might be sought for that Executors own half, albeit the other should not concur: And sicklike, albeit one of the Parties bound had suspended, the *Lords* found, that that was no cause, but that Execution might be sought against any other Party bound conjunctly and severally, he who first suspended being dead, and that the person now charged ought to repeat in this Suspension, any Reason and Argument contained in that Suspension, if any was contained therein, which might suspend the Charges and Payment now used and sought from him; which former Suspension, the *Lords* found not to be a Reason to stay execution against this Suspender, except the Reason thereof being repeated here, be Relevant to import the same. Actor. Alter. *Oliphant.*

Foulis contra *July* 8. 1626.

George Foulis having Set a Tack to a Tennent in *Ravelstone*, of some of his Lands there, for the space of 16 Cropts after his entry, which by the Tack was appointed to be in *September*, and to expire in *September* after the said space, makes Warning before the *Whitsunday* in that year, wherein the Tack was to expire at *September* after that *Whitsunday*, to the Tennent to Remove, and after the *Whitsunday* raiseth Summons, and pursues the Tacksman to be decerned to Remove at the said Month of *September* thereafter. The Tennent compearing Alledged, that the Warning nor Action of Removing could not be sustained, being made before the time of the expiring of his Tack, before the expiring whereof he could not have been warned, far less could Action of Removing been intented against him, until his Tack had been ended. The *Lords* found, that Warning might have been made before *Whitsunday*, albeit the Tack expired not till *September* thereafter; but that the Defender could not be pursued to Remove till the Term of the endurance of the Tack was run out, although the Action and Summons concluded not to Remove before *September* was past, neither craved a present Removing; but the *Lords* not the less sustained the Warning made before the Ish of the Tack, to the effect, that after the Ish he might seek his Removing, and pursue the same; otherwise, if Warning should not be made till the *Whitsunday* following after the Tack, the Pursuer might be prejudged of a years Profite of his Land, and the Defender might bruik the same a year longer than he had Right, and yet not be subject in any other Duty than his Tack-duty, which were unequitable. Actor. *Foulis.* Alter. *Gibson* Clerk. *Vid. 16 Decemb. 1628, Inglis. 17 Decemb. 1623, E. Galloway. 5 Feb. 1624, Wood.*

Smith contra Cautioner, *Eodem die.*

One called who was acted Cautioner in the Convention of Burrows, for one who was admitted their Factor in the Low-Countreys, that he should do his Duty faithfully to all the Merchants, who should employ him in their Affairs in Merchandice, according to the order observed in the like

Cases. This Cautioner being pursued by a Merchant called *Smith*, for payment to him of the prices of certain Wares, sent by the said *Smith* to the said Factor, to be sold to his use, and whereof he had made no satisfaction. The *Lords* found, that they would grant no Process against the Cautioner for the said Factor, until the said Factor had been discuss'd first, and that Sentence were recovered against him, finding him Debitor in a particular Sum, and so that thereby he had failzied against the Obligment, whereto he was bound when he was admitted Factor, and for the which he had found the foresaid Caution; for the Cautioner being only generally bound, that the Factor should discharge an honest and faithful Duty, could not be specially pursued, till Sentence were recovered against the Factor, constituting him special Debitor to the Pursuer, which was so found by the *Lords*, albeit the Pursuer Replyed, that he had in effect discussed the said Factor, in respect he produced two of his own Missive Letters written to the Pursuer, wherein he confessed, that he had received so many Wares from him as extended to the prices now acclaimed by the Pursuer; likeas he confessed in the same Letters, that he was not then able to give him Satisfaction, which Reply was not sustained. Actor. *Burnet major.* Alter. *Scot* Clerk. *Vid.* 10 *Dec.* 1623, what is noted there.

Turnbull contra *Scot*, *Eodem die.*

Turnbull of *Howdon* Annailzies his Lands of *Howdon* to *Turnbull* of *Philiphaugh*, under Reversion, and receives back again a Tack from him for payment of a Duty, and retains thereby the possession of the Land Wodset; After that the said *Turnbull* of *Howdon* dispones the saids Lands to *Scot* of *Hartwood-myres* and *Scot* of *Aikwood*, who receives also Possession of the said Lands from their said Author, and they being pursued by the said *Turnbull* of *Philiphaugh*, for payment of the foresaid Tack-duty of certain bygone years, and to find Caution to pay the same in time coming. The *Lords* sustained the Action against the saids two *Scots*, albeit they alledged that they were not bound to pay the said Tack-duty, and that they were singular Successors to the alledged Tacksman, and who could not be subject in that, wherein he was obliged, but the Tacksmans self, and his Heirs were only astricted thereto, and not they, especially seing they bruiked not the saids Lands by vertue of that Tack, but by vertue of their Heretable Right acquired from their Author; which alledgance was repelled by the *Lords*, and they were found to be Debitors to the Pursuer, seing their common Author could give to thir Defenders no other Right nor Possession than he had himself; and he being denuded in favours of the Pursuer, of his Heretable Right, and accepting a Tack, by vertue whereof he might only bruik, seing no other Right consisted in his person, he could not thereafter do any deed in prejudice of the Pursuer, to invert the Right of that Tack, and Duty thereof, and the Defenders could not be in any better case than their said Author, and so could not ascribe their Possession to any other Right, than that by vertue whereof their said Author could only lawfully bruik; and so the Action was sustained against them, albeit they were singular Successors to the Tacksman. Actor. *Stuart.* Alter. *Cunninghame* & *Scot.* *Gibson* Clerk. *Vid.* 17 *July* 1632. L. *Auchinleck.* 28 *July* 1625. E. *Morton.* 22 *January* 1633. *Gordon.* 11 *July* 1628. L. *Collingtoun.*

Turnbull contra *Mathison*, *July* 12. 1626.

IN a Suspension raised by *Turnbull* against *Mathison*, of a Decreet obtained before the Commissars of for payment of 200 Pounds, which was quarrelled in that Suspension, because it exceeded 100 Pounds, and so not subject to the Commissars Jurisdiction; the Decreet was sustained, because the Sum was Acclaimed and Decerned in his favours, to whom the same was left

left in Legacy, and so the Commissars might Judge thereon. In this same Process the *Lords* also sustained the Decreet given against one of the two Executors of the Defunct, albeit the other was not called, seing the Executors called, against whom Decreet was given, was sole Intrometter, at least had intrometted with more than the Sum contained in the Decreet extended to, and had not made payment to any other, neither was distressed by any other of the Defuncts Creditors. The like was decided before, as is here marked 23 *July* 1625. betwixt Mr. *Peter Hewart* and *Aitkin*; but the Reasons specially respected, and moving the *Lords* in this Decision, was in respect of the Decreet standing, which could not be taken away in this Suspension so summarly. Actor. *Craig*, Alter. *Stuart*. *Gibson* Clerk. *Vid.* 6 *Feb.* 1624. *Gordon*.

Stuart contra E. *Hume* and others, *Eodem die*.

IN an Action of Reduction at the instance of *John Stuart*, as being Infeft by the King in the Barony of *Coldinghame*, and also at the instance of *Douglas* of *Evlie*, and *Cranston* of *Moristoun*, who were also Infeft in the saids Lands and Barony, by the said *John Stuart*, to be holden of the said *John*, against the Earl of *Hume*, and certain others, pretending Right to the Lands of the Barony granted to them by the King; *John Stuarts* self, who was Vassal to the King, being debarred from pursuing by Horning: It was alledged, that the rest of the Pursuers, who were only Infeft by a base holding, to be holden of the said *John Stuart*, and not by a publick holding of the King, could not be heard to pursue this Action of Reduction against the Defenders, who were Infeft by a publick Infeftment, holden of the King; which publick Right could not be called in question, to be reduced by vertue of a base Right, which was not made publick, nor holden of the King, and so they could not have interest by vertue thereof to reduce their publick Right, which was corroborat, and depended upon Acts of Parliament. This Alledgance was repelled, and the *Lords* found, that the said base Infeftment gave sufficient interest to the Pursuers, to pursue this Reduction of the said Defenders publick Right; albeit *John Stuart* was debarred by Horning, seing their Right was a Right of the Property, and that the same proceeded from *John Stuart*, who was Infeft publickly to be holden of the King. In this same cause the Seasin produced for the Pursuers, who had their Right from *John Stuart*, as said is, being quarrelled by the Excipients, because it was given at the Place of *Coldinghame*, and not upon the Grounds of the Lands, and Kirks therein contained, which lyes discontigue from the place where the same was taken: And that no inferior person, nor no Subject could make an Union, but the King allanerly. This Alledgance was also Repelled, and the Seasin was sustained, seing the whole Lands were Disponed, which was contained in *John Stuarts* own Infeftment; and in his Infeftment the King had given an Union, appointing Seasin to be taken at the place where this Seasin controverted was taken; so that albeit a Subject could not make an Union, yet he might Dispone the Lands United, in that same manner, as he had the same granted to himself: And this was found, albeit the Defenders alledged, that the Disposition could not avail so far as concerned the Union, except that Disposition had been Confirmed by the King; which was repelled, as said is. Actor. *Craig*. Alter. *Belshes*. *Gibson* Clerk. *Vid.* 2 *March* 1627. & 26 *March* 1623. Heirs of Lo. *Tester*. 18 *Decem.* 1623. L. *Monimusk*. 16 *January* 1623. *Aitkin*.

La. *Kilbirnie* contra her Tennents, *Eodem die*.

IN a Removing pursued by the Lady *Kilbirnie* contra her Tennents, the *Lords* sustained an Exception proponed for the Tennents, founded upon a Tack Set to them by the Lady, of the Lands Libelled, with consent of the Laird her

Husband; Albeit she Replyed, that that Tack could not defend them, seing it was Set by her principally (as was confessed by the Defenders) with consent of her Husband, she then having no Right in her person to the Lands therein contained; and albeit she had then Right, as she had none, yet the Tack ought to have been Set by her Husband, he then being living, and she should have been only made Consenter: Far less can the same be sustained, where it is principally Set by her, her Husband being then living, who had the only Right; and she then haying no Right, and his consent to her Deed, which she had no power to do, cannot prejudge her: This Exception was sustained, as said is, notwithstanding of the answer, because it was Duplyed, that the Pursuer, after the Setting of the Tack, acquired a Right to the Lands, so that her supervenient Right must be profitable to the Tennents, to make that Deed done to them by her to be valid, & to exclude her right, that she could not quarrel the same, being her own Deed. In this same Process also, the *Lords* sustained an Exception, bearing, *that the Defenders had done Service to the Pursuer since the warning, and that the same was accepted by her*, without necessity to Alledge the same to be done at her command, seing her acceptation was equivalent, being a Ratihabition; and found the same might be proven by Witnesses, and was admitted so to be proven, without necessity to prove the same by Writ, or Oath; but it was found necessar, that the Defender, should Alledge and prove, that the foresaid Service done by them to the Lady, was a part of the old Duty, accustomed to be payed for the Lands before. Actor. *Cunninghame*. Alter. *Belshes*. *Gibson* Clerk.

E. *Dumfermling* contra La. *Dumfermling*, *Eodem die*.

IN an Action of Extention of a Minut betwixt the Earl of *Dumfermling* and his Mother, pursued at the instance of the Earl, and of the Earl of *Wintoun* his Tutor against the Lady. The *Lords* found, that neither this Minut could be extended, nor should produce any other Action thereupon, because the same was only set down by way of advice and counsel, and contained only the opinion of certain Friends, whose opinions were sought by the saids Parties in certain particular Questions, anent matters controverted betwixt the saids Parties; which resolution and advice so set down in the foresaid Minut, was found not to be obligatory to bind the Parties to their Advice, and to the abiding and standing at the same; and so that it could not produce Action against the Party, who should oppone against the same: And this was found, albeit the Inscription bore these words, *viz. Questions to be resolved by the three Friends therein named*, viz. *The* Chancellor, *the Earl of* Melrose, *and* Lauderdale, *with the which both the saids Parties were content*. Likeas, the said Minut, containing the saids Questions, was at the end thereof Subscribed by both the saids Parties: In respect of the which Inscription, bearing, as said is, *That the Parties were content*; and in respect of their Subscription of the Minut, the Pursuer Replyed, That the Defender could not be heard, to Alledge that the Minut was not obligatory, and that it was but a naked Advice, which could not bind by the Law. Which Reply was not respected, and the Minut found not to be obligatory, because it was set down by way of Advice, as said is. Actor. *Hope* & *Nicolson*. Alter. *Stuart* & *Aiton*. *Gibson* Clerk.

L. *Craigie-Wallace* contra *Wallace*, *Eodem die*.

LAird *Craigie-Wallace* borrows from *David Fullerton* 8000 Merks; *David* on his Death-bed makes *Wallace* of *Menford* Assigney; which Assigney having obtained the Bond Registrat at his instance, Charges for payment; which Charges are Suspended, and the said Assignation also by Action desired to be Reduced, both upon one Reason, *viz. That the Assignation was made by*

the

the Defunct, upon his Death-bed. This Bond being Heretable, and so in prejudice of the Heir, who could not be prejudged by the Defunct on his Death-bed; & the Suspender could not be *in tuto* to pay to this Assigney, seing he would be compelled to pay the same again to the Heir, who hath the only Right thereto. This Reason was not sustained at the Debitors instance, seing the Assigney was ordained by the *Lords*, to find good Caution to warrand the Suspender at the Heirs hands. Likeas the Cedent, by his Missive Letters written to the same Assigney before his sickness, confest the Money to pertain properly to the Assigney, and that his name was only borrowed thereto; and in the same Letters promised to make the Charger Assigney, whereby the *Lords* found, that this reason was not competent to these Debitors, he being also put *in tuto* by Caution to warrand him at the Heirs hands, as said is; and where the Assignation was quarrelled in this same Process by the Debitor, as not sufficient, because it was Subscribed by two Nottars, whereas the Maker thereof could Write himself. This was Repelled, because it was made by the Cedent on his Death-bed; neither was it found necessar to prove, that it was Subscribed in his Death-bed, seing the Assignation it self bore, *that the Nottars Subscribed for him, because he was then unable, being in his sickness, upon his Death-bed, to Subscribe himself*; and which the saids Nottars, in their Subscriptions of the said Assignation testified, and which the *Lords* found sufficient, to qualifie that it was done upon Death-bed, without any other Probation. Actor. *Lamie.* Alter. *Scot* Clerk. *Vid. 16 January*, 1627. *Janet Courtie. Reputt January* 1622. *Paterson.*

Guthrie contra L. *Barnbarroch*, *Eodem die.*

Richard Guthrie Cook in *Edinburgh*, makes the L. *Barnbarroch* Assigney to a Bond of 2000 Merks, adebted to him by the L. *Mochrum*, who gives his Bond again to *Guthrie*, to pay 1200 Merks, with provision that if he got not payment from *Mochrum*, his Bond should be null. *Barnbarroch* being charged by *Guthrie*, he Suspends upon the foresaid provision, and subsumes according thereto, that he had not received payment from *Mochrum*: To which it was Answered, that he had either received payment, or the equivalent, *viz. that he having Caption against* Mochrum, *he took him by vertue thereof*; so that having taken him, he became full Debitor to the Charger, as if *Mochrum* had payed to him the Debt Assigned. This alledgance being found Relevant upon this Æquipolent (which I think was hardly done) the *Lords* found it ought to be proven by Writ, or Oath of Party; and that the taking of him was not admissable to be proven by Witnesses, tending in effect both to prove payment to *Barnbarroch* of 2000 Merks, and to make him Debitor for 1200 Merks, *Hay* Clerk.

L. *Haloro* contra *Somervel*, *July* 13. 1626.

A Bastard marrying, and in Marriage begetting a Bairn, that Bairn dying unteastate and unmarried, and having neither lawful Brother, nor Sister, nor Children begotten by that Bairn in lawful Marriage; after the decease of that Bairn, the King will have Right to the Goods and Gear of the Father of that Bairn so deceased without Succession, by vertue of the Fathers Bastardie; but under that Bastardie, will not be comprehended so much of the Bastards Goods as might befal to that deceased Bairn, Procreat in lawful Marriage by the Bastard as said is, neither will the Donatary of the Bastardie of the Father extend to that Legittim, which pertains to that Bairn, but only to the rest of the Defuncts Bastards Goods, and not the less the King will have Right also to the Legittim, and whole Goods and Lands also pertaining to that lawful Bairn, as *Ultimus Hæres* to that Bairn, but not by reason of Bastardie of the Father only; so that in such Cases of the Kings Succession, there must two

things concur, *viz.* that the Stock was a Baſtard, and that the whole Poſterity and Iſſue proceeding of that Stock, albeit begotten in lawful Marriage be deceaſed, for as long as any lives begotten by the Baſtard in a lawful Marriage, the King cannot be *Ultimus Hæres*; and where the lawful Deſcent fails, there is no other Collateral or Aſcendant Succeſſion of the Baſtard, and ſo the Right pertains to the King. *Vid.* Craig, *p.* 268. 18 *March* 1626, *Paterſon.* 7 *July* 1626, betwixt thir ſame Parties.

Edgar contra Heirs of L. *Craigmiller*, *Eodem die.*

IN a Regiſtration of a Bond granted to *Thomas Edgar*, by the umquhile Laird of *Craigmiller*, which was craved by the ſaid *Thomas* to be Regiſtrat againſt the Heir of Line, and alſo againſt the Heir-Male and of Tailzie. This Action was ſuſtained againſt them both, by the ſame Summons in one Action, and the Bond was decerned to be Regiſtrat againſt them both, but the Execution againſt the Heir of Tailzie was ſuperceded, until the Heir of Line was firſt diſcuſſed, as uſe is. Actor. *Lawtie.* Alter. *Belſhes.* *Gibſon* Clerk. *Vid.* 26 *January* 1622, *Cowen.* 25 *Feb.* 1623, *Lyon* contra *Scot.* 22 *March* 1627, betwixt thir ſame Parties.

Smith contra *Gray*, *July* 14. 1626.

Thomas Smith purſues *John Gray* as Intrometter with his umquhile Fathers Goods and Gear, to make Payment to him of a Sum adebted to him by his ſaid umquhile Father. In the which Action, this Exception was found Relevant to Aſſoilzie the Defender, in ſo far as he was conveened as Intrometter, *viz.* that the Defender alledged, that he himſelf was Executor confirmed to his umquhile Father, and ſo had *beneficium Inventarii*, and could not be further conveened as Intrometter: likeas, he was confirmed Executor, as a Creditor of his Fathers; for he being Cautioner for him to ſundry perſons, he had payed to them their Debts, wherein he was Cautioner for his Father, and had taken Aſſignation from them to their Bonds, and for relief of his Cautionry, he was confirmed Executor. Which Exception was found Relevant, albeit the Purſuer Replyed, that the Confirmation was done *poſt hanc litem cœptam*, and after he was Summoned, and after the day of Compearance therein, and alſo that he had Intrometted with his Fathers Goods before the Confirmation; which preceeding Intromiſſion could not be purged by the ſubſequent Confirmation, to exclude the Action which aroſe to the Creditor thereby before that Confirmation, and he was in *mala fide* to do the ſame in prejudice of this Creditor. Which Reply was Repelled, and the Exception ſuſtained, ſeing the Confirmation, albeit after the intenting of the Cauſe, was within leſs than a year after the Defuncts deceaſe. Actor. Alter. *Mowat.* *Vid.* 20 *March* 1624, *Cochran.* 23 *Novemb.* 1630, *Smith* contra *Gray*, & 28 *July* 1626, *Tennent* contra *Tennent.*

The ſame was found before in this ſame Seſſion, betwixt the Relict of *Robert Dawling* and *James Hume*, where the *Lords* found no Proceſs againſt *James Hume* as Intrometter, the Bairns of the Defunct being confirmed Executors to him within year and day, albeit after the Intenting of the Cauſe. *Belſhes* being for the Defender. *Scot* Clerk. *Vid. ult.* *March* 1624, L. *Curriehill.*

Stuart contra E. *Hume*, *Eodem die.*

IN the foreſaid Action of *John Stuart* againſt the E. of *Hume*, whereof mention is made 12 of *July* 1626. In the which Action, the Earl of *Hume* being abſent, one compeared who had a Subaltern Right, *viz.* a Tack of ſome Teinds, ſet to him by the Earl of *Hume*, and which would fall if the Earl of *Humes* Right fell, as was intended by this Reduction, and Alledged, that the Earl of *Hume* Party principally called, was Minor, and ſo *quod non teneatur placitare*

citare super hæreditate, &c. and which benefite ought to extend to the Excipient, whose Tack is of a part of the Teinds, contained in his Heretable Erection, desired to be Reduced. The *Lords* Repelled this Exception, being proponed for this Defender, and not for the Earl of *Hume*, who compeared not to alledge the same, seing neither he to whom it was competent, compeared to propone it, neither did the Proponer thereof show, what prejudice the Earl of *Hume* could have by the proceeding of this Reduction: For the Pursuer Replyed, that the Earl of *Hume* was denuded of his Heretable Right, in favours of another person, who was conveened in this same Reduction, neither was the Earl of *Hume* oblig'd in Warrandice of any of the Rights disponed by him, and so he could have no prejudice, being allenarly oblig'd to warrand from his own Fact and Deed; and so the Process was sustained, notwithstanding of his Minority. The Compearance as marked *supra* 12 *July*. *Vid.* 25 *Nov.* 1624, *Hamilton*. & 23 *June* 1625, *Pringle* contra E. *Hume*.

Adam contra Baillies of *Air*, *Eodem die*.

ONe *Adam* pursues the Baillies of *Air*, for payment of the Debt, for the which his *D*ebitor, being Rebel, was Incarcerate, and thereafter they suffered him to go to Liberty. The Baillies Compearing, alledged the Horning whereupon Caption was execute, was null; becaus the Charge given to the Party, whereupon he was denunced, was not lawful, seing the same bore, to be execute at his *D*welling-place, and made no special mention nor designation of his *D*welling where he was charged. Which Alledgance was found Relevant, and so that the Horning was null, and therefore the Baillies were Assoilzied *simpliciter* from the Pursuit; albeit the Pursuer Replyed, that the Horning could not be found null for that alledged defect, seing it was execute against a Burges of *Air*, whose *D*welling must be presumed to be in *Air*; and also, that the Execution bears, that a Copy was delivered to his Wife, being then personally present; likeas, it was further Replyed, that the Baillies cannot excuse themselves by that alledged nullity, to put the said Rebel to Liberty, whom they had apprehended by vertue of Letters of Caption, and had once Incarcerate, after whose Incarceration, they could not at their own Hands, without a Warrant of some Soveraign Judge, Inlarge him thereafter. Which Reply was not respected, for the Horning was found null for the Reason foresaid, and so they had no necessity to have taken him, who was not lawfully at the Horn; and being taken, they had no necessity to retain him in Ward. Actor, *Miller*. Alter. *Belshes*. *Vid.* 28 *Novemb.* 1628 *Baillie* contra *Porter*. 6 *July* 1624, Baillies of *Kildrimmy*. 22 *July* 1626, *Stuart* contra *Auchinay* 25 *July* 1626, *Smith* contra Baillies of *North-Berwick*. 25 *June* 1642, *Fo. Ross*.

L. *Grange* contra *Betson*, *Eodem die*.

IN a Contravention pursued by the Laird of *Grange* against *Betson* of *Carden*. The *Lords* were of the mind, albeit this was not then in specifick terms found, (because that point was not controverted) that neither Pasturage in *Confinio*, amongst Neighbours Marching together, nor yet Herding of Goods upon the Neighbours Lands, were sufficient Deeds, whereupon Contravention ought to be granted, except therewith some further Deed should concur, such as if he who pastured, being Prohibite by the other Neighbour, and discharged to do the same, he would not obey, but that he persisted notwitstanding thereof, or Masterfully persisted or used some Violence, or did some other unlawful Deed, beside the naked Pasturing; for in *Confinio*, the suffering of Goods to stay and pasture upon the Neighbours Ground, which may fall out by the over-sight of Herds and Servants, without allowance of the Master, is over-bare a cause of Contravention. But this was not decided, and before the De-

cision, the *Lords* gave Commission to two of their number to see the Ground, and to examine Witnesses for both Parties; for both the Parties claimed the Land, as Pertinents of their Heretage, and alledged Possession thereof, as Parts and Pertinents of their Lands. Actor. *Stuart.* Alter. *Lermonth.* *Gibson* Clerk.

Hamilton contra Vassals of *Bargany*, *Eodem die.*

IN an Improbation pursued by Sir *John Hamilton*, against certain Vassals of *Bargany*. The *Lords* sustained this Action of Improbation, at the said Sir *Johns* Instance, as having Right to the Lands flowing from *Kennedy* of *Bargany* his Author, who was Infeft therein, for Production of all the Writs Lybelled, made to the Defenders, by his Author, or by his said Authors Predecessors, enumerat in the said Summons, to whom his Author might succeed *jure sanguinis*, which Action the saids *Lords* sustained, at the Instance of the Pursuer, he being Singular Successor; and found the same als competent to him to pursue after that manner, for Production and Improbation of the Writs, made by his Authors Fathers Guidsir, Grandsir, and other Predecessors, to whom he might Succeed *jure Sanguinis*, as said is; as his said Author himself might do, if the Pursuit had been at his own instance, in case he had not been Denuded. Also the *Lords* found, that it was not necessar, either to Lybel, or to Instruct, that the Pursuers Author was Heir, or Succeeded to these Predecessors by Progress, by whom the Evidents Lybelled, are Alledged to be made, but that it was sufficient to Lybel in this, and all the like Actions, that he is appearand Heir of Blood to them, without any qualification of any other progress of Right, derived in the Pursuers Authors by Course of Succession, or being Heir to each one of his Predecessors, he shewing his Authors Self to be Infeft therein, as Heir to his Father, or Successor therein to him, which the *Lords* found sufficient, seing in him continued the Succession of the Blood uninterrupted, *in linea recta*; and if he had been Pursuer, he had no need to instruct any other Right, from each Predecessor, to his appearand Heir, succeeding in the Blood, except the said descent in Blood. But this contrare to the Decisions made before whereanent look *Feb.* 1. 1622. L. *Craige-Wallace. Item Feb.* 26. 1622. Earl *Kinghorn* contra L. *Inshture* & *Feb.* 13. 1627. Lady *Borthwick*, *Decem.* 3. 1634. Lo. *Johnston*. In this Process also, the *Lords* sustained the Action, for Production, and Improbation of Personal Bonds, made by the said Pursuer his Authors and Predecessors foresaids, the same being this way Restricted, *viz.* in so far as the Pursuer may thereby be prejudged in his Heretable and Real-Right to the Lands Lybelled.

In this Process also, The *Lords* found, that Lands pertaining to the Principality, could not be Disponed by the King, there being a Prince, Except by the King, as being Administrator to the Prince, so that if the same should be simply Disponed by the King, and not *eo nomine* as Administrator, any other thereafter acquiring Right from the King, as Administrator to the Prince, would be preferred to that prior Right, given by the King simply, without relation to the Principality; and where there was no Prince, there was no necessity to Dispone, but as King, as in other Dispositions made by the King, but the Disposition would make mention, that the Lands pertained, and were of the Principality. Actor. *Hope* & *Stuart.* Alter. *Aiton* & *Nicolson.* *Gibson* Clerk.

Johnston contra *Mason*, *Eodem die.*

GIlbert *Johnston*, and *Mason* his Spouse, conveens *Mason*, as behaving himself as Heir to his umquhile Father, by Intromission with his Heirship Goods, to make payment of a Sum of Money promitted to them, by his Father in Tocher; in the which Cause the Defender alledged, that he could

not

not be conveened *hoc nomine*, as Intromettor with the said Heir-ship Goods, to make him Heir, because he being Infeft by his umquhile Father, in a Tenement of Land, before the Contract of Marriage Lybelled, after the decease of his Father, he removed the Relict, and entered to the Possession of that Tenement, within the which the said Heir-ship Goods was then standing for the time, and which he could not cast out, but suffered the same to remain in the House, where they are yet extant, to be forth-coming to the Pursuer, or any other, having interest in the same, and except he had Sold and Disponed thereupon, or had made some other use of them, than by retaining of the same in the House, he cannot be therefore conveened, as thereby behaving himself to be Heir. This alledgance was Repelled, and the retaining of the Possession of the said Goods, and using of the same, by eating on the Boards, and lying on the Beds, was found sufficient; neither was it found necessar, that the Pursuer should Reply upon the Defenders Selling or Disponing of the Heir-ship, seing his retaining thereof, and using of the same, as said is, was found enough; for if he had pleased to evite the Danger of being Heir, he had his ordinary Remeed, to have meaned himself to the *Lords*, and to have obtained a warrand to make Inventar of the Goods, within the Dwelling House foresaid, before he had entered thereto, to have been forth-coming to all Parties, which not being done, he has prejudged himself, especially seing it was offered to be proven by the Pursuer, that there are two years past, since his Fathers decease, during the which whole space, he has retained the Possession of the said Goods. *Gibson* Clerk. *Vid. January* 17. 1627, *Frazer*, *Nov.* 6. 1622. *Durdas*.

M'phadrick contra *M'lachlan*, *July* 15. 1626.

IN an Action at the Instance of a Poor woman called *M'phadrick* contra *M'lachlan*, for Intrusion; The *Lords* found, that albeit the Action was prescrived, not being pursued within the space of three years, after the committing thereof, yet that the same ought to be sustained, for the ordinar Duties of the Land, which they were in use to pay, before the time of the Intrusion, albeit the Defender alledged, that the Action for Profits ought not to be sustained in any sort, which was Repelled. Actor. *Turnet*. Alter. *Mowat*, *Scot* Clerk. *Vid. March* 16. 1627. *Walter Hay*. *Feb.* 25, 1624. *Denmure*.

Oliphant contra *Oliphant*, *Eodem die*.

IN an Action betwixt *Oliphant* and *Oliphant*, wherein *Thomas Oliphant*, as Brother and nearest of Kin of umquhile *James Oliphant*, pursues *Margaret Oliphant*, who was left Executrix, and universal Legatrix to the said umquhile *James*, who died without Bairns, Wife, Sister, or Brother, except the said Pursuer, to make payment to him of the two part of the Defuncts Gear, as nearest of Kin to him, conform to the *Act* of Parliament, *anno* 1617. against the which pursuit, the Defender alledged, that the Pursuer could have no part of the Defuncts Gear, in respect the Defunct not only left the Defender his Executrix, but also made her his universal Legatrix, whereby she had the only undoubted Right to his whole Goods; and the Pursuer Replying, that the *Act* of Parliament foresaid, gave the Legatrix only Right to the Defuncts third, so that if it exceeded the Third, the foresaid *Act* did so limitat the same, that the Legatar should only have the Third, and should not be heard to claim both the Third and Legacy also, whereby it is manifest, that the universal Legatrix could seek no more, by vertue of the Legacy, albeit alledged to be universal, but only the third, and no more, and that the two part pertained only to the nearest of Kin. This Exception was Repelled, and the Right to the Gear totally was found to pertain to the Defender, but any Deduction, by reason of the said universal Legacy, notwithstandig of the *Act* of Parliament foresaid,

which *Act* was found not to debar any person in Testament to leave all his Gear, whereupon he might dispone of the Law, to any Person he pleased, and which being so done, his neareſt of Kin was thereby fully debarred. *Actor.* *Alter. Aiton.* Gibson Clerk. *Vid. June* 11. 1629. *Newing* contra *Hoge.*

L. *Glengarnock* contra L. *Kilbirnie, July* 18. 1626.

IN a Removing pursued at the Instance of the Lady *Glengarnock* contra Laird *Kilbirnie*, for Removing from a Loch; The Defender compearing, and proponing an Exception upon his particular Infeftment of the same Loch, clad with fourty years Possession, by all Deeds of Property, as Fishing by Net, Wands and Cobil, and all other lawful manner. This Exception was not found Relevant in this Possessor Judgment, to defend the Excipient, but the same was Repelled, in respect that the Pursuer Replyed, upon her *Authors* elder Infeftment of the Loch lybelled, long *Anterior* to the Excipients Right, and continual Possession, not only by themselves, conform to their Right thereof, but also that they were in use to debar all others, from any Fishing therein, and specially this same Excipient, and also his Father before him, in so far as the said Pursuers *Authors* brake the Boats, which were put upon the said Loch, by the *Excipients* Father, and by himself sensine, since his Fathers decease; which Reply was admitted to Probation, albeit the Excipient alledged, that the breaking of Boats, which of it self was an *Act* unlawful, could not be respected as a lawful Interruption, for the which the doer might be conveened for a wrong and insolent Ryot, which Reply nevertheless was sustained, as said is. *Actor.* *Alter. Belshes. Scot* Clerk. *Vid. Nov.* 18. 1624. L. *Lagg.*

Winrham contra *Cranston, Eodem die.*

IN an Action of Poynding of the Ground, for an *Annualrent*, at the Instance of *James Winrham* in *Edinburgh*, against *Cranston* of *Moriston*, who Defended himself with a publick Infeftment of the said Lands, out of which the Pursuers *Annualrent* was granted, to be uplifted, and Possession of the said Lands conform to the said Heretable *Publick* Right. The *Lords* nevertheless, sustained the Pursuers base Seasin of the Annualrent, seing he offered to prove in Fortification thereof, that the granter of his said Infeftment, had made payment to him of the said Annualrent diverse years, which payment so made by the Annailziar, albeit not alledged to be payed out of the Lands, which were affected with the *Annualrent*, nor yet alledged to be payed by the Tennents, and Labourers of the Ground, but only alledged to be personally payed by him, who granted the said Infeftment of Annualrent. The *Lords* sustained it, as a sufficient Possession of the said Annualrent, to *Authorize* the foresaid Right, in respect wherof the same should be preferred, to the said Defenders publick Right foresaid, seing thereby the *Lords* found, that the said Pursuers Right was clad with sufficient Possession (the same being proven, as said is) and therefore could not be excluded by the said Excipients Right. *Actor. Belshes.* Alter. *Craig. Gibson* Clerk. *Vid. Feb.* 11. 1630. *Ross* contra *Elliot.*

Wallace contra Tennents, *Eodem die.*

IN a Removing, at the Instance of *Wallace* contra Tennents of The *Lords* would not sustain the Pursuit, upon a Seasin produced by the Pursuer for his Title, which was of a date posterior to the Warning, albeit the Pursuer alledged, that the Seasin proceeded upon the Superiors Precept of *Clare Constat* given to him, as Heir to his Father, which Precept preceeded the Warning; and so that the Seasin should be drawn back to the Precept, which was not sustained by the *Lords*, as if the Seasin had proceeded upon a Retour, in which Case it is usual, to draw back the Seasin to the Retour, but not to a

Precept

Precept, of *Clare constat.* Actor. *Cunninghame.* Alter. *Miller. Scot* Clerk. *Vid. January* 20. 1625. L. *Selms* contra *Guthrie*, and the other Cases there cited.

E. *Marishal* contra Relict and Bairns Minister of *Peterhead*, *July* 19. 1626.

IN a Double-poynding at the Instance of the Earl *Marishal*, who was Charged by the Relict and Bairns of the Deceast Minister at *Peterhead*, who was Incumbent and served the Cure, and who died before the Feast of *Michaelmas Anno* 1623. and who was on the other part Charged by the new Intrant Minister, for the Stipend of the year 1624. To the which Stipend, for the whole year, the said Intrant Minister craved the only right, and alledged that he ought to be answered thereof, for both the Terms of *Whitsunday* and *Martinmas* that year, in respect he served the Cure that whole year, and the Relict and Bairns of the deceased Minister claiming right to the half of that years Stipend, by reason of an Act and Statute of the Kirk, introduced in favours of the Relicts and Bairns of deceast Prelats and Ministers, which appoints the Duties of the half of the profits of the Prelacy, and sicklike of the Stipend for the year subsequent, next after the decease of the Incumbent, to pertain to the Relict and Bairns of the said deceased Incumbent, and the other half to pertain only to the Intrant. The *Lords* having seen and considered an Ordinance and Act made by the Bishops, which had relation to a Letter of the deceast King *James*, tending and written for that same effect, and which was ingrossed in the said Act, and which Act was produced by the said Intrant Minister, by the which Act, (wherein relation was made in the Tenor thereof, to the like Ordinance made before that Act in favours of Ministers) it was found, that where the Prelat dies before the *Michaelmas*, and after the *Whitsunday*, that his Relict and Heir shall have that years Profits and Rents of the Benefice, both the *Whitsunday* and *Martinmas* Terms thereof, that year, and nothing of the year subsequent; and if the Prelat die after the *Michaelmas*, that his Relict and Heir shall have right to the half of the Profits and Rents of the subsequent year, beside and attour the whole Rents of that year wherein he dies, in respect whereof, and that the said Act proported, that the like was Statute before for the Relicts and Bairns of Ministers, there being no other Act nor Ordinance shown in favours of the Relict. The *Lords* Decerned conform to the said Act produced. And therefore seing the Minister, Husband to this Relict now compearing, died before *Michaelmas* 1623, The *Lords* found, that she nor her Bairns had no right to any part of the Stipend of the year 1624. controverted, but that the same totally pertained to the Intrant Minister, whom the *Lords* Decerned to be answered and obeyed thereof. Actor. *Mowat.* Alter. *Belshes. Gibson* Clerk. *Vid. Decemb.* 9. 1623. anent *Annats*, *Decemb.* 17. 1623. Minister of *Livingstouns* Relict.

Harvie contra *Baron*, *July* 20. 1626.

IN a Reduction pursued at the instance of one *Harvie*, against *George Baron* of *Kinard*, who had recovered Decreet against the said *Harvie*, as lawfully Charged to enter Heir to his umquhile Goodsir on the Mother side, *viz.* one *Watson*, who was obliged to relieve the said *George Barons* Father of some Moneys, which his said umquhile Father had payed as Cautioner for the said *Watson*, to the said *Watsons* Creditor. This Decreet for repayment of the said sums, being so recovered at the instance of the said *George Baron*, against the said *Gilbert Harvie*, as Charged to enter Heir to the said *Watson*, whose Daughter and only Bairn was Mother to the said *Harvie*, and the said Decreet being only given against him *eo nomine*, as Charged to enter Heir, the same was desired to be Reduced, because he offered to Renounce to be Heir to his umquhile Goodsir *rebus integris*, he never having medled with any thing that might constitute him to be Heir to him. And the party who had obtained the said De-

creet contending, that after the giving of that Sentence against him, as lawfully Charged to enter Heir, which was given against him in *anno* 1610. by the space of sixteen years since, during the which space, he had done nothing to oppone against the said Sentence, nor ever offered to Renounce to be Heir, which albeit he had immediatly offered after the Sentence, could not be received, far less now after so long time; Therefore that his Sentence ought to have effect, and the party could not be suffered to Renounce, specially he being now Major, before the intenting of his Reduction; the *Lords* found, that albeit the Sentence had been given against a Major, yet that he might be heard to Renounce to be Heir: Which Renunciation they found ought to be received, *etiam post sententiam*, given against the party only, as lawfully Charged to enter Heir, seing that Renunciation was offered *rebus integris*, nothing being otherways alledged, either of the Reducers intromission, or of any other deed which might make him Heir, except the said Charge, which they found in a Reduction might be elided by the said Renunciation, to elide the foresaid Sentence, given upon the said Charge only, and no ways offered to be maintained by any other Deed of the Party, whereby he might be found Heir; and this was found for this end only to take away all personal execution against the Reducer, but not to stay any real Execution for Compry sing or Adjudication to the Creditor, or any other real execution upon the Goods, or Lands, or Debts which the said Party Charged to enter Heir, might acclaim by the Goodsir, who was Debitor, from the right whereof, they found this Creditor could not be debarred, nor he prejudged therein, by the said Renunciation, and by Reduction of the said Sentence; for this was only to take away the personal execution, which the *Lords* found were great injustice, if it should strick against him, because he was Charged to enter Heir, and omitted to Renounce before the Sentence, that therefore this omission (which was desired to be supplyed in this Reduction) should make him personally lyable for all his Goodsirs Debts, of whom he had never received benefit; and therefore because he descended of his blood, that he should be subject to pay his Debts, there being no other Adminicle but the said Charge; and the Recoverer of the Sentence being now no other ways prejudged, nor damnified by this Renunciation to be Heir, after the Sentence, than if it had been made before the same; and it appears most just, that he should be suffered to Renunce, but I think of reason, that he ought to refound what has been expended by the Obtainer of the Sentence, in all the Acts and Dependences of the Process, since the time that he ought to have Renounced, and that he omitted to do it, for the Party has debursed the same necessarly in his default; and seing he is Reponed, it ought to be *rebus integris* for either party, and his omission ought not to hurt the other party; And that he ought to be reponed, it is clear by this, that one who has compeared in Judgment, and being convened as Charged to enter Heir, and then Renouncing, yet thereafter satisfying the party who had Comprysed, or gotten Adjudication, he will be reponed notwithstanding of his Renunciation, far more where there is only a naked Charge, and neither Renunciation made, nor Compry sing, nor Adjudication. *Gibson* Clerk. *Vid. Craig* in *lib.* 3. fol. 298. and *I. C.; Renunciatio si a suis fiat dicitur Abstentio, si ab extraneis Repudiatio, quam nos indistincte repudiationem dicimus, sed l. 4. Cod. de Repud. hereditas semel Renunciata amplius adiri nequit.*

This same Decision was again done upon the 21 of *December* 1627. in a Reduction betwixt *Campbel* contra Doctor *Rosi*, and the Reducer who was Reponed, was ordained to pay fifty pound for the other parties Charges, who had obtained the Decreet against the party, as Charged to enter Heir. *Vid. December* 18. 1623. *Mowat. February* 23. 1628. *Dumbar, January* 13. 1629. *Nisbit* contra *Nisbit*.

L. Clu-

L. *Clunie* and *Stirling* contra *Ogilvie*, *Eodem die*.

IN an Action betwixt L. *Clunie*, *Thomas Paterson*, and *James Stirling* his Assigney against Mr. *David Ogilvie*, who had bought the Lands of *Frothie* from the L. of *Clunie*, for a certain price, and which price he was not obliged to pay while *James Curies* Renunciation of his right to the Lands Disponed, were delivered to him; the Laird of *Clunie* and his Assigneys pursuing for the Annualrent of the Moneys, conditioned for the price of the Lands, or else for the profit of the Land intrometted with by him since the Alienation, seing he both possessed the Lands and keeped the Moneys, without profit paying; and that they offered in place of *James Curies* Renunciation, which was *factum impræstabile*, he being deceast, and there being no person who would be Heir to him, to give sufficient and responsal Cautioners, to warrand him at all hands, for all skaith and damnage which ever he might incur, for not delivery of the said Renunciation; and the Defender contending, that he could not pay any Annualrent for the said Money, except it had been so contracted betwixt the parties, which was not; or else that he had been *in mora* for not paying of the same, which could not be shown to be on the Defenders part, seing *non per eum sed per actorem stetit*, that the sums were not payed, in respect he had not procured the said Renunciation, as he was obliged in their Contract. The *Lords* found, that albeit the Contract bore nothing of paying of Annualrents for the Moneys; yet that it was not equitable, that the Defender should both possess the Lands, and retain the Money, without paying of the Annualrent, albeit the said Renunciation was not obtained, seing he had only possest the saids Lands by vertue of the said Contract, and Right acquired thereby from the Pursuer; but because the Defender had payed to the Pursuer, a part of the price of the Lands, and had retained another part of the price conveened upon, while the said Renunciation should be delivered, The *Lords* found, that in so far as the profits of the Lands, and the Farms and Duties thereof would exceed the Annualrent of the Sums, which the Defender had payed in part of payment of the price, as said is, that for the superplus of the Profit and Duties of the Land, more than the ordinary Annualrent of the Moneys received by the Pursuer would extend to, the said Defender should refound and pay back the same again to the Pursuer: But concerning the rest of the price, and profit thereof, the *Lords* would not sustain the said Pursuers Action; and found that the said Defender was not subject, nor holden to pay the same, the said Renunciation not being obtained, albeit that the Pursuer offered Caution to warrand the Defender thereof, as said is; and so by this Decision the *Lords* had no respect to the Bargain, that the same was perfected by buying and selling, and had taken effect by Right and Possession: But they thought it most reasonable, that what profit the Buyer had of the Lands bought by him, more than the Annualrent of the Money, which he had actually payed to the Seller, the same should be refounded to the Seller, but respect to any of the rest of the Money Contracted to be payed, and retained unpayed, for not delivery of the said Renunciation; and for the which retained Money, they found him not holden to pay any Annualrent for the cause foresaid. Actor. *Hope & Nicolson*. Alter *Stuart & Fleisher*. *Gibson* Clerk. *Vid. February* 17. 1624. L. *Durie* contra Lo. *Ramsay*.

Morison Lo. *Prestoun-Grange* contra Heirs E. *Louthian*, *July* 22. 1626.

THis day there was an Action moved at the Instance of Mr. *Alexander Morison*, one of the Lords of Session, against the appearand Heirs of the Earl of *Louthian*, by the which, he as having the Wodset of the Lands of *Prestoun-Grange*, and *Achesons-Haven*, granted to him by the umquhile Earl of *Louthian*, desired that it might be found, that it was necessary and profitable to the Heirs of *Louthian*, to have the Harbory of *Achesons-Haven* Beeted and Re-edi-

fied again by him, which was cast down and demolished by a preceeding Tempest, and was made thereby so unuseful to Barks, that none could have access or entry, nor safe being within the same, except the same were Repaired; without which Reparation, the People and Indwellers of the Lands of *Prestoun-Grange* would leave the Ground, they finding their chief Conveniency to consist by the said Harbory, which gave them occasion to export the Commodities of the Ground, and to receive by the intercourse of Trade and Sailers, and others passing out, and coming in within the said Harbory, benefit and profit, which made the Indwellers more meet to Labour the said Land, and to pay the Rent thereof to the Master and Heretor; and which would not so continue, if the Harbory were not Re-edified, and so the Heretor would want his Rent, for the Indwellers would leave the Land; and therefore he desired that the *Lords* would find and Declare, that it was profitable and necessary for the Heretor, that the same should be Re-edified by the Pursuer, who had the Wodset, and that the expenses which he should deburse thereon, should be refounded to him by the Heretor, or any other who had right to Redeem the same, before the Lands should be redeemed from him, and that the sums debursed should accresce to the Reversion. This Action was sustained, and after Commission given by the *Lords*, to two of their number, to consider the estate of the Harbory, who made report again of the ruine of the same; the Summons was found Relevant, and after Probation by Witnesses, Decreet was given, and the Action sustained, conform to the desire of the Summons. But no party compeared here for the Defender. *Scot* Clerk. *Vid. penult Nov.* 1628. *Livingston* contra L. *Bass*.

Stuart contra *Achanay*, *Eodem die.*

IN a Declarator betwixt *Stuart* and *Achanay*, the Horning whereupon Declarator was sought, was alledged to be null, because the Charge bore not, *That the party was either Charged personally, or at his Dwelling-place*, and whereas the Charge bears, *That the Messenger delivered a Copy to the party Charged*, that ought not to sustain the Charge, seing the same could not be found lawfully Execute, except the Messenger had expresly set down in his Execution, *That he Charged him personally apprehended*, no more than an Execution could be found lawful, where the Charge bears not, *That the Messenger had affixt his Stamp thereto*, albeit that the Stamp was affixt thereto. This Alledgance was Repelled, and the Horning found sufficient, bearing, *That a Copy was delivered to the party*, which could not have been, but by a Charge given to him personally apprehended. Actor. Alter. *Belshes. Scot* Clerk. *Vid. July* 14. 1626. *Adam* contra Baillies of *Air*. *

M'culloch contra L. *Merton*, *Eodem die.*

IN an Action of Declarator of Bastardy, at the Instance of *M'culloch* contra L. *Merton*, The *Lords* sustained an Exception, founded upon the Service of an Heir to the alledged Bastard, which Service being a Sentence standing, the *Lords* sustained as sufficient to Elide the Gift of Bastardy, and to exclude the Kings Right, so long as the said Service stands untaken away, and which the *Lords* so found, albeit the Service was not Retoured, nor past the Chancellary; and which, albeit it should never be Retoured, seing the person Served died shortly after the Service, and so the Pursuer Alledged, that the said Service not Retoured, ought not to Elide this Pursuit, the same being an unperfect and null Writ, which would never furnish Action to him who was served, and which ought not to produce any benefit to him, and consequently ought not to furnish any Argument in his favours against this Pursuit, notwithstanding whereof the Service was sustained, as said is. Actor. *Nicolson* and *Lawtie*, Alter. *Aiton & Neilson*, *Gibson* Clerk.

contra

contra *Eodem die.*

ONe having by Contract Heretably Diſponed his Lands to and Reſigned the ſame in his favours; thereafter he Diſpones the ſame to another, who after the Procuratory of Reſignation, and before the Seaſin taken by the firſt Buyer takes Seaſin, before the taking of Seaſin by him who acquired the firſt Alienation, and by vertue of his firſt Seaſin, he who acquired the ſecond Right, becomes in poſſeſſion of the Lands; This Right being granted to be holden of the Annailziar, and the other Right being publick upon Reſignation, as ſaid is, to be holden of the Superior. This firſt Acquirer being laſt Seaſed, albeit by a publick Infefement, as ſaid is, purſues the other who was firſt Seaſed and in Poſſeſſion, by vertue of his Right to be holden of the Annailziar for Removing; Wherein the *Lords* admitted the Exception, founded upon the Defenders firſt Seaſin, clad with Poſſeſſion; albeit the Purſuer Replyed, That his Contract and Procuratory of Reſignation was before the Defenders Right; and that his Seaſin, albeit a ſhort ſpace after the Excipients Seaſin, (for they were both in one year) ought to be drawn back to his preceeding Procuratory of Reſignation, and the Poſſeſſion ought not to be reſpected, ſeing it was but a year paſt ſince the firſt of their Rights was made, and there was few weeks betwixt the dates of their Seaſins; Notwithſtanding of the which Reply, the Exception was ſuſtained, founded upon the ſaid prior Seaſin and Poſſeſſion, albeit the other was publick, and ſo little diſtance of time betwixt them, and ſo ſhort Poſſeſſion. Actor. Alter. *Lawtie*, *Gibſon* Clerk. *Vid. March* 22. 1626. *Erskin. February* 13. 1624. *Corſe.*

Auſtine contra *Ker*, *July* 25. 1626.

MAſter *David Hume* being debitor to *James Aikman* by an Heretable Bond, in a ſum of Money to be payed upon a ſimple Charge, notwithſtanding of the Clauſe of Annualrent, whereby it was Heretable, and being Charged by the ſaid *James* to make payment of the principal Sum, and Suſpended by the ſaid Mr. *David*; the time of this Suſpenſion, *Ker* of *Kippilaw* becomes Caution for payment of the principal Sum and Annualrents, ſo far as ſhould be adebted by the ſaid Mr. *David*. This Suſpenſion being diſcuſſed, and the Letters being found orderly proceeded, *George Auſtine* Creditor to *James Aikman* arreſts the principal Sum and Annualrents in the hands of *Ker* of *Kippilaw*, Cautioner foreſaid in the Suſpenſion, and intents Action againſt him, to make the ſame forthcoming, wherein *Kippilaw* Compearing Alledged the ſum could not be arreſted, becauſe he being Cautioner, could be no otherways obliged but as the Principal Mr. *David Hume* was, for whom he was Cautioner, and he was only obliged by an Heretable Bond, and ſo not ſubject to arreſtment. This allegiance was repelled, becauſe the ſum was made moveable by the Charge given to Mr. *David Hume* by *Aikman*, before the Suſpenſion, wherein *Kippilaw* was Cautioner; which Suſpenſion being diſcuſſed againſt Mr. *David*, made the Cautioner lyable as the Principal was. And it being further diſputed, that after the Charge no Annualrent could be craved, becauſe the Charge making the ſum moveable, there was no further obligement for Annualrents, ſpecially againſt the Cautioner in a Suſpenſion. The *Lords* found, that albeit there appeared ſome probable argument, why after the Charge, the Clauſe of the Obligation anent payment of the Annularents ceaſed; yet that the Debtors delay'd to pay Annualrent after the Charge, ſhould not be prejudicial to the Creditor, and help the Debitor: And therefore they found, that the Cautioner ſhould pay proportionally, as much of the penalty of the Bond as effeirs to the Annualrent of all Terms ſince the Charge, which preceeded the time of the Arreſtment; for the which, the *Lords* ſuſtained the Action againſt the Cautioner, ſeing he had obliged himſelf at the Suſpenſion, to pay what Annualrent the *Lords*

should find to be owing. *Hay* Clerk. *Vid. March* 2. 1626. *Gray* contra Tennents of *Fernistat.*

Lo. *Lovit* contra L. *Philorth*, *Eodem die.*

IN a Removing pursued at the Instance of the Lord *Lovit*, who was Infeft upon the Resignation of the L. *Pitsligo* in the Lands of *Philorth*, which Laird *Pitsligo* had Compriſed the saids Lands from umquhile Sir *Alexander Frazer* of *Philorth*, against *Alexander Frazer* Son to the said Sir *Alexander*, who compearing, Alledged, that he nor his Tennents ought not to Remove from the said Compryſed Lands Libelled, becauſe the Sums whereupon the Compryſing was deduced were payed to the Purſuer, by the said umquhile Sir *Alexander*; at the leaſt the Purſuer had accepted from him Lands, in full ſatisfaction of the ſame Compryſing. And it being Replyed for the Purſuer, That the said Exception could not be found Relevant to ſtay this Removing, in reſpect the said Compryſing and Securities, and Infeftments following thereon, were neither Renounced nor Redeemed, and the ſame being ſtanding, could not be ſo ſummarly taken away, by way of Exception; But the furtheſt that the ſame might work, (albeit it were true) were only, to produce Action thereupon againſt the Purſuer, ſeing the Compryſing once led, Denuded the Excipients Father of his Right, to the which he can never come again, except the Defender firſt lawfully removed that impediment of the Compryſing, whereby himſelf might be Infeft in the Lands. The *Lords* found the Exception Relevant, notwithſtanding of the Reply; for the *Lords* found it againſt reaſon, that the Purſuer ſhould both receive payment of the ſums, for the which the Lands were Compryſed, or ſatisfaction for theſe Sums, and alſo the Lands Compryſed, and ſo bruik both, but that he being ſo ſatisfied, as the Exception bears, the Compriſing ſhould ceaſe. *Hay* Clerk.

Stuart contra Brewers in *Glaſgow*, *Eodem die.*

IN an Action at the inſtance of *James Stuart* Burgeſs of *Glaſgow* againſt certain Brewers in the Barony of *Glaſgow*, to have heard it been found, that the Right and Priviledge of Brewing within the particular bounds Libelled, pertained only to him, as being Infeft in a part of the Lands of that Barony, with the only priviledge of Brewing within theſe bounds Libelled, and therefore all others to be diſcharged from Brewing within the ſame Lands and Bounds. The *Lords* found, that the Right of the Decreets recovered by certain perſons, who had right to the ſaids Lands and Priviledges before the Purſuer, whereby the ſaid priviledge was found to pertain to them by theſe Sentences, did belong to this Purſuer, as Succeſſor to them in the Right of the ſaids Lands and Priviledges, the ſame Priviledges being real, which followed the ground; which Right ſo found by the ſaids preceeding Sentences, the *Lords* found was competent, and did Militat in this Purſuers favours, who was Infeft with the ſaid priviledge, to furniſh him a Title to purſue this Declarator, and Action Libelled at his inſtance, albeit he was not ſpecially made Aſſigney to the Decreets, but that he uſed the ſame as a Title to ſuſtain this Action. *Vid.* 25 *March* 1623. L. *Hunt-hill.* 26 *March* 1623, *Donaldſon*, 1 *Decem.* 1630. Fewers of *Chappeltoun.* 1 *March* 1636. *Guthrie.*

Smith contra Baillies of *North-Berwick*, *Eodem die.*

THe Baillies of *North-Berwick* being purſued by one Smith, for payment of a Sum adebted to him by one *Lawder*, in reſpect they being charged by Caption to take him, they did not the ſame, he being in their company. The Defenders alledged, that they did no wrong in refuſing to take the ſaid Rebel, becauſe the Meſſenger who Charged them, was deprived of his Office, before the Charge given to them; which Deprivation was publiſhed at the Mercat-Croſs before the ſame Charge, for verifying whereof they produced a Teſti-

a Testificat Subscribed by Sir *Jeromy Lindsay* Lyon King at Arms, bearing, *That he had deprived him, and had caused lawfully publish the same.* The *Lords* found not this Testificat sufficient, but astricted the Excipients, to prove that the Officer was deprived, either by production of a Decreet of Deprivation, or by Production of a lawful publication of his Deprivation; either of the which being *positivè* Alledged, *viz.* either that he was deprived by a Sentence, or that there was Publication made of the Deprivation; albeit they Alledged not a Sentence preceeding, depriving him, but only that Publication was made that he was deprived. The *Lords* found any of thir two Relevant, and any of them being proven, to be sufficient to Eleid this Pursuit. *Vid.* 14 *July* 1626. *Adam* contra Baillies of *Air*, and the other cases there cited.

L. *Rowallan* contra *Muir*, *Eodem die.*

IN a Removing pursued at the instance of the Laird of *Rowallan* against *Janet Muir*, she compearing Alledged that this same Pursuer, by his Discharge produced in Process, granted the Receipt from her Husband and her, and satisfaction of an *Herezeld*, when the same should fall out to be due to him, which is alike, as if she her self had payed it after her Husbands decease, seing the Pursuer hath before-hand granted him, as said is, to be satisfied by him and her for the same *Herezeld*, when it should happen. And it is true, that it is the Custom of the Barony, that where the Relict pays an *Herezeld*, she bruiks the Land for payment of the old Duty, during her lifetime; which Custom hath been kept past memory of man. This Exception was found Relevant, but the alledged Custom was ordained to be proven by Writ expresly, or Oath of Party, and no otherways, and so it was admitted to be proven, and not by instances of others, who having payed the like, bruiked for their lifetime; which was not found sufficient. Actor. Alter. *Miller*. *Gibson* Clerk.

Lockhart contra *Lockhart*, *Eodem die.*

ONe *Marion Lockhart* having given Discharge to *Lockhart* of *Bar* of a Sum of Money, wherein the Father of the said *Lockhart* of *Bar* was obliged to the said *Marion*; the said *Marion* pursues an Action of Restitution *in integrum* against the said Discharge, by reason the same was done in her Minority, having neither received Money, nor other Good deed; which Action was sustained, notwithstanding the Defender Alledged, that this Action could not be sustained, except the Pursuer would Alledge, that the said Discharge was given by her *sub spe numerandæ pecuniæ*, which followed not, or that the Defender promised her payment, and hath not done the same, without which the Action ought not to be sustained; for as a Minor past 12 years of age might make a Testament, so also she might lawfully at that age Dispone upon that Sum, or Discharge it. This Alledgance was Repelled, and the Reason found Relevant.

Dickson contra *Anderson*, *Eodem die.*

IN a Reduction betwixt *Dickson* and *Anderson* of a Decreet obtained before the Baillies of *Dumfreis*, decerning *Dickson* to pay 500 Merks, being referred to his Oath, and not compearing, *&c.* This Decreet being desired to be Reduced, because he was never Warned by any Officer to compear; and the Executions being called to be produced, and to be improven in this Process, the Defender compearing, and Alledging, that in their Burrow-Courts their Custom was, to command their Town-Officers to pass and Warn Parties to compear before them, and to give their Oaths upon the Claims referred to their Oath; & that there used no Writ to be made upon their Officers Warnings, nor no Execution in Writ was usually produced by the Officers, but only they compeared in Judgment, and made relation to the Baillie, that they had warn-

ed the Party, either personally, or at his dwelling-place, and upon his report Decreet was given; so that for not production of their Officers Execution the Sentence could not be Reduced. This Alledgance was Repelled, and this Custom was found not to be allowable, for thereby the ordinar means, to try the verity of the Officers warning of Parties, and the way to improve the same, was taken away, which ought not to be permitted, and to give therein more trust to the relation of a Messenger or Officer, than is due to him, and which ought not to be: So the *Lords* found, that in such Citations and Warnings made by Town-Officers, the least that could be done in any lawful Process, proceeding Judicially thereupon, by the Magistrat of Burgh was, that when the Officer made his report in Judgment, that thereupon a Note should be made by the Town-Clerk in Writ, bearing; *That such an Officer made such a report in Judgment*, viz. *That he upon such a special day warned the Party, either personally or otherways according as he hapned to do, to compear in such a Cause, and before such special Witnesses named and designed*; which Report in Writ the *Lords* found ought to be extant, and made forth-coming to all Parties, when the Process should be called in Question, or the saids Executions called, to be produced by the Parties having Interest; and which being so extant and Exhibit, the *Lords* found might supply the production of any Precept, or Executions of Officers called for to be produced. Actor. *Belshes.* Alter. *Gibson* Clerk. *Vid.* 17 *June* 1624. *Wood* contra *Crawfurd.*

Nisbets Arthur's Oyes *contra* his Relict, *July* 26. 1626.

IN an Action betwixt the Relict of Mr. *John Arthur* and his Oyes, the Bairns of Mr. *Patrick Nisbet.* The *Lords* sustained an Action of Advocation from the Commissars of *Edinburgh*, of a Testament of the said Mr. *Johns*, desired to be confirmed before the Commissars by his said Relict, who was his Executrix nominate in the said Testament; and discharged the saids Commissars to proceed in the Confirmation thereof, until an Action of Reduction intented before the *Lords*, for Reducing of the said Testament was first discussed, intented at the instance of the saids Oyes against the Relict: But the *Lords* assigned a day in *December* to the saids Reducers, to discuss the said Reduction, after the which day, they would consider, if any further day should be granted, to end the Reduction, or if then the matter should be Remitted. Actor. *Hope* & *Megill.* Alter. *Stuart* & *Nicolson. Gibson* Clerk.

Nota. Four days before this, the contrair was done, betwixt *Mcmorahame* and *Mcmorahame*; where a Testament craved to be Confirmed, and desired to be Advocat upon the like Dependance of a Reduction, the same was refused, and the matter Remitted to the Commissars.

Russel contra L. *Kerse*, *Eodem die.*

IN an Action of Spuilzie, pursued at the instance of one *Janet Russel* against the Laird of *Kerse*, who was conveened for Spuilzie of Corns growing upon the Lands libelled; And the Spuilzie libelled to be committed in *January* 1624, and the Corns being of the growth of the Cropt 1623; the Husband of this Pursuer, who sowed the Corns of this Cropt, dying in *September* 1623, before the Spuilzie: whereby the Defender alledged, that the Corns of that Cropt, alledged spuilzied from the Pursuer, behoved to pertain to her Husband, who was his Tennent of the Lands, and sow'd that Cropt and Corns, he dying in *September* that same year as said is, at which time the Corns were separate from the Ground, and shorn by the Defunct, and therefore until his Testament were confirmed, the Relict could not pursue for the Corns alledged pertaining to her, for the same would pertain to his Executor, who behoved to be answerable to this Defender, for the Farms of the Lands, adebted by

by the Defunct. This Alledgance was Repelled, and the Action sustained at the Relicts instance, without necessity of Confirmation, in respect of her Possession libelled continually to the time of the Spuilzie. *Item*, In this same Cause, an Exception was proponed upon the Compryfing of the Corns by the Birle-men, with consent of the Pursuer, and delivery of the same to this Defender, for satisfying of his Farms owing to him by consent also of the Pursuer; which Exception was also found Relevant, and admitted to the Pursuers Probation, which the *Lords* found Relevant to be proven in all the Heads thereof, especially anent the Pursuers consent by Witnesses, and found no necessity, that her Consent should be proven by her Oath or Writ. *Vid.* 1 *July* 1626, *Hay*.

Finlason contra her Tennents, *July* 27. 1626.

ISobel *Finlason* being Infeft by umquhile *Gray* her Husband, who was Infeft in certain Cottages in *Coldinghame* by the King, as vacant in his Hands, by the Disabilitation of *John Stuart*, Son to the umquhile forfaulted Earl of *Bothwell*, provided to the Priory of *Coldinghame*; and by the Annexation of the said Priory to the Crown, pursues Removing against some Tennents, Possessors of the saids Cottages; wherein the said *John Stuart* compearing for his Interest, Alledged, that the said Act of Disabilitation and Annexation of the said Priory, which was the ground of the Pursuers Husbands Infeftment, was rescinded and reduced by a posterior Act of Parliament, with all Infeftments depending thereon, and are declared null; and the said Act ordained the nullity to be received by Exception or Reply, and therefore that Infeftment cannot be a Title, whereupon either to Pursue or Defend. This Exception was found Relevant, and instantly proven, by ptoduction of the said Act of Parliament, and so Absolvitor was given; albeit it was Replyed, that the Defenders called, were Tennents to the Pursuer and her Husband, to whom they payed Mail and Duty; so that their Possession could not be inverted, until they were orderly Removed by the Excipient, and the said Act could not prejudge the Pursuer and her Husband, who was not called thereto; Likeas, the Act of Parliament *Salvo Jure Cujuslibet* works so far for the Pursuer, that by any other Act in favours of a particular person, a third Parties Right never called cannot be prejudged; which Replyes were Repelled, and notwithstanding thereof, the Exception sustained. Actor. Alter. *Craig. Hay* Clerk: *Vid.* 25 *July* 1623, E. *Nithisdale*, and the Cases there cited.

M'culloch contra *M'culloch*, *Eodem die.*

IN a Declarator of Bastardry of *M'culloch* contra *M'culloch*, whereof mention is made, *July* 22, 1626. The *Lords* found, that albeit it be required, that the Brieves be proclaimed upon 15 days warning, as is appointed by the 127 *Act* Parliament 9. *James* 1. and by the 94 *Act Par.* 6. *James* 4. Yet that the Execution and Space was sufficient, if either the day of Citation, and whereupon the same was Proclaimed, or the day to the which the saids Brieves were Proclaimed to be Served, were compted, in the number of the saids days, so that they needed not both to be free. In the same Proces also, the *Lords* found a Brieve whereupon a Service was deduced to be null, because the same was Blotted, and Vitiat in the day of the Execution, albeit the Party user of the Brieve offered to prove, that the same was truly Execute, upon the very day, which the Execution proported, as it was mended, and that he alledged, that the same could not be found null for that Cause, seing he might lawfully mend his Execution, as in all other Citations, and Summons, where the Party abyds at the same, which the *Lords* Repelled, in respect of the 113 *Act*, Parl. 9. *Ja.* 1. *Whereby it is declared, that Brieves may be lawfully impugned, if they be razed or blotted in suspect places, viz.* In the Name and Surname of the Follower and Defender, and the Name of the Land, or of the Cause where-

upon the Brieves was purchast, and the date, which Act the *Lords* found to extend to the date of the Execution of the Brieve also, albeit the Defender Alledged, it did only extend to the date of the Brieve it self, and not to the date of the Execution thereof. But the *Lords* Repelled the same, and found the Act should extend to the date of the Execution, seing a Brieve not execute is not a Brieve, and there can no Exception be proponed, while the same be execute, so that the Act declaring, what Exceptions should be admitted against Brieves, cannot mean but of Brieves Execute, and therefore the date of the Breive should comprehend the date of the Execution thereof. Actor. *Nicolson* & *Lawtie*. Alter. *Aiton* & *Neilson*. *Gibson* Clerk. *Vid. June* 24, 1623. Act anent Compryings.

L. *Anstruther* contra *Black*, *July* 27. 1626.

IN an Action betwixt the L. of *Anstruther*, as Assigney constitute by Sir *Thomas Dischington*, to some Monies adebted to him by Mr. *Black*, out of the Lands of *Largo*. The *Lords* found, that an Assignation made to Sums of Money, for the which Sir *Thomas* the Cedent had Charter and Seasin, the time of the Assignation, could not be so valiably *Assigned*, but that notwithstanding of the *Assignation* and Intimation thereof, another of the Cedents Creditors might thereafter Compryse the same from the Debitor; and which Compryser would be preferred in his Right to the prior Assigney, seing the *Assignation* was not *habilis modus* to denud the Cedent of his Real Right, whereof he had then Charter and *Seasin*, but whereupon at the time of the *Assignation*, the Cedent was not Infeft, though thereafter he acquired Charter and Seasin, but then another Compryses; yet the *Assigney* will be preferred to the Compryser, notwithstanding of the said subsequent Charter after the *Assignation*, and before the Compryging. *Actor*. *Hope* & *Lermonth*. *Alter*. *Lawtie* & *Oliphant*. *Hay* Clerk. *Vid. November* 23. 1627. *Dumbar*.

Tennent contra *Tennent*, *July* 28. 1626.

IN an Action of Registration of a Bond pursued by one called *Tennent*, against another so called, who was conveened as Intromettor with the Defuncts Goods and Gear, Debitor to the *Pursuer*. It being alledged, for the Defender, that he could not be conveened as Intromettor, because before the Intenting of the Cause, there was an Executor Confirmed to the *Defunct*; and it being Replyed, that the Pursuers Action ought to be sustained against him, as Intromettor, notwithstanding of the Confirmation of Executors, because if any Testament was Confirmed, the same was most fraudulently done, by this same Defender, who having first Intrometted with the Defuncts whole Goods, he thereafter, to the effect that the Creditors just *Actions* therethrough competent against him might cease, moved a poor Begger to lend his Name to the said Executry; and caused another *Begger* to become Caution for him; likeas not only he bestowed the whole expense upon the said Confirmation, and payed the *Quot* of the Testament, and also promised to Warrand the Executor of all *Action* and Danger, which he might incur, by his being Executor; But the said Executor concurred with the *Pursuer* at the Bar, in this Pursuit; and so in effect the said Excipient is both Executor and Intromettor, in respect of the which examplary fraud, the Defender ought to be only found his just Debitor, and the Pursuer ought not to be excluded by this indirect dealing, from his just Debt, which is in effect all that he has, but the Defenders Exception ought to be Repelled. This Exception was admitted by the *Lords*, notwithstanding of the Reply, for the *Lords* found, that Executors being Confirmed, the Process behoved to cease against the Intromettors; and if any fraud were done by the Excipient, the same in this place could not exclude

clude this *Action*, and if the *Excipient* made any promises to relieve the Executor, the Pursuer had his Action Competent against him thereupon, after that the Executor was found his Debitor. Actor. *Miller*. Alter. *Gibson* Clerk. *Vid. July* 14, 1626. *Smith* contra *Gray*.

L. *Tulliallan* contra L. *Clackmanan*, *Eodem die*.

IN a Suspension betwixt the L. of *Tulliallan*, against L. *Clackmanan*, anent the payment of the Principal Sum of 4000 merks, and Annualrent thereof; which Sum *Tulliallan* was obliged to pay to the L. of *Clackmanan*, and his Spouse, and the longest liver of them two, at *Whitsunday*, 1625. And in case of their deceases, to *Alexander Bruce* their Son in Fee; and upon this Obligation follows Infeftment after the said Term of the said Annualrent, for the said principal Sum, to the said L. *Clackmanan*, and his Spouse in Liferent, and to their said Son in Fee. In the said Obligation it is Provided, that the Suspender should be obliged to pay the principal Sum, at any Term whereat he should be Charged, notwithstanding of the Infeftment without Requisition, to the said L. of *Clackmanan*, his said Spouse, and their said Son, in manner foresaid: in this Cause it being controverted, if the L. of *Clackmanan* might Charge for the principal Sum, seing he remained naked Liferenter thereof, and the Fee was established in his Sons Person, by the Infeftment taken thereof in that maner, after the Term destinat in the Bond, for payment of the principal Sum, whereby it was contended, that the Liferenter could not uplift the Sum in prejudice of the Fiar, but only have his Liferent of the Annualrent of the same, specially the Fiar being deceast, whose Heir would have the undoubted Right to the said principal Sum, after the Liferenters decease. The *Lords* found, that notwithstanding of the Infeftment of Fee, standing in the Person of the Son, that the Father might Charge for the principal Sum, and uplift, and dispone upon the same at his pleasure, in respect of the Clause and Provision foresaid, conceived in the Obligation, which bore, *That the Debitor, notwithstanding of the Infestment, should remain obliged to pay the Sum to the* L. *of* Clackmannan, *his said Spouse, and their said Son, in manner foresaid*; Which words, *viz.* (in maner foresaid) The *Lords* found, ought to be ruled by the preceeding Clause of the Bond, bearing *the Debitor*, as said is, *to be obliged to pay the same to him and his Spouse at the Term of* Whitsunday, 1625. *and in case of their deceases, to their Son.* By the which Clause the *Lords* found, that Power remained with the Father, in his own time to uplift the Sum, and use the same at his pleasure, so long as he lived; and that the Fee only was acquired and conferred, to be in the Sons Person, in case of the Fathers decease, who being on Life, might Charge for the principal Sum, and imploy the same at his pleasure. And this was found, because he had Charged for the principal Sum, upon the which Charge, the Suspender had provided the Money, and Consigned the same, albeit *Clackmanan* Alledged, that he was only a naked *Liferenter* and that the Fee remained with his Son, and his Heirs, so that he had no Right to Charge for the principal Sum; and if he had used any Charges for the same, he past therefrom, and declared, that he Charged only at this time, for the bygone Annualrent thereof; which *Alledgance* was Repelled by the *Lords*, for they found that *Tulliallan*, upon that Charge had reason to obey, and might lawfully have payed the Sum to the Charger, or Consigned the same; and that the Fathers Declaration foresaid, should not prejudge him, who had Consigned the Money. *Actor. Primrose*. Alter. *Hay* Clerk. *Vid. Feb.* 20 1629. L. *Drumkilbo. January* 18. 1625. *Wat. Feb.* 22, 1623. *Leitch*.

L. *Preston-Grange* and *Dick* contra *Hamilton*, *November* 8. 1626.

IN an Action pursued at the Instance of the Laird *Preston-Grange*, and *William Dick*, against *John Hamilton* Burges of *Edinburgh*, for delivery of an

Obligation of 2000 merks made to him, by the Pursuers, to be destroyed by them, in respect of a Back-Bond, made by the Defender to them, whereby he obliged him to Re-deliver the same Bond to them, in case he fulfilled not a Condition expreſt in the said Back-Bond, which Condition the Pursuer subsumed, the said Defender had not fulfilled, and therefore they concluded, conform to the said Back-*Bond*, Re-delivery of their said *Bond*. The Defender Alledged, that this *Action* should abide Continuation, being for delivery of Writs, and in effect resolving in a Declarator of a Failzie, for not fulfilling of the Tenor of the Back-Bond; which nature of Action he Alledged ought not to be sustained, without Continuation. This *Alledgance* was Repelled, and the Action was sustained, without Continuation, upon the first Summons, seing the Pursuer produced the Back-Bond, whereupon the Summons was founded instantly, and the not fulfilling of the Condition thereof, was a Negative which proved it Self, nothing being alledged to purge the same; but this Reason will appear to Militat, in all Declarators upon Failzies, wherein albeit the Evident, which bears the Condition, be instantly produced, and that the Failzie be a Negative, which proves it's Self, yet Continuation is ever found necessary, that the Party being twise Summoned, may be heard to compear to purge the Failzie, or to propone his other competent Defenses, neither will Decreet be given upon the first Citation, yet the *Lords* found here no necessity of Continuation, no more than if any Party had by his Bond obliged himsef to deliver any Writ, and if he had been pursued for delivery thereof, in that case the Bond being produced, there was no necessity of a second Summons, so the like in this Case, but this same instance was doubted of by some of the *Lords*, yet it was found *ut supra*. Actor, *Mowat* & *Stuart*. Alter. *Cunninghame*, *Hay* Clerk. *Vid. Feb.* 8. 1627. *Robert Ker.*

Wyllie contra *Bellenden*, *November* 15. 1626.

IN an Action pursued at the Instance of *James Wyllie*, Son and Heir to umquhile *William Wyllie* Writer, against Sir *William Bellanden* of *Brughton*, for Poynding of the Ground for an *Annualrent*, and also for payment of the said Annualrent, by personal Execution against the Defender. This Pursuit was instructed by Production of a *Seasin* of the said Annualrent, given to the Pursuer, bearing *the same to proceed upon a Precept of* Clare Constat *granted to him, as Heir to his Father, by the* Lady Brughton, *as Commissioner, and having power to receive Vassals and Tennents, in name of the said Defender her Son*; which Precept of that Tenor, was Insert in the Seasin, but nothing was produced but the Seasin. The *Lords* found this Seasin was not sufficient, to produce this personal *Action*, against the Defender, seing it was neither Lybelled, nor *Replyed*, that the Defender was Heir to the Person Disponer of the Annualrents, to the Pursuers Father, without the which were alledged, albeit the Real Action might be sustained, yet the Personal could not be granted against him; and also the *Lords* found, that the said *Seasin* was not sufficient, to produce the Real Action, except the Precept of *Clare Constat* were produced, and the *Ladies* warrand to grant the same, whereto it was Relative, which the *Lords* ordained the Pursuer to produce, before Proces could be sustained upon that Seasin. Actor. *Mowat*. Alter. *Primrose*. *Gibson* Clerk. *Vid.* in *July* 5. 1625. L. *Aiton*, *Maxwel* contra *Graham*, & for the Personal Action, E. *Galloway*, both there cited.

Galbraith contra *Cunningham*, *Eodem die.*

James Galbraith, as *Assigney* made by Sir *John Stuart* of *Methven*, pursues *Andrew Cunningham* Brother to the L. *Glengarnok*, for payment of a Sum contained in a Bond made by him to the said *Sir John*, and made in *Ireland*, and after the manner of Bonds formed in that Kingdom; it being Alledged, that the

the Defender could not be pursued in *Scotland*, in respect it was a Pursuit founded upon an *Irish* Bond made in that Kingdom, and pursued against the Defender, who with his Wife and Family were actual Residenters in *Ireland animo remanendi*; And where he had so dwelt, and remained these 14 years by-past; likeas he was Denized an *Irish* man, and so ought to be pursued in that Kingdom, as his proper *Forum*. This Alledgance was Repelled, in respect the Defender was a *Scotish* man, and that the Pursuer declared, that he sought only Execution against the Defender, for such Lands and Goods, as the Defender had within *Scotland*. And which the *Lords* sustained, for that effect. It being also Alledged, that the Bond was null, because it wanted Witnesses, and designed not the Name of the Writer; and seing it was sustained, to produce Action here in *Scotland*, it ought to be Judged by the *Scots* Laws. This Alledgance was also Repelled, in respect the Pursuer offered to prove by the Custom of *Ireland*, that Bonds made after the Tenor and Form of this Bond produced, was sufficient, and that it was the Custom in that Kingdom, to make them so; Which Custom and Form the *Lords* found ought to be proven, and admitted the same to Probation. Actor. *Belshes*. Alter. *Cunninghame*. *Gibson* Clerk. *Vid Decem*. 6. 1626. *Stranger* in *Middilburgh*. *Feb*. 15, 1630. *Harper*. *March* 7, 1629. *Muirhead*. *March* 11. 1624. *Letitia Heth*. *July* 27. 1633. *Gordon*. *July* 3, 1634. *Melvill*. *Novem*. 16 1626. betwixt thir Parties.

Chalmers contra *Marshal*, *Novemb*. 16. 1626.

A Decreet being obtained at the instance of *James Chambers* contra *Marshal* and *White*, as Intromettors with the Gear of a Defunct, who was his Debitor. This Decreet being Suspended by one of the Defenders, upon this reason, that he could not be Charged for the whole Debt, but only for the equal half thereof, seing the Sentence was given against them both as Intromettors, which was proven by the Sentence, and was not given against them and ilk one of them conjunctly and severally, the Sum therefore behoved to divide. The *Lords* found, that the Sum contained in the said Sentence, should divide betwixt the two Defenders; for albeit if any of them had been pursued alone for the whole, and that it had been proven, that that one person conveened had intromitted, that person alone would have been Decerned *in solidum* to pay the whole Debt; yet seing there was two conveened and proven against them both, , and Decreet given against them both. Therefore the *Lords* found, that the Sum should divide betwixt them, seing the Pursuer had elected them both to be pursued. The *Lords*, notwithstanding of this Decision, uses to decide where two Executors are Decerned to pay to a Creditor, yet that Creditor may seek Execution upon that Sentence against any of the two Executors, Decerned *in solidum* for the whole Debt, without division *in hoc casu*, viz. *If the Creditor do prove, that that Executor, against whom he seeks Execution for the whole, intromitted with as much of the Defuncts Goods as will satisfie his whole Debt, and no otherwise*. But this was not sustained against any one of the two Intromettors, as said is. *Scot* Clerk. *Vid. Ult. February* 1626. *L. Cashogill*. 9 *Decemb*. 1628. *Sowtar*.

Galbraith contra *Cunninghame*, *Eodem die*.

IN the foresaid Action of *Galbraith* contra *Cunninghame* mentioned *supra*, 15 *November*, an Exception of payment of the Sums contained in the Bond being proponed, and offered to be proven by Witnesses, which the Defender Alledged was admissable to be proven *hoc modo*, being payment of an *Irish* Bond, and payed in *Ireland*, where the form in that Countrey allowed Probation by Witnesses. The *Lords* found this Exception probable after that manner by Witnesses to be Relevant, the Defender always proving

proving therewith, that by the Laws of *Ireland*, payment of Sums contained in such Bonds, may be proven by Witnesses, and that that Probation by Witnesses is received and allowed by the *Irish* Laws; neither was it respected by the *Lords*, where the Pursuer Replyed, that this Pursuit being made in *Scotland*, and betwixt *Scots*-men, the Probation ought only to be admitted therefore, which is allowed by the Laws of *Scotland*; which was Repelled, because the Bond being made in *Ireland*, and after the manner of the Laws there, albeit betwixt *Scots*-men, the payment might be made, and proven to be made, according to the same Laws where the Bond was granted, and so it might be dissolved as it was knit. *Partibus ut supra.*

The like Decision was done *penult. Feb.* 1633. betwixt L. *Balbirnie* and L. *Urtill*, whereto *Scot* was Clerk, that a Bond made of borrowed Moneys, done in *England* betwixt two *Scots*-men then remaining in *England animo remanendi*, and made after the *English* form of Bonds; being pursued for payment here in *Scotland*, and payment thereof being alledged to be made in *England*, and offered to be proven by Witnesses, which was alledged ought to be received by the Laws of *England*, where both the Bond was made, and the payment thereof. This Exception to be so proven was found Relevant, albeit it was Alledged to the contrary, that it should not be proven but by Writ, or Oath of Party, conform to the Laws of *Scotland*, where the Pursuit was moved; notwithstanding whereof, the Exception so to be proven was admitted, the Custom of *England* being proven. *Nam Regulariter probatio sit secundum consuetudinem loci, ubi solutio fieri debet*, Socin. & Bartol.

Seaton of *Meldrum* Supplicant, 21. *Novemb.* 1626.

A Supplication being given in at the instance of *Seaton of Meldrum*, making mention that he had raised Brieves for serving of himself Heir to umquhile Mr. *George Seaton*; therefore he craved warrand from the *Lords* to the persons of Inquest, for Dispensing with the Rebellion of the said umquhile Mr. *George*, and that they should proceed in the Service of the said Brieves, notwithstanding that he died Rebel, and was at the Horn; and this was desired, in respect of the common Clause of all Brieves, bearing, *to cognosce that the Defunct died at the faith and peace of our Soveraign Lord*, &c. This Bill was refused, because the *Lords* found, that it was not proper to them to dispense with Hornings or Rebellion, for that was not *suæ jurisdictionis*, but only *Imperii & potestatis Regiæ*; and that it was only proper to the King to Dispense therewith, albeit of Reason such Dispensations are unnecessarly sought, seing the persons of Inquest are ever in use to serve, notwithstanding that the Defunct, to whom the Service is sought, died Rebel; and if that should be found to be a fault of the Service, and of the Retour following thereupon, many Services would fall; for by this proceeding of the Service none is prejudged; but by the contrary, the Heir served is lyable to the Creditors for the Defuncts Debt, and for any thing for which he was Rebel; only the doubt may be, if an irresponsal person shall be served Heir; and yet whether he be responsao r not, that hath no co-incidence with the case foresaid, and makes nothing concerning the Defuncts Rebellion, either to help or hinder the dispensing therewith, which was desired: So the *Lords* thought it needed not to be craved to be dispensed with, in regard of the foresaid Clause, by reason that Clause was to be understood of Forfaultries, which made Forefaulted persons to be repute to have died, not at the Faith and Peace of the King, and not of common Rebellion and Horning. *Vid.* 19 *June* 1630. E. *Crawfurd.*

In special Declarators, after the general Declarator, the Rebel needs not to be called, when the Debitors to the Rebel are specially conveened, because the Decreet of general Declarator puts the Donatar in the Rebels place, and so the

the same holds when the Rebel is dead, that his Executors need not to be called to the special Declarator, nor no other person who might represent him of the Law, as Heir or Executor.

Glen contra *Binnie*, &c. *Novemb.* 24. 1626.

IN a double Poynding raised at the instance of some Tennents of Burrow-Land in who were distressed for their Mails, at the instance of *Glen* on the one part, and by *Binnie* on the other part: *Glens* Right was a Tack Set to him by his own Son, who shortly after the Date of the Tack became Bankrupt; and which Son by his Contract of Marriage, was appointed to be Infeft by his said Father (who was also Party-Contracter in the said Contract of Marriage) in the same Land, and according thereto was Infeft therein. This Tack bore in the Narrative thereof, that notwithstanding of the Provision made to the Son by the Father, conform to the foresaid Contract; yet at the date and time of the said Contract, it was conveened verbally betwixt the Father and the Son, and the Son promised that the Father should retain the Possession of the said Lands, wherein he was appointed to be Infeft, during all the days of his lifetime, notwithstanding of the Right to be given to the Son Heretably, by vertue of the said Contract, for fulfilling of the which promise and condition the said Tack was Set; and in respect of the which Tack, bearing the said promise, and that the Father now Defender Alledged, that he had continued in real Possession of the Duties of the Lands Libelled continually, by vertue of the said promise, since the date of the said Contract many years, to the time of the Setting of this Tack: and that also he had uplifted a Terms Maill of the Land, since the Date of the Tack, and so the same was clad with Possession; therefore he Alledged, that he ought conform to his Tack to be answered of the rest of the Terms controverted, *viz. all the Terms after that Term whereof he had received payment*, as said is; especially seing he needed not to prove any further of the promise, than by the Narrative of the Tack, and that conform to the Act of Parliament anent Dyvours, that he was content to give his Oath upon the true Cause, and that the promise was then truly made, so that there was no neeessity of any other anterior Writ. The other Party, *Binnie* Alledged, that he ought to be preferred, in respect the Tack was Set to the Father by the Son, who was at the Setting thereof *in meditatione fugæ*, and thereafter shortly became Bankrupt, and he was his Creditor, who had Registrat the Sons Bond a day before the Setting of the Tack, and had Comprised the Lands, and was Infeft therein before any Terms had past, except that one alledged uplifted by the Father, which one only Term could not make the Tack lawful against the Compriser, there being nothing extant in Writ to verifie any anterior promise; which promise made so fraudulently, the time of the Contracting of Marriage, ought not to be allowed, especially where there is nothing to qualifie, but the assertion of the Son, done so long after the Contract, and made to his own Father, and in prejudice of him a lawful Creditor, who had done all diligence: For as that Tack could not meet the Sons Wife, who had her Conjunct-fee-right of that Land given to her, if her Husband had been dead, no more now ought the same to meet the Creditor. This Alledgance of the Creditors was admitted, and the Fathers Alledgance Repelled, and the Creditor preferred, and Decerned to be answered and obeyed. *Gibson* Clerk. *Vid.* 23 *March* 1624. *Brown* contra *Haliburton* 24. *March* 1626. *Gray* contra Tennents of *Fairnistat*. 22 *January* 1630. *Mark Ker* and the Cases there cited.

Berills Relict contra his Creditors, *November* 25. 1626.

IN a Double-poynding betwixt the Relict of *George Berill* and the Creditors of the said *George*, Disputing for the Mails and Duties of some Houses in *Edinburgh*,

dinburgh, the Relict claiming the same, by vertue of her Infeftment of Conjunct-fee thereof, granted to her conform to her Contract of Marriage, whereby her Father in Law, Father to the said *George* her Husband, is obliged to provide the Fee of the saids Houses to his Son, and to her in Conjunct-fee; And conform thereto, her Husband and she was Infeft, and so thereby claimed the saids Duties; And on the other part, the Creditors of the Husband of the Relict, who for Debt owing by the Husband, had Compryfed the saids Lands, and so claimed the Right thereof, wherein they alledged they ought to be preferred to the Relict, in regard that before the Contract of Marriage, the Relicts Husband, their Debitor was Infeft lawfully in the Fee of the saids Lands, whereof he was never Denuded lawfully by the said Contract of Marriage, in favours of his Wife, nor no otherwise, seing the Relicts Right flowed from her Husbands Father in Law, who was Denuded by the preceeding Fee, given to his Son long before that Contract of Marriage, and the same flowed not from her Husband, for she was Infeft upon her Father in Laws Resignation, and not upon her Husbands Resignation, who only had the Right, and stood then Infeft, and not the Father in Law; so that the Sons Right being Appryfed by his Creditors, they ought to be answered. This Alledgance was Repelled, and the Relict was preferred to the Creditors, in respect of the said Contract of Marriage, containing the said Provision of Fee, and Conjunct-fee made by the Father to his Son and Good-daughter, which Contract was Subscribed by the Son, and who thereafter was Infeft with his Wife in the said Land, and thereby the Husband had in effect past from the prior Infeftment, Subscribing the Contract, and accepting the posterior Infeftment, conditioned in the Contract, and so the case of the Relict was thought more just and favourable, depending upon a Contract of Marriage, which ought not to be Eleided by any fraudulent deed done by the Creditors *ex post facto*, after the said Contract and Infeftment of the Relicts. Actor. *Mowat.* Alter. *Stuart. Gibson* Clerk.

Turnbul contra *Scot*, *Eodem die.*

THe *Lords* found in an Action betwixt *Turnbul* and *Scot*, a Bond produced for verifying of a Triply, admitted to *Turnbuls* Probation, whereby the Maker of the Bond was oblig'd to Discharge a Reversion, granted to him to be null, because it was not Registrat in the Clerk of Registers Books, conform to the Act of Parliament *anno* 1617, and therefore found the Triply founded thereupon not to be proven; and this was found, notwithstanding that the Pursuer alledged, that the Act of Parliament foresaid, extended not to Bonds made for discharging of Reversions, and there was not any mention made of such Bonds in the said Act, and the *Lords* could not extend the Act of Parliament further than the very words thereof bore; notwithstanding of the which Alledgance, the *Lords* found the same null, for not Registration as said is, because the Act of Litis-contestation found the Alledgance founded upon a Bond to discharge the Reversion, to be als sufficient as a Discharge thereof; and so if it was equivalent to a Discharge, they found that it ought to be of the nature of a Discharge in that point, which without Registration could not have been sustained; and this was found, being proponed not by him who made the Bond, but by another third person, who had acquired the Heretable Right from the Maker of the Bond after the making thereof, and whom the *Lords* found to be a competent Party, and to have sufficient interest to propone that nullity; albeit the Pursuer alledged, that the Act of Parliament admitted that to be proponed only by one, who had a better Right, in which case the Proponer was not, whose Right was after the Pursuers Right and Inhibition execute thereon, which was Repelled, and the Bond found null. Actor. *Stuart.* Alter. *Cunninghame & Scot. Gibson* Clerk. *Vid. 29 July* 1623, E. *Marischal.* 2 *March* 1636, E. *Tullibarden.* E. *Kinghorn*

E. *Kinghorn* contra *Wood*, *Eodem die.*

IN a Declarator of Escheat at the instance of the Earl of *Kinghorn* against *Wood*, one compearing for another Donatar, who had obtained a Declarator already upon a prior Gift; and the Earl Replying, that by a Back-bond given by that prior Donatar to the Thesaurer, the Donatar was oblig'd to use the Gift, by the advice of the Thesaurer, he being resounded of his Charges, to the effect that no Creditor of the Rebel should be prejudged; whereupon the Pursuer subsumed, that he was content to pay him his Charges, and so having obtained a second Gift, he should be preferred. This Reply was not sustained, albeit the Bond, which was produced, was of the Tenor foresaid; for the first Donatar was found by the *Lords*, notwithstanding of the foresaid Bond, to have good Right to the Rebels Goods, as long as there was not a Creditor of the Rebels to claim the benefite thereof; in which case, if any Creditor should compear and alledge Right to the Bond, *eo casu* the Donatar was holden to use the Gift after his own satisfaction, for satisfying of the said Creditor compearing, by the advice of the Thesaurer: But this was not found to be competent to another Donatar, who could never have Right by vertue of the second Gift, he not being a Creditor, to frustrate the first Donatar of the benefite of the Escheat; neither was it found, that the said first Donatar could be compelled to receive satisfaction for his Charges, given out for Composition and otherways, and so to quite his Right, but at his own pleasure, if he pleased so do, and no otherways.

In this same Process also, the *Lords* found, that a Gift of Escheat, granted of all Goods, *&c.* pertaining to the Rebel the time of his Rebellion, and bearing no other Clause, nor extending to no other Goods which he had acquired since his Rebellion, or before the Gift, could extend to no more than was *specifice* disponed, and would not comprehend any Goods which the Rebel had acquired within the space of a year after his Rebellion; for the King might by a new Gift Dispone the same again; and where the Gift bore the Disposition of the Rebels Goods, which he had the time of the Denunciation, or sensine, and should acquire thereafter, while he were relaxed; they found, that such Gifts of that Tenor, would extend to all the Goods which the Rebel had at the time of his Rebellion, or at the time of the Gift, and also at any time after the Rebellion, and before the Gift; and sicklike, which he should acquire within a year after the date of his Gift, he remaining at the Horn unrelaxed all that time, to the which space the *Lords* found, that Gifts of the Tenor foresaid, could be extended at furthest, and not any longer, otherways it should confound Gifts of simple Escheat and Liferents. Actor. *Hope* & *Rollock.* Alter. *Stuart. Gibson* Clerk. *Vid. Penult Feb.* 1623, L. *Essilmont.* 2 *Feb.* 1627, *Lewis Somerwel.*

E. *Kinghorn* contra *Wood*, *November* 28, 1626.

IN the above-written Declarator of the Earl of *Kinghorn*, an Exception being proponed upon a prior Gift granted to another Donatar, as is abovementioned, the same was Elided by two Replyes, the one bearing, *That the Gift was taken to the behove of the Rebel, remaining Rebel the time of the taking thereof, and also being Rebel the time of the granting of the Pursuers Gift*; Which Reply the *Lords* found Relevant, notwithstanding of the Defenders Duply, bearing, *That his Gift was good, notwithstanding that the same was taken to the Rebels own use, in respect that he was now relaxed from the Horn, and no Creditor being prejudged by the taking of the same to his own use, he ought to be preferred, for it was lawful to the Rebel to take it to himself, there being no Creditor thereby hurt, and he now being Relaxed.* This Duply was Repelled, and the said Reply sustained, seing the Rebel being Rebel, and at the Horn un-relaxed, the time of

the taking of the said Gift, granted to the Pursuer, his Relaxation sensyne could not hinder the King, effectually to *Dispone* the Escheat to a second Donatar (if the first was taken to the Rebels own behalf) and which was sustained, albeit there was no Creditor thereby hurt: For the Gift being taken to the Rebels use, continuing in his Rebellion was alike, as if it had been Gifted to himself, *quo casu* there was place to a second Donatar, to acquire a new Gift, at any time before the Rebels Relaxation, as the Gift given to the Pursuer was, at the acquiring whereof he was not Relaxed; Also this Reply was found Relevant, *viz.* That the said prior Gift granted to the Excipient, was procured upon the Travels and Expenses of the Rebel himself, which he offered to prove by the Officers, and Members of Court, as use is in such Cases, and which the *Lords* sustained, as sufficient *per se*, without any further Alledgance, that it was taken to the behove of the Rebel, to infer Simulation. And the *Lords* admitted the same in these Terms, to the Pursuers probation. *Vid. July* 6: 1627. E. *Annandale: March* 11: 1629. *Douglas*.

contra *Mowat*, *Eodem die*.

IN an Action for the price of an Horse, pursued at the Instance of a Stabler in *Edinburgh*, against *James Mowat* Writer; The *Lords* found, that the Defender was subject to pay the Price of the Horse hired by him, and not restored again; Albeit he Alledged, that he ought not to be found subject therein, in respect that he having borrowed his Horse to a part agreedupon, he was not holden, nor astricted to keep him, but the Pursuer ought to have sent for his Horse again, or to have sent any Boy with him, to have brought him back, which not being done, but the Horse having strayed away, or being stollen by the Defenders fault or knowledge, it cannot be imputed to him, which Exception was Repelled, for *conductor equi* of the Law, *non tenetur ad estimationem, si Equus per casum moriatur sine culpa sua, & quamvis de casu non teneatur, tamen de culpa tenetur etiam levissima, ut est in* Bart. *ad Leg. si ut certo. §. Nunc videndum & §. sed interdum ff. Commodat. & conductor rei mobilis retinendo ultra tempus, non videtur reconducere, imo tenetur furti.*

Hope & *Nicolson* contra *Nicolson*, *November* 28, 1626.

MR. *Thomas Hope* and Mr. *Thomas Nicolson* having uplifted some Sums of Money pertaining to umquhile Mr. *Thomas Nicolson*, which he had laid on Land; and having payed the same to a Creditor of the said Mr. *Thomas*; they procured from that Creditor an Assignation in their favours of that Bond made to the Creditor, which they procured, for their Security, and Warrandice of a Renunciation made by Mr. *James Nicolson*, Son to the said umquhile Mr. *Thomas*, of these Sums upon Land, up-lifted by them as said is; in the which Renunciation they were obliged to cause the said Mr. *James* Ratifie the same at his Majority. When this Assignation was so made by the Creditor, the said Mr. *James*, who should have returned the Assignation with the principal Bond, which was payed, and with the returning whereof he was intrusted, ignorantly being a Minor, cancelled his Fathers Name out of the Bond, not knowing what of Law was to be done, whereupon he being conveened for the said cancellation, at the Instance of the said Mr: *Thomas Hope*, and Mr. *Thomas Nicolson*, who are bound for him as Cautioners foresaids, and who for their Relief, acquired the said Assignation, to hear and see the Premisses verified; And therefore, that the said Bond Cancelled by him, should make als great Faith against him, as when it was whole. The *Lords* sustained this Pursuit Summarly, upon a Supplication execute against him, but further Process, to be proven by his own Oath, and by his Oath found it proven against him, to infer the foresaid Conclusion, seing it was only craved against himself, and

no

no other, albeit he was a Minor. And tho that it was doubted, if such a Sentence upon his own Confession, being Minor, could be valid, but being *in facto suo, & in quasi maleficio*, and only craved against himself, and he not opponing thereto, the *Lords* decerned. Likeas after the pronuncing of the Sentence, the said Mr. *James* compeared Personally before the *Lords*, and by his great Oath, being sworn made Faith, that he should never come against the Sentence, whereupon the Pursuers asked Instruments. *Partibus præsentibus. Gibson* Clerk.

L. *Smeton* contra Relict of *Spiers*, *November* 29, 1626.

IN a special Declarator, at the Instance of the L. *Smeton*, Donatar to the Liferent of *Lidderdale* of St. *Maries* Isle, against the Relict of *William Speirs*, who was conveened as Intromissatrix with a Debt of the Rebels. The *Lords* found an Exception of *Nullitie* proponed against the Horning, whereupon the General Declarator was Decerned, to be Relevant bearing, *That the Charge of that Horning was a Charge to find Caution of Law-borrows*; likeas before the Denounciation, and within the days of the Charge, Caution was found, and he produced the Act of Caution, which was dated before the Denounciation, the date of which Denounciation was contained in the Decreet of General Declarator, in respect whereof, the same being instantly verified, the Horning was found null, notwithstanding of the Sentence of General Declarator; for this was proponed for a Creditor, who was not called in the General Declarator. Actor. *Lawty*. Alter. *Foulis*. *Gibson* Clerk.

Forsyth contra *Forsyth*, *Eodem die.*

IN an Action at the Instance of one *Forsyth*, one of the Bairns of *Forsyth* his Father Brother, who was left Executor, by the Pursuers Father, for payment to this Pursuer, as one of the four Bairns of the Defunct, of his fourth Part of the Defuncts Third, Intromett with by the Defender Executor foresaid. The *Lords* sustained this Action at the Pursuers Instance, for his Part of the said Third, without any Defalcation to be taken therefrom, in favours of the Defender, who Alledged that he had Right to retain the Third of the Defuncts Third, he being left Executor to him, in respect of the Act of Parliament, 1617. anent Executors which provides the same, and that the Bairns of the Defunct has only Right to the two Part of the said Third, which Alledgance was Repelled, in respect that the Defunct had left in Legacy to his Bairns, all which his own Third would extend to, which being so exhausted with the Legacies made by the Defunct, The *Lords* found, that the Executor *hoc casu* had no Right to any Part of the Third, by vertue of that Act of Parliament. In this Process also the *Lords* found, that any one of the Bairns might pursue for their own Part, albeit the rest of the Bairns were neither Summoned in this Pursuit, nor yet assisted the Pursuit. Actor. Alter. *Rollock*. Hay Clerk.

Scot and his Father contra L. *Gallashiels*, *Eodem die.*

IN the foresaid Suspension at the Instance of *Scot*, Son to the Laird *Harden*, and of the Good-man of *Harden* his Father, against the Good-man of *Gallashiels*, who had charged *Harden* to employ upon Land to his said Son, & to his Spouse in Conjunct-fee, who was *Gallashiels* Daughter, the Sum of ten thousand pound, conform to a Contract of Marriage, betwixt the saids Parties, whereby *Harden*, was obliged to pay the said Sum to his said Son, to be employed in manner foresaid, by the sight of *Gallashiels*; *Harden* being charged to employ to the use of the longest liver of them two, as said is, produces a Discharge, upon the payment made of the said Sum, to his Son, to whom he is obliged to pay the same, & Suspends thereupon; Alledging that by the Contract, he is only obliged to pay

to him the same, which he has done, and so that he cannot be charged any further, seing he is not obliged to employ; and that his Son is the Partie, who ought only to be charged to employ the same to his Wifes use, who is Responsal to do the same; and being charged will fulfil it. The *Lords*, notwithstanding of this Reason, and of the payment made to the Son, found the Letters Orderly proceeded against the Father, ay and while the Sums were employed to the use of his Sons Wife in Liferent, and found that he was not liberat by the said payment made to his *Son*, in respect that the payment was appointed by the Contract, to be made to his Son for that end, *viz.* to be employed, *&c.* which the Father should have caused to have been done, at the payment to his Son, and which should have been done at *Gallashiels* sight, otherways the Contract betwixt the Father and the Son might be easily Elieded, in all such cases, to the prejudice of the Sons Wife. *Actor. Belshes.* Alter. *Scot. Gibson* Clerk: *Vid. Jan.* 9. 1623. *Marshell* contra *Marshell*, and the Cases there cited. *March* 23. 1624. L. *Belstane.*

Viscount of *Stormont* contra *December* 1. 1626.

IN a Suspension at the Instance of the *Viscount* of *Stormont*, against a Man of Mr. *Harie Chaip's*, wherein the Suspender offered Compensation to a part of the Sum, contained in the Sentence, which was Suspended, with a like Sum owing to him, by the obtainer of the Sentence; and which Debt he instantly verified, by production of the Writ, bearing, *the Debt subscribed by the Charger, or by his Cedent, before the Assignation made to the Charger*, which was all one; For the *Lords* are in use to admit Compensation *eodem modo* against the Assigney, as against the Cedents self. The *Lords* would not admit this Compensation by way of Suspension, albeit instantly verified; seing it was not proponed before the obtaining of the Decreet, which the *Lords* found should be then proponed, and was not admissable after Sentence; specially the Sentence being given against the Suspender, at what time it was Competent, and should have been proponed, and he compearing then, and then not proponing it. The *Lords* found it not admissable by way of Suspension, in respect of the 141 Act 12 Par. *James* 6. Which prohibits the same to be received by way of Suspension (as was offered in this Case) or by way of Reduction. Actor. *Chaip.* Alter. *Hay* Clerk. *Vid. Jan.* 11, 1627. *Barclay: Decem.* 1. 1626. Lady *Balbigno*: *Decem.* 6. 1626. Lo. *Kincleaven: I.C. Compensatio admitti potest post sententiam aliquando; nam est regula, quod ea peremptoria, quæ venit ad limitandam sententiam tantum, sed non ad impugnandam, potest opponietiam post sententiam, videtur etiam post sententiam opponi posse Compensationem, ubi non requiritur altior indago, nam ibi Actio est instar Exceptionis.*

This Decision agrees with the Act of Parliament; but the same was never observed to my Memory before this time; For the *Lords* has ever been in use to admit Compensation, by way of Suspension, notwithstanding of this Act of Parliament, which while now was not *in viridi observantia*. The like was done *January* 17, 1632. contra where Compensation in a Suspension was not received, after Sentence given against the Party compearing, the Compensation being then competent before the Sentence, and not then proponed. *Hay* Clerk.

La. *Balbegno* contra L. *Lauriston*, *Eodem die.*

IN an Action betwixt the Lady *Balbegno* contra L. *Lauriston*, The *Lords* would not receive an Offer and Alledgance of Compensation of Victual to meet the Debt of a Liquid Sum, acclaimed by the other Party, in respect the said offer was not *de liquido in liquidum*, conform to the 141 Act Par. 12. *Ja.* 6. Anent Compensations, which so appoints the same, albeit the Party Compenser,

penser, to remove that Scruple, referred both the verity of the Debt of the Victual, and also the Liquidation of the Prices of the Victual, to his Parties Oath of Verity, which supplyed the instant Verification, and Liquidation, and was alike therewith, notwithstanding whereof the Compensation was refused, but I think the Party here was not present to depone, and albeit he had been present, it would have been refused, seing it was not found a Debt by a Sentence; and that the Party alledged, that if he had been pursued for that Victual, he had grounds to Elide that pursuit, whereby he would not have been found Debitor therein. *l. C. Quod est liquido proximum compensari potest, (sicut hic apparet) sed ratio decisionis est, quia liquidum fit per testes, vel per alias probationes, non autem per Confessionem. Ita L. ult. C. h. t. illud liquidari permittitur quod breviter liquidari potest. Vid. Decem.* 6 1626. *Campbell* contra L. *Kincleiven.*

Jaffrey contra *Gray*, *December* 5. 1626.

IN an Action betwixt *Jaffrey* contra *Gray*, where the Wife being conveened, as Intromissatrix with her Husbands Goods, to pay a Debt owing by her Husband to the Pursuer; *pendente Lite*, she being Confirmed Executrix, and having Confirmed a Testament, and thereafter another of her Husbands Creditors, having recovered Sentence against her, for payment of Debt owing by the Husband to that Creditor, which Debt exhausted all the Gear contained in the said Testament, and which Sentence she had satisfied, and Reported the said Creditors Acquittance thereon, whereupon she having proponed an Exception against the Pursuit foresaid, now pursued; Alledging that she ought to be Assoilzied, in respect that she was Executrix Confirmed, and that she had payed a Debt conform to the Sentence foresaid, which exhausted all the Free Goods; and therefore she could not be conveened as Intromissatrix, she being Confirmed Executrix, and if she had any further Intromission with any more of the Goods and Gear of the *Defunct*, then she had Confirmed in Testament, the Pursuer might take a Dative thereof, but therefore she could not be reput nor conveened as Intromissatrix. This Alledgance was Repelled, and the Action sustained against her as Intromissatrix, notwithstanding of the Testament wherein she was Confirmed Executrix, and notwithstanding of the Decreet obtained by the other Creditor, and payment alledged made of the Debt exhausting the Testament. For the *Lords* found, that she could not make payment to another Creditor, in prejudice of the Pursuer, who had a Pursuit Depending before the said payment, and before that Sentence; but she ought to have Suspended, upon double Poynding, where the Creditors Right would have been Discussed, according to the force of the same, and their Diligence done by them, and thereby she would have been in security, to pay to the Creditor, who should be found to have best *Right*; and so she could not at her own Election, prefer one Creditor to another. Actor. *Craig* Alter. *Stuart.* *Gibson* Clerk. *Vid. June* 14. & *Jan.* 26. 1625. *Andrew Coupers March* 19, 1624. *Barbara Cant*, and the Cases there Noted.

Shaw contra *Balfour*, *Eodem die.*

IN a Suspension at the Instance of *Shaw* of *Knockhill* contra *Balfour*; wherein a Reason being founded upon a Discharge; The Charger Alledged, that the said Discharge could not be Respected, nor could make Faith to prove the Reason, because that Clause therein insert, and whereon the Reason was founded, was never communed upon, nor spoken to the Partie Subscriber, neither at the time of the Subscription of the Discharge, nor at any time before, but was cautiously insert therein by the Suspender, the time of the Writing thereof, being all Written by himself, and ommitted to be read by him, he having

ing read all the rest of the Clauses thereof to the Defender, and the Defender being then over-taken with Drink before he subscribed it, and that Clause reserved un-read, which he referred to the Suspenders Oath. This was found Relevant in this same order of Suspension, to be proven as said is, albeit the *Lords* thought that this was a matter of Improbation, and that it ought to be quarrelled as false, by particularly proponing the Alledgance of Improbation; likeas, others thought it of a dangerous preparative to take away Writs, albeit Clauses were insert therein which were not read at the subscribing thereof, nor then communed, because he who subscribed the Writ, should have read and considered the Contents thereof, before he had set his Hand thereto, he being then Major, *& rei suæ providus*, and not doing that, it might be presumed, that he had allowed what-ever was therein insert, and consented that the Maker should insert therein whatsoever he pleased: Which was Repelled, and the Alledgance against the Discharge sustained to be proven by the Parties Oath, as said is. Actor, *Kinross*. Alter. *Scot* Clerk. *Vid.* 4 *July* 1635, L. *Monimusk*. 4 *Decemb.* 1623, *Hay* contra *Geichan*.

Campbel contra Lo. *Kinclaiven*, *Decemb.* 6. 1626.

IN a Suspension betwixt *Campbel* and Lo. *Kinclaiven*. The *Lords* would not admit a Reason of Compensation upon a Debt of Victual, owing to the Suspender by him who was Charger, to pay a liquid Sum contained in the Sentence obtained against the Suspender, albeit the Debt of the Victual was instantly verified by Writ, and the none Liquidation of the Victual was alledged to be no Impediment to the Compensation, being referred to the Oath of the Charger; which the *Lords* would not admit, because the Debt of the Victual was verified by a Contract only, whereupon no Execution was used; and if the Party had been charged to pay the same, he had Reasons wherefore he could not be Debitor for the same. Actor, *Stuart*. Alter. *King*. *Hay* Clerk. *Vid.* 1 *Dec.* 1626, La. *Balbegno*. *Eodem die*, V. *Stormonth*. & 11 *January* 1627, *Barclay*.

Winram contra Executors of *Dansken*, *Eodem die*.

IN a Transferring of an Action and Summons, pursued by *Robert Winram* against the Executors of Mr. *Henry Dansken*, which Summons desired to be Transferred, was priviledged, because part thereof was referred to the Defenders Oath; and the Defender being dead, the Summons being desired to be transferred in his Executor, against whom the Pursuer was to verifie the whole Summons by Writ. The *Lords* found, that Summons could not be transferred, because the Defender therein being dead, against whom the priviledged Summons was sustained, by reason it was referred to his Oath, which otherways being proven, would not have been so priviledged; therefore the cause of that personal Priviledge ceasing by his death, the same could not militate in the Pursuers favour, to be transferred in the Executors of that Defender, against which Executor, that Summons with that Priviledge could not be prosecuted. Actor, *Stuart*. Alter. *Scot* Clerk.

Stranger of *Middleburg* contra Executors of *Smith*, *Eodem die*.

IN an Action pursued by a Stranger of *Middleburg* against the Executors of one *Smith*, for payment of a Sum contained in the Defuncts Bond made in *Flanders*, which wanted Witnesses insert therein. The *Lords* sustained the Bond, albeit it was Alledged that it wanted Witnesses, and so was null, because the Pursuer offered to prove, that it was the Custom of the Country, that such Bonds, albeit wanting Witnesses, yet were effectual against the Subscribers thereof; which the *Lords* admitted to Probation, but found, that that Custom should not be proven by the Declaration of Witnesses, but by a Testimonial of the Judges of the Country. Actor, *Rig*. Alter, *Belshes*. *Gibson* Clerk.

Clerk. *Vid.* 15 *Nov.* 1626, *Galbraith.* 8 *Dec.* 1626, betwixt these Parties. & 8 & 9 *Dec.* 1626, Lo. *Blantyre.*

Famison contra Tennents, *Eodem die.*

IN a Suspension betwixt Mr. *William Famison* against the Tennents of *Longnewton*, for suspending of the Charges raised at the Ministers instance, upon his Decreet of general Letters conform, as provided to the Right of the Parsonage of that Kirk. The *Lords* sustained a Declaration given in by the Minister, containing the special quantity of the Victual, for the which the Suspenders were charged, which the *Lords* received to be taken in and tryed in this same Suspension, without any new Process or Action therefore, the Charger proving, that the Teinds, the Year controverted, extended to that quantity contained in the Declaration forsaid, and that the Suspenders intromitted with the same that year, and that the Minister had served Inhibition for the same *debito tempore* that year; which Declaration, fortified with the Answer, offering to prove the particulars foresaid, the *Lords* sustained, and found it not necessary to the Minister to Alledge or prove, that the Suspenders had ever been in use to pay that Duty acclaimed for these Teinds by the Minister at any time preceeding, or that the Minister had ever been in Possession of that Quantity, without the which the said Declaration was admitted. Actor, *Belshes.* Alter. *Hay* Clerk. *Vid.* 22 *Feb.* 1627, L. *Aitkin.* 16 *Nov.* 1624, *Troup* contra Lo. *Herris.*

Stranger of *Middleburg* contra Executors of *Smith*, *Decemb.* 8. 1626.

IN the above-written Action mentioned before of the Stranger against the Executors of *Smith*, the Defenders denyed the Subscription of the Obligation to be the Hand-writ of the alledged Maker thereof, and so Alledged that except the same were approven by the Pursuer, no Action could follow thereon, seing the same wanted Witnesses. The *Lords* found no necessity of Approbation, but that the Defenders ought to Improve the same, if they doubted of the Subscription thereof; and the want of Witnesses was not respected as a Motive, thereby to urge the Pursuer to Approve in respect as is above-written that the Pursuer was astricted to prove, that the Custom of the Country is, that such Obligations are sufficient, albeit wanting Witnesses insert; and so being proven, he had no necessity further to Approve, but the same ought to be respected as a perfect Bond, and as any other Bond in this Country with Witnesses, *quo casu* the Defender behoved to Improve, and the User of the Bond needed not to Approve the same. *Vid.* 15 *Feb.* 1630, *Harper* contra *Jaffray.*

Lo. *Blantyre* contra *Forsyth*, *Eodem die.*

THe Lord *Blantyre* pursues *James Forsyth* for Intromission with the Moneys of umquhile *Patrick Mosman* Debitor to the Pursuer, to make the same forth-coming to him for his Debt: This *Mosman* had fled out of *Scotland* to *Rotterdam* in *Holland*, with some Moneys pertaining to the Pursuer, where the said *Mosman* died; and before his death he delivered the Moneys to *James Forsyth* Defender, Resident then in *Rotterdam*, to be employed on his Funerals, and other Business concerning him. The Defender therefore Alledged, that he could not be conveened here in *Scotland* for the alledged Debt foresaid, because he, his Wife and Family, were actual Residenters in *Rotterdam*, where they had dwelt these ten years by-gone, and yet remains there *animo remanendi*; likeas, the Deed is libelled to be done in these Forraign parts out of this Country, and so *neque ratione rei*, *neque persona* it is competent to the Jurisdiction of the *Lords*. This Alledgance was Repelled, because the Parties were all *Scots*-men, but the *Lords* sustained the Process before them, to produce Execution only against the Defenders Goods and Lands, which he had within *Scotland*,

and no others. *Vid. Quod sequitur.* and *6 Decemb.* 1626, Strangers in *Middleburg*, and the other Cases there cited.

Lo. *Blantyre* contra *Forsyth*, *December* 9. 1626.

IN this above-written Cause of the Lord *Blantyres*, wherein he pursued by his Summons, that it might be tryed that *Mosman* intrometted with his Moneys, and fled therewith out of *Scotland*; and that *Forsyth* Defender, after his decease intrometted therewith, and with his Goods and Gear, and so should pay the Money libelled to the Pursuer. It was Alledged for *Forsyth*, who was conveened as Intromettor with *Mosmans* Goods and Gear, that this Action pursued against him as Intromettor could not be sustained, until first Sentence were recovered against the Heirs or Executors of umquhile *Mosman*, or some to represent him, declaring the Debt against him, and thereafter he might be conveened as Intromettor, and not till then; and if he might be conveened as Intromettor, and the Debt tryed also against the Defunct in one Summons, yet some person as representing the Defunct ought to be conveened *hoc nomine*, seing he is a Stranger, and some other neareſt of Kin ought to be conveened, against whom the Debt owing by the Defunct ought to be declared. This Exception was Repelled, and the *Lords* found, that both the Debt owing by the Defunct might be tryed against this Defender, and he also conveened as Intromettor with the Defuncts Goods in one Summons by this same Pursuit, and that there was no necessity of a preceeding Sentence against any representing the Defunct, but that both might be tryed in this same Pursuit, albeit nothing was extant to constitute the Defunct Debitor to the Pursuer of before; and also they found, that there needed no other person to be called to this Pursuit, to represent the Defunct, seing the Defender, albeit a Stranger, and dwelling out of the Country, and also libelled to have Intrometted out of the Country, did in effect represent him, being conveened as Intromettor. Actor. *Lermonth.* Alter. *Primerose.* *Scot* Clerk.

Lo. *Buckcleugh* contra Tennents, *Eodem die.*

LOrd *Buckcleugh* pursues Removing against the Tennents of *Elleistone*. The Defenders Alledged they were Tennents to the Lady *Bonitoun*, who was Infeft in the Lands, and she not Warned. This Alledgance was Repelled, except the Tennents would alledge, that their Masters Right was Confirmed by the King, being of Kirk-Lands; for if it was not confirmed, it was a null Infeftment, and so could not Alledge upon her Infeftment, but was as if she were not Infeft: And this was so found, albeit the Tennents Duplyed, that they could not Dispute upon the validity of their Masters Right, seing they were only Tennents, and she was not Warned, who if she had been Warned, would have maintain'd her own Right, which was not known to them, if it was Confirmed or not; Which was Repelled. Actor. *Scot.* Alter. *Scot* Clerk. *Vid. Penult January* 1628, *John Stuart*, and the Cases there.

E. *Buckcleugh* contra *Young*, *December* 13. 1626.

IN an Action of Redemption at the instance of the Earl of *Buckcleugh* against *Young*. The *Lords* found the Instrument of Premonition made to the Defender to be null, because it bore him to be Warned at his Dwelling-place, and made no mention of the special Dwelling-place whereat he was Warned, nor designed the same in the Instrument, but only bore, that he was warned at his Dwelling-place indefinitely; and this was so found, albeit the Date of the Instrument bore two special Places therein mentioned, designed in the Inscription thereof, *viz.* in this manner, at *Trockness*, and such a day and year; and the Instrument proported, that he was Warned indefinitely at his Dwelling-place, not declaring which of the foresaids two Places dated in

in the Instrument, nor yet bearing, at his dwelling place *foresaid*, nor *there*. Actor. *Scot.* Alter. *Scot* Clerk.

E. *Rothes* Donatar, contra L. *Grant*, *Eodem die*.

IN a Declarator of Non-entry, pursued by the E. of *Rothes* as Donatar, against L. *Grant*: an Exception being admitted, bearing, that the Earl of *Rothes* had Subscribed a Precept of *Clare Constat*, in favours of the Defender, which was delivered to the Defender, and so thereby become his Evident; the Defender thereafter delivered it to the Pursuer, to the effect he might append the Earls Seal thereto, which was in the Pursuers keeping; which Exception the *Lords* found could not be proven by Witnesses, but only by the Earl of *Rothes*'s Oath, or else Writ, seing it tended to make up an Evident, and which could not be lawfully done by Witnesses; albeit the Defender Alledged, that this might as well be proven by Witnesses, as the having of Evidents in Actions for delivery of Writs, or as in Actions of proving of Tenors, which are proven by Witnesses, which the *Lords* found not alike, seing this, as said is, tended to make up an Evident, which is not the intent of Actions of delivery of Writs, where the having is only to be proven; and in Actions to prove Tenors, there is ever Relevant Adminicles required, besides the Witnesses; and a Relevant Cause of Amission, besides the verity of the Deed, and a Specifick Tenor of the Writ. Actor. *Aiton.* Alter. *Belshes. Gibson* Clerk. *Vid.* 22 *January*, 1624. *Lermonth.* 22 *Feb.* 1627. *Williamson.*

E. *Galloway* contra *M'culloch*, *Eodem die*.

IN a Reduction of a Sub-Tack pursued by the Earl of *Galloway* contra *M'culloch*, who was Sub-Tacks-man to another, principal Tacks-man to the Pursuer, and which Sub-Tack was also consented to, and Subcribed by the Pursuer, Setter of the said Principal Tack; the reason of Reduction was, because the Principal Tack was Reduced, where-through the Sub-Tack depending thereon, behoved to fall; Likeas, the said Sub-tack had a Clause irritant therein insert, that if the Sub-Tacks-man failzie in paying of his Tack-duty at the Terms appointed therein, that the Sub-Tack should be null; So it was Subsumed that he had failzied. The *Lords* assoilzied from thir Reasons, because albeit the Principal Tack was Reduced (it being reduced for not production, and in absence of the Party, and this Sub-Tacks-man not being called to that Reduction) that was found no ground wherefore the Sub-Tack should fall, seing it was Subscribed, and consented to by the Pursuer, and so who could not be prejudged by that Decreet, whereto he was not called, and who could not been miss. known by the Pursuer, if he had intended that the Sub-Tack should fall, having consented thereto: And sicklike the failzie of the Clause irritant, contained in the Sub-Tack, was not any reason competent to this Pursuer, who had consented to the Sub-Tack, wherein he was astricted to pay his Duty to the Setter of the Sub-Tack, and not to the Pursuer, which Setter quarrelled not the Defender upon the said failzie; and this was so found, albeit the Pursuer Replyed, in fortification of the reason, that by the Reduction of the Principal Tack, and by serving of Inhibition since, at the Pursuers instance, upon the Teinds contained in the Tack, the Pursuer was become in the place of the Principal Tacks-man, whose Right was taken away by the said Reduction, and the Pursuer thereby had devolved in his person all the Right to the Teinds, which the Principal Tacks-man had, and that consequently the Right to the Duty adebted by the Tacks-man belonged to the Pursuer, and the Defender ought to have payed the same to him, especially seing the Inhibition foresaid, served at the Pursuers instance, was intimat to this same Defender, in so far as he had intented thereupon Action of Spuilzie of thir same Teinds against the Excipient; from the which albeit the Defender obtained Absolvitor, in re-

ſpect of an Exception proponed by him, founded upon this Sub-Tack then ſtanding, yet the ſame was of that force to make it known to the Defender, that the Purſuer had Right to the Duty of the Sub-Tack, and that he ought to have payed the ſame to him, for eſchewing of the Clauſe irritant; it being of verity, that at no time ſenſyne, nor ſince the Intenting of this Action (there being divers Terms paſt ſince the raiſing thereof) the Defender hath never offered, nor payed his Duty of his Sub-Tack to the Purſuer; all which was Repelled, and Abſolvitor given, as ſaid is: For the *Lords* found, that the Purſuer could not ſeek Declarator upon the failzie of the Sub-Tack, except firſt that the Purſuer had obtained it Declared, that the Right of the Duty thereof was eſtabliſhed in his perſon, as ſucceeding in the place of the Principal Tacksman, and that the Defender ought to pay the ſame to him. Actor. *Stuart* & *Neiljon*. Alter. *Scot*. *Scot* Clerk. *Vid. ult. Nov.* 1622. Sheriff of *Forreſt*, and the Caſes there cited.

Calderwood contra *Smith*, *Decemb.* 14. 1626.

IN a Removing at the inſtance of one *Calderwood*, who was Seaſed in the Lands Libelled, as Heir to his Father Served and Retoured, againſt *James Smith*: The *Lords* found no Proceſs by vertue of that Seaſin, albeit the ſame proceeded upon a Retour, as Heir to his Father, becauſe both the Seaſin, and alſo the Retour was after the Warning; for albeit the Seaſin had been after the Warning, yet if the Retour had been before the ſame, it would have been ſufficient; but the Retour being alſo after the Warning, The *Lords* found the Purſuit upon that Warning could not be inſtructed to ſeek the Tennent to be Decerned to Remove, and ſo to make him ſubject to violent Profits ſince the Warning; for the *Lords* found, that it could not be drawn back to the time of the Purſuers Fathers Deceaſe; as if that he being his Heir at the very time of his Deceaſe, he was not made Heir by the Retour only from the Date of the Retour, but from the time of his Fathers Deceaſe he was Heir, and the Retour cognoſced him to be Heir to that man, ſo that the Purſuer Alledged, that he being cognoſced Heir by the Retour, he had Right to the Lands from the time foreſaid of his Fathers Deceaſe, which was Repelled in this Judgment of Removing, where violent Profits might be thereafter acclaimed; but if this Seaſin had been uſed to inſtruct a Purſuit againſt the Tennents for the Duties of the Land, which were in uſe to be payed to the Defunct before his Deceaſe, I think *eo caſu* the ſame would have been ſuſtained *ad hunc effectum*, albeit not to ſeek Removing thereupon. *Craig Lib.* 2. *Dieg.* 9. *dicit, quod hereditas ſemper continuatur cum morte defuncti, & ad eam retrotrahitur. Vid.* 20 *January* 1625. L. *Selms* contra *Guthrie*, and the other Caſes there cited. 20 *June* 1627. L. *Touch*.

Mitchel contra L. *Capringtoun*, *Eodem die*.

IN an Action at the inſtance of *Robert Mitchel*, againſt the L. *Capringtoun*, for making of certain Silver Work, as Baſon, Laver, Cups and Spoons, Arreſted in his hands, as belonging to the Lady *Ochiltree*, and ſo as pertaining *Jure Mariti* to *Andrew* Lord Stewart of *Ochiltree* her Husband, Debitor to the Purſuer, to be forth-coming for ſatisfying of the ſaid Debt; it being controverted, how that part of the Summons, *viz.* bearing, *the ſaid Silver Work to pertain to the Lady*, ſhould be proven, ſeing the Defender *Capringtoun* Alledged, that it could not be proven by Witneſſes, but allanerly either by Writ or Oath of Party, eſpecially ſeing it was a matter of great importance; and that there was no ſpecial qualification Libelled then how the ſame pertained to her, either that ſhe bought the ſame, or that they were marked with her name, nor no other qualification to make them to pertain to her, This Alledgance was Repelled,

Repelled, and the Summons was sustained, bearing, the same to pertain to her, which the *Lords* found might be proven by Witnesses, and no necessity of Writ, or to refer the same to the Parties Oath; for the Defender might Alledge and propone his Defence upon any other persons Right to the same, if they did not pertain to her, wherein he was not prejudged by this Interloquutor, if he pleased to propone the same. But *J: C. Dominium non potest probari per testes quia Incorporalia non cadunt sub sensibus. Vid. Bartol. Tract. de Testibus.* Actor. *Mowat.* Alter. *Cunninghame.* *Gibson* Clerk.

Declarator of the L. *Foulis* Escheat, *Decemb.* 15. 1626.

IN a Declarator of the L. of *Foulis* Liferent, pursued to the behove of his Lady, compeared the Lo. *Lovat*, as being Infeft by a publick Infeftment in the Lands, whereof the Maills and Duties were acclaimed by the Donatar, in this Action of special Declarator, and in respect thereof, Alledged that he ought to be preferred to the Donatar. This Alledgance was Repelled, in respect of this underwritten Reply, *viz.* that the Pursuer offered to prove, that that Infeftment was granted to the Lord *Lovat*, to the effect that thereby he might relieve himself of certain Debts, wherein he was obliged to the Creditors of the L. of *Foulis*, so that he ought to have intrometted conform to his Right, with the Farms of the saids Lands, and Profits thereof, and thereby satisfied the Creditors to whom he was bound, as said is, and which he might have done, if he had intrometted (the saids Farms being of that avail, which would have defrayed the same) whereas by the contrary he suffered the L. *Foulis* to retain and keep the Possession of the saids Lands, and to uplift all the Duties thereof; and he did no Diligence upon his Infeftment to recover the same, and to apply the same to the use foresaid, so that he had prejudged himself in the Right of the said Infeftment, and the King and his Donatar ought to be preferred to the same. This Reply, seing it was not proponed by a Creditor of the L. of *Foulis*, but only being proponed by the Donatar to his Liferent, was only found Relevant for the years since the L. of *Foulis* was denounced Rebel, and no other preceeding years; in the which the L. of *Foulis* intromitted with the Profits of the Lands since the Right foresaid made to the Lo. *Lovat*; for before the Rebellion the Lo. *Lovat* might have suffered the L. of *Fowlis*, or any person to medle with the saids Lands, which would not have derogat from the strength of his Infeftment in any sort; for thereby no person was prejudged, his said Author that space not being Rebel, and no Creditor opponing the same; But since his Rebellion the *Lords* found, that the Intromission had by the L. of *Fowlis*, and the not doing of Diligence by the Lo. *Lovat*, to recover the same, did prejudge him; that he could not cloath himself therewith for relief of so much of the Debt adebted to the L. of *Foulis* Creditors, as the quantity of the Farms intromitted with by the L. of *Foulis* would extend to proportionally, since the time foresaid of his Rebellion allanerly, whereof the Lo. of *Lovat* had prejudged himself, as said is; and if any Creditor had proponed this Reply, the *Lords* would have found the same Relevant for all the years of L. *Foulis*'s Intromission, since the time he was constitute Debitor to the Creditor, who had proponed it; But that the Infeftment was granted for the cause foresaid, The *Lords* found that ought to be proven by Writ, or by the Oath of the Lo. *Lovat*, and that the L. of *Foulis* Intromitted, and the quantity whereto his Intromission extended, The *Lords* found that might be proven by Witnesses, and was not of necessity to be proven by Writ, or Oath of Party. Actor. *Russel.* Alter. *Lawtie.* *Gibson* Clerk. *Vid.* 23 *Decemb.* 1623. L. *Drumelzier.*

Byres contra *Johnston*, *Decemb.* 16. 1626.

James Johnston having Subscribed a Letter of Alienation of some Lands to *John Byres* of *Cotes*, which Letter was delivered by the said *James* to Mr.

Francis Hay Writer, to the behove of the said *John Byres*, to the effect that Charters might be formed thereupon in favours of the said *John*; and after the saids Charters were written out, the said *James* having come to the said Mr. *Francis*, and borrowed from him the said Letter of Disposition, to the effect he might confer the same with the Charters, promising to re-deliver the same; and that divers times since, the said *James* promised to the said *John* to re-deliver the same, and to fulfill the whole conditions thereof; the said *John Byres* pursues the said *James* for re-delivery thereof, and referrs the Summons, being of this Tenor above-written, to his Oath. This Summons was not found Relevant by the *Lords*, notwithstanding of the whole particular circumstances and points above-written, therein contained, seing it was not Libelled therein, that the foresaid Letter of Alienation was either delivered to the Pursuers self, or to the said Mr. *Francis Hay*, to be delivered by him to the Pursuer; albeit it bore, *that the Bond was Subscribed by the Defender, and delivered to the Writer, to the behove of the Pursuer, and to form Charters thereupon in his favours, and thereafter borrowed out to confer with the Charters, upon promise to render the same back again.* And albeit the Summons bore promise made by the Defender divers times since, to re-deliver the same, and to fulfill it, yet all this was not Relevant, except the same bore, the Bond to have become the Pursuers Evident, by delivery thereof to himself, or to some other, to be delivered to him; which not being Libelled, nor yet Replyed, the *Lords* found, that the Defender might resile from the Bargain, and that he was not obliged to stand to the same, seing it was not perfected by Tradition, as was necessary to the perfection thereof, and the promise since to perfite, was sicklike not obligatory, seing the Defender had place to repent; for as the Pursuer might upon his part resile from the Bargain, if he pleased, there being nothing extant which could compel him to pay the price thereof, seing the Letter of Alienation granted the receipt of the Money, and price thereof from the Pursuer, albeit in effect the same was not payed, but granted payed on trust; so the like liberty ought to be permitted to the Defender to resile. This is conform to the Civil Law, where *licet pœnitere, nec est emptio ante confectionem Scripturæ, ubi in scriptis facienda est*, yet it appears, that if the Money had been delivered, *non erat locus pœnitentiæ*. Actor. Alter. *Hope* & *Belshes*. *Gibson* Clerk.

Finlason contra Executors of *Lawder*, *Eodem die.*

Patrick Finlason, as Executor to his Father, pursues the Executors of umquhile *William Lawder*, for payment of the Sum of 300 pounds, and of the price of a Pipe of Sack, and a Tun of Beer, which the said umquhile *William Lawder*, by his Ticket Subscribed with his hand, granted him to be adebted to the Pursuers Father; the Defender Alledging the same to be payed to the Defunct in his own time. The *Lords* found the payment of the Money contained in the Ticket, ought to be proven by Writ, or Oath of Party, but that the payment of the Price of the Butt of Sack, and Tun of Beer might be proven by Witnesses, albeit all was contained in one Ticket. *Gibson* Clerk.

Matthew contra *Sibbald*, *Decemb.* 19. 1626.

IN a Suspension and Reduction betwixt *Matthew* contra *Sibbald*, both upon one reason, *viz.* for Suspending and Reducing of a Bond made after this Tenor, *viz.* whereby *Blyth* the Husband, and *Matthew* his Wife, granted them to have borrowed from *Sibbald* a Sum of Money, which they both obliged them and their Heirs to pay again to the Creditor at any Term thereafter, upon Requisition conjunctly and severally; and obliged them both, and ilk one of them, and either of their Heirs, to Infeft the Creditor in an Annualrent effeirand to the Principal Sum, forth of the Land specially mentioned in that Obligation pertaining

pertaining to the Wife, ay and while the Principal Sum was repayed; upon the which Bond, the Wife called *Matthew* after her Husbands Decease, being Charged to Infeft the Creditor in an Annualrent out of the said Land, she having right thereto, she Suspended, and Reduced upon that Reason, because it was a Bond made by her *Stante matrimonio*, which after the Decease of her Husband ought not to be obligator against her. The *Lords* having heard the Parties Dispute thereupon, they found, that albeit a Woman *Stante matrimonio*, could not be obliged to do any Deed, which might affect the moveable Goods and Gear, which might befal to her after her Husbands Decease, or which might make her personally obliged to perform any Deed, which was to receive Implement in Moveable Sums, by reason that during the time of the Marriage, betwixt her and her Husband, and while they were both living together, she has no Property *in mobilibus*, because the same belongs to her Husband; and for that part of the Goods, which of the Law will fall to her through her Husbands death, she can do nothing therein in her Husbands lifetime to prejudge her thereof, before the same fall, and before that it be thereby constant, if she will fall any or not, and what the quantity of the same is: But as concerning a Womans Obligation with her Husband, in things whereof the Wife had any actual, or other real Right, as in Liferent, or Heretable Property of Land or Annualrent, constitute by Infeftment. The *Lords* found, that she might be effectually bound with her Husband in things of that nature, the same being formally and legally made. And concerning this Obligation controverted, the *Lords* found it not Obligator against the Woman, but only against the Husband and his Heirs, because albeit the Woman was Heretor of the Land, where out of the Annualrent was ordained to be uplifted by the Bond; yet that Bond binding the Husband first therein-named, and then the Wife nominat in the second place to be obliged, and their Heirs to give that Infeftment, could not effectually bind the Wife, who ought to have been bound *primo loco* (if the same should have Denuded her) as Disponer her self, and her Husband as Consenter, and authorizing her therein, and with his expres Advice and Consent; And therefore this Bond binding first the Husband and then the Wife, and their Heirs *æque principaliter*, ought to receive Execution against the Husband and his Heirs, and not against the Wife, who was not formally bound thereby, as said is, and therefore the Letters were Suspended *simpliciter*. Actor. *Halyburton & Rusel.* Alter. *Hope & Oliphant.* *Gibson* Clerk. *Vid.* *March* 24. 1626. *Greenlaw* contra *Galloway*.

Stuart contra Commissar *Dunkeld*, *December* 19. 1626.

IN a Suspension betwixt Mr. *John Stuart* contra Commissar of *Dunkeld*, The *Lords* found the Decreet controverted in that Suspension null, because it was given at the Instance of an Executor Dative Decerned, and bore not *that he had Licence granted to him to pursue that Cause whereupon he had recovered Sentence*; Which Title without a Licence, or Confirmation of a Testament, the *Lords* found not to be sufficient, whereupon Sentence could be given; and this was so found, albeit the Party offered *cum processu*, to produce and show where this Executor Dative had Confirmed a Testament, containing this same Debt contained in that Decreet, which was not Sustained to maintain the Decreet. Actor. *Lermonth*. Alter. *Hay* Clerk.

contra *Scot*, *December* 20. 1626.

IN an Action at the Instance of Creditor to umquhile *Scot* of *Bonytoun*, against one *Scot*, as lawfully Charged to enter Heir to the Defunct, for Registration of a Bond. The Defender Compearing, and offering to Renunce to be Heir, whereupon the Pursuer desired Sentence to be given against him,

Cognitionis causa, to the effect he might seek Adjudication, as use is in such cases. Compeared in this Process another Creditor of the said *Scot* of *Bonytoun*, and Alledged that this Sentence, upon the Defenders Renunciation to be Heir, could not proceed in the Pursuers favours, thereby to seek Adjudication of the Defuncts Lands in his prejudice, seing he offered to prove, that the Defender had behaved himself as Heir to the Defunct, by intrometting with his Fathers Lands and Goods, and so could not Renunce to be Heir to him; this Alledgance was Repelled, seing when this Creditor should pursue this Defender for his Debt, he might insist against him, or qualifie him to be Heir, as he might best do of the Law, which could be no hinderance to this Pursuer, to prosecute all lawful Diligence competent to him of the Law, upon the Defenders Renunciation to be Heir, for this Diligence of Pursuit, moved by the Pursuer, *qui sibi vigilavit*, could not be stayed by this Alledgance of this Creditor, who had not provided himself so as to seek and use the like Diligence for recovering of his Debt. Actor. Alter. *Burnet*. This Decision was followed *January* 22. 1629. Mr. *Frederick Carmichael* contra the Laird of *Kincraig* and his Creditors, in this same manner as is here marked. *Gibson* Clerk.

Young L. *Ley* contra *Blairs* Relict, *Eodem die*.

IN a Declarator of the Escheat of umquhile *William Blair* Rebel, at the Instance of the young Laird of *Ley*, Donatar thereto, against his Relict, and Brothers and Sisters. Compeared in this Process one of the Rebels Creditors, and Alledged that the Horning, whereupon Declarator was sought, was null, because the Rebel was Deceased before the Registration of the said Horning. This Alledgance was Repelled, and the Horning sustained, albeit not Registrat, till after the Rebels Decease, seing he being lawfully Denunced in his lifetime, the Party might lawfully Registrat the same *quocunque tempore*, aswell after the Rebels Decease, as before, being done *debito tempore*, within the time required thereto, for his interveening Death could not be found a lawful impediment to hinder the user of the Horning, to adhibit that Solemnity which was required thereto of the Law. Actor. *Mowat*. Alter. *Hay* Clerk. *Vid. Novemb.* 20. 1624. L. *Lag* and the cases there.

Town of *Edinburgh* contra *Logan*, *Decemb.* 21. 1626.

IN a Suspension of Charges upon Precepts out of the Chancery, execute at the Instance of *Andrew Logan* of *Cottfield*, and Charging the Town of *Edinburgh* to receive him in certain Lands, wherein he was Retoured Heir to his Father, to be holden of them as Superiors. The *Lords* found the Letters orderly proceeded, notwithstanding that the Town of *Edinburgh* in their Suspension Alledged that they were not Superiors of the Lands contained in that Retour, but that his Father held the same of the Laird of *Restalrig*, from whom the Superiors had no Right to the Superiority of these Lands contained in the Retour, and that any Right which the Suspenders had, was a Right of Property, acquired from the Kings Majesties Predecessors, by the space of sixty years since, and which Lands they have bruiked continually since, as their Property without interruption, so that the said Retour could not be of force to cause them receive him their Vassal in their own Property, and thereby to prejudge themselves of their Rights, notwithstanding of which Reasons the Charges were found orderly proceeded, in respect of the Retour standing; but it was declared, that this should be but prejudice of the Suspenders Right, and that their Entry of him upon the said Retour should not derogate from their Right in any sort, which otherwayes lawfully remained in their persons, and they might also refuse, *quo casu* the Charger had recourse to the Chancery, for there was no Letters of

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Horning here, nor in such cases, but Execution upon Precepts out of the Chancery, whereupon no Horning follows, but the Party may refuse, or obey as he pleases. Actor. *Hope*. Alter. *Belshes*. *Hay* Clerk. *Vid. March* 23. 1622. Mr. *Simeon Ramsay*.

The like Decision was done *March* 11. 1636. betwixt *Scot* contra *Elliot* of *Stobs*, *Scot* Clerk thereto, where the person Charged to Enter, the Compriser Suspending, that he was not Superior, yet the Letters were found orderly proceeded, but prejudice of the Rights of all Parties having interest, *pront de jure*, unprejudged thereby, as the Note there made bears.

Executors of *Brown* contra *Drummond*, *Eodem die*.

IN a Registration at the Instance of the Executors of *James Brown* against Mr. *John Drummond*, for Registration of an Obligation granted by him, whereby he was obliged to pay to the Defunct 600 Merks, and to his Wife, and to the longest liver of them two, and to their Heirs, at the Term contained in the Bond, and failzying thereof, to pay ten merks for ilk hundreth thereof to the longest liver of them, and their foresaids, as well not Infeft, as Infeft, ay and while the repayment; The Heir of the Defunct compearand, Alledged that this Sum being Heretable, *viz.* bearing, *to pay Annualrent*, pertained to him, and so could not belong to the Executor. This Alledgance was Repelled, and the Sum found to pertain to the Executor, notwithstanding of the Heretable Clause, because the Husband died before the Term of payment, at the which the Heretable Clause could only take beginning, and so the Sum would fall under his Testament, and therefore did not pertain to the Heir, neither was the *Lords* moved with that Alledgance made for the Heir, *viz.* That albeit the Husband died before the Term of payment, yet his Wife who was also Creditrix, and had her Liferent by the Bond of the foresaid Sum, lived after the Term, and was yet on life, which was not respected, seing the Sum was found to come under the Husbands Testament, and the Wife would have her own part of the principal Sum, so much as of the Law would fall to her. In this it occurs to be considered, who can have Right to the Annualrent since the Husbands Decease, there being many Terms since, for the Executor cannot claim it, as is Alledged. Actor. Alter. *Hart*. *Gibson* Clerk. *Vid. January* 18. 1625. *Wat* contra *Dobie*. *February* 26. 1629. *Douglas*. and for the said doubt *January* 8. 1624. Crowner *Hendersons* Children.

La. *Foulis* contra her Husband, *Eodem die*.

IN an Action pursued at the Instance of the Lady *Foulis* against her Husband, for payment of a yearly Sum of Money to her, for her Sustentation conform to his promise made thereupon, referred to his Oath. This Action at the Wifes Instance against her Husband, was Sustained, albeit there was no Action of Divorcement depending betwixt them; And albeit it was Alledged by the Defender, that the Wife *Stante matrimonio*, could not be heard to pursue her own Husband, who in all Pursuits ought to authorize her: Which Alledgance was Repelled in respect of the Summons and Action, which proported that he had diverted from her, and that he had Married, and did Co-habite with another Wife, and that he being Denunced Rebel, being Charged to compear before the Secret Council, for Insolencies commited against her, and not compearing to answer thereto, in end by the Mediation of his Friends she purchast Protection to him, to come and Treat for the settling Controversies betwixt them, at which time the said Promise was made to a mediat person, to her use, and for her Sustentation, and the Bairn Procreat betwixt them: And also the same was made to her self, for the same Cause; Which case being considered in thir Circumstances, and being a Cause Alimentar, and to the Pursuer, who was a stran-

ger, it was Sustained by the *Lords*, and the Alledgance was Repelled. Actor. *Russel*. Alter. *Lawtie*. *Gibson* Clerk. *Vid. July* 23. 1629. La. *Buchannan*. *November* 26. 1624. *Johnston*.

Dundas contra *Strang*, *Eodem die*.

Sir *James Dundas* pursuing Mr. *William Strang* for delivery of Evidents. The Defender Alledging, that the same was Impignorat to him for some Moneys adebted by *Borthwick* of *Newbyres*, Heretor of the Lands, whereupon he shew'd the said *Borthwick* of *Newbyres* his Obligation and Letter, bearing, *the Hypothecation thereof*, and therefore while he were payed of the Sums adebted to him, He alledged that he ought not to deliver the Writs. This Alledgance was Repelled, and the Writs ordained to be delivered to the Pursuer, for two Reasons, and Replyes *separatim*, 1°. Because that before the Debt, *Newbyres* Debitor had sold the Lands, whereof these were the Evidents acclaimed, by Contract past betwixt him and the Pursuer, whereupon the Pursuer had both Denunced *Newbyres* Rebel, and served Inhibition against him, both before the Bond made by him to the Defender, and before the Impignoration of the Writs. 2°. Because the Pursuer was Infeft in the Lands, and Seased therein, which albeit it was after the Impignoration, yet it carryed with it Right to the Evidents of the Lands. But this last Reply was not clearly admitted, seing the *Lords* doubted that the Seasin after the Impignoration would have been preferred, if it had depended upon a Contract made also after the Impignoration; but the first Reply was enough *per se*. Actor. *Aiton*. Alter. *Lawtie*. *Gibson* Clerk. *Vid. July* 16. 1629. *Plumber* contra *Hagie*.

Irvin contra L. *Monymusk*, *Eodem die*.

In an Action pursued by *Irvin* contra L. *Monymusk*, who was conveened to pay a Debt owing by his Father, as behaving himself as Heir to him: in this manner qualified *viz*. in so far as the Pursuer offered to prove, that *Monymusk* had sold a Tenement of Land, since the decease of his Father, in the which Land his Father had died last Infeft and Seased; which qualification was Repelled in respect of this Exception proponed *viz*. that the Defender the time when he sold this Land, had then an elder Brother living, so that *per rerum naturam*, he could not then been Heir to his Father, and so that Deed could not make him to be Heir, there being another then living who would have been Heir. This Exception was admitted to Elide the said qualification, notwithstanding it was Replyed, that the elder Brother was an Idiot declared, and that the Defender was his Curator; and that he had succeeded to him, and that he was now Deceased, so that the appearance of that Succession by the elder Brother had evanished, and also that it was Answered, that the Defender had received the price of the Land sold by him, and had the same yet in his hands, which all was Repelled: And the Exception sustained, for the *Lords* thought that that Land sold by the Defender, might yet be sought to be Adjudged to the Pursuer for satisfying of the defuncts Debt lybelled, notwithstanding of the Alienation thereof by the Defender, seing the Defunct died Infeft therein, and the Defender has qualified no Right in his Person thereto *aliunde*. Actor. *Baird*. Alter. *Lermonth*. Hay Clerk. *Vid.* 17 *January* 1627. *Frazer*.

Gordon Supplicant, *Decem.* 22. 1626.

A Supplication was given in at the Instance of one *Gordon*, making mention that he was Served and Retoured Heir to his Umquhile Father, who had Compriſed certain Lands from another *Gordon* his Debitor, and his Father being Deceased lately before that he obtained Charges to the Superior to enter him to the Lands Compriſed, therefore he as Heir to him craved the command to the Superior, to enter him upon that Compriſing in the Lands Compriſed

priſed as Heir to his Father, this Supplication was refuſed, being ſought after this manner ſo Summarly, whereas if this had been ſought by purſuit, in an Action intented at the Heirs Inſtance to that effect, it would have been granted then, as was done *March* 22. 1626. Mr. *Patrick Collace*, and as is there noted done that day, and the other Caſes there cited. *Vid. Feb.* 11. 1629. *Frazer*.

* *Peibles* Relict, contra Town of *Perth*, *Decemb.* 23. 2626.

IN an Action Purſued at the Inſtance of the Relict of Umquhile Mr. *Alexander Peibles*, as Executor to him, againſt the Provoſt Baillies and Council of *Perth*, for Payment of a Sum of Money adebted by him to the ſaid Mr. *Alexander*, conform to an Act Subſcribed by the Town Clerk; bearing them to be reſtand owing the ſaid Sum, as borrowed from the ſaid Mr. *Alexander*, and which they Obliged them to pay to the ſaid Mr. *Alexander*, at the Term therein contained: This Act being quarrelled, becauſe it was not Subſcribed by the Provoſt, and Baillies and Council, but only by the Town Clerk, which ought to work no further than if it had been Subſcribed by a Nottar, and ſo was not Sufficient to produce Action againſt them, for Payment of the Sum of 400 Pound Libelled. Likeas, the party Alledged that the *Lords* had found, that the like Acts made by the Clerk, Subſcribed by him, whereby other Perſons were Acted to pay Sums to their Creditors, was not Obligatory againſt the Party Acted without their own Subſcription: This Alledgance was Repelled, and the Act was found Sufficient, albeit not Subſcribed by the Magiſtrats and Council of the Town, who were Parties obliged, but only by their Clerk, ſeing it was an Act Judicially done, and Regiſtrat in their Court-Books; and that the Purſuer offered to prove, that at the time of the making of this Act, the Magiſtrats and Council of *Perth*, were in uſe to Act themſelves after this manner, and to grant Obligations to diverſe Parties, by Acts only Subſcribed by their Town Clerk, as this Act was, and not to Oblige themſelves by their own Subſcriptions, and that theſe Acts ſo made hath taken Effect and been ſatisfied by them, it being their Cuſtom to bind themſelves after that manner at that time; which Reply the *Lords* found Relevant, to maintain this Act and Purſuit Lybelled founded thereon; neither was the *Lords* moved with the Alledged Practiques, whereby Acts made and ſubſcribed by the Town Clerk, wherein other Debitors were obliged to their Creditors were found null, as not being Subſcribed by the Perſons thereby obliged, becauſe there was difference in Obligations made by one Partie to another, in which Deeds, the Clerk could have no other reſpect than as due to another common Nottar, whoſe ſubſcription could not bind the Debitor, whereas the Caſe is otherwiſe, when the Town bind themſelves to a Partie, and where the Clerk in theſe Caſes is their publick Officer, and their ſervant, and where they were in uſe to bind themſelves Effectually to others after that ſame manner. Actor. Alter, *Chaip*.

Supplicants contra *Nimmo*, *Jan.* 9. 1627.

THis day a Supplication was given to the *Lords*, by ſome Perſons in whoſe favour ſome Clauſes were conceived and Introduced by a Contract betwixt *Herring* and *Nimmo*, in the which Contract, *Herring* having ſold ſome Lands to *Nimmo*, *Nimmo* was obliged to pay the Sums contained therein for the Price of the Land diſponed to the ſaids Perſons, who craved Inhibition againſt the ſaid *Nimmo*, upon the foreſaid Clauſe Introduced in their favours, and it being doubted if they might crave the ſaid Inhibition, ſeing the ſaid Contract was not Subſcribed by them, neither was the Parties Contracters therein, nor the Inhibition craved by any of the Contracters, The

Lords found that the saids Persons notwithstanding they were not Contracters, might seek Inhibition upon the Clause foresaid, conceived in their favours, against the Party Obliged by the Contract, to perform the same to them, *John Dunlop* was Proctor for the Supplicants, and caused raise and seek this Inhibition. *Vid. Feb.* 29. 1628. L. *Whitinghame*, *March* 16. 1627. *Bruce.*

L. *Thorntoun*, & Dr. *Strachan*, contra *Keith. Jan.* 10. 1627.

IN an Action pursued by the L. of *Thorntoun* and Dr. *Strachan*, against *Robert Keith* Burges of *Aberdeen*, for Payment of a Legacy left by a Defunct, to the Defuncts Legatar, which the Defunct ordained to be payed by her Executors, at the time of the Marriage of the said Legatar, and in the mean time that the Sum left in Legacy, should be employed upon Profit to the use of the said Legatar: thir Pursuers being made Assigneyes by the Legatar to the said Legacy, pursues this Defender as Executor to the Testatrix, for Payment of the principal Sum left in Legacy, and of the Annualrent thereof continually since, as well before the time of the Legatars Marriage, as since the time of the Marriage, and the Defender Compearing and Proponing an Exception of Payment of the Legacy to the Cedent before the Assignation, which being admitted to Probation, and he having Succumbed in proving thereof: Thereafter the Defender when the Exception was found not proven, and the Decreet was to be pronounced conform to the desire of the Summons, he Alledged that the *Lords* ought not to pronounce a Decreet for any years Profit since the Marriage, seing the Legacy which was the ground of the Pursuit, astricted the Executor only to pay Profit to the Legatar, to the time of the Marriage, when the principal Sum should have been payed, so that after the Marriage there was no Action Competent for any profits thereafter; the Pursuer Answered, that this was not Competent now to be Proponed, after the proponing and admitting of a Peremptor Exception, wherein the Defender Succumbing, there rested no more but Sentence conform to the Summons; which could not now be quarreled upon Irrelevancy, or how far the same should be Extended after Succumbing as said is, but ought to have been Proponed before Litis-contestation: The Defender answered that this was Competent to be considered at all times by the Judge, albeit the Party had Omitted the same, for the *Lords ex officio nobli*, ought to Decern nothing but that which is Relevant and Reasonable, albeit the Party should Ommit the same, *quia quæ desunt Partibus & Advocatis, Judex debet supplere.* The Pursuer Answered that this Supplement of the Judge is not now to be received, being the Parties fault *& non juris*, wherein the Judge of the Law may supply. The *Lords* found that notwithstanding of the Defenders Succumbing to prove the Exception proponed, and Omission to propone this Alledgeance, that they as Judges, *ex officio nobli* might in this same state of the Process after the Defender had failzied in probation, yet consider how far the Debt should extend as to the Profits, for that was incumbent to the Judge, to see that their Sentence should proceed upon Reasonable and Relevant grounds, and therefore seing the Testament was only the ground of the Pursuit, which appointed Profite to be payed to the time of the Marriage, and that the Pursuit was not moved upon that ground, *viz.* that the Profit was sicklike due sensine *ob moram*, for not Payment of the principal Sum at that time: Therefore the *Lords* found that Decreet should only be given for the Profite to the time of the Legatars Marriage, there being no Profite sought as said is, upon any other ground *ob moram*, in not paying thereof then; and this was found might and ought so to be done by the Judge, albeit it was not Proponed by the Party, and albeit of the failzie to prove *ut supra*.

Actor

Actor. *Hope & Stuart.* Alter. *Nicolson & Lawtie.* *Gibson* Clerk. *Vid. 4 March* 1628, *Forrester* contra *Clerk.*

Hume contra *Hume*, *January* 11. 1627.

IN a Suspension at the instance of *Hume* of *Bassindine* against *Hume*, who had charged for payment of a Sum of Money, conform to the Suspenders Bond, the Reason of Suspension was, that the Charger had poynded certain Goods for the same Debt; and because the Poynding was not the Suspenders Evident, so that thereby he might verifie the same instantly, he referred the Poynding to the Chargers Oath, and the Quantity and Avail of the Goods, he offered to prove by Witnesses. This was not sustained, but the *Lords* found, that he ought to prove, not only the Fact of the Poynding, but also the Quantity of the Goods poynded, and the Avail thereof, either by Writ, or Oath of Party: Whereupon the Suspender offering so to prove the same by Writ or Oath, the Charger thereafter Alledged, that the Suspender, after the Poynding, had received the Goods alledged poynded back-again from the Officer, who delivered the same to him, hearing that there was a Suspension purchas'd before his Poynding. The Suspender Replyed, that he offered to prove that the Goods were yet in the Chargers hands; and this being found Relevant in Fortification of the Poynding, it was controverted how it should be proven, seing it tended to take away the Chargers Registrat Bond. The *Lords* found, that the Poynding ought to be proven by Writ or Oath of Party as said is, but that the Poynder retained the saids Goods, The *Lords* found it might be proven by Witnesses, even as the Charger might have proven his Exception by Witnesses anent the re-delivery again of the Goods to the Suspender, which being Eleided by that Reply, might receive that same manner of Probation; and found, that they would grant ordinary Terms to prove the same, albeit it was in a Suspension; and would not Astrict the Suspender only to one Term allanerly, seing the Poynding was found only probable *ut supra*, by Writ, or Oath of Party. Actor. *Belshes.* Alter. *Sandilands.* *Hay* Clerk.

Paton contra *Barclay*, *Eodem die.*

IN a Suspension betwixt *Paton* and *Barclay*, wherein *Paton* being charged to pay 300 Merks conform to his Bond, whereto *Barclay* was made Assigney by the Creditor, to whom the Bond was made; the Reason was, that the Cedent being this Suspenders Tennent, in some Lands occupyed by him, for the which he was Debitor to the Suspender in als many Farms as being liquidate, extended to the Sum contained in the said Bond, and which Farms were owing to him at the time of the making of the said Assignation; likeas, since that Assignation he hath recovered Decreet against the Cedent his Tennent, for paying of the same, and liquidating the prices thereof, which ought to Compense against the Assigney, as it would have compensed against the Cedents self, if he had been Charger. The *Lords* found this Compensation Relevant against the Assigney as well as against the Cedent, albeit the Decreet against the Cedent, which both found the Cedent his Debitor, and also liquidate the Debt, was posterior to the Assignation made to this Charger, who was a true Creditor to the Cedent, and that it was made for satisfying of his just Debt; and albeit the Assignation preceeded the said Decreet, seing the Decreet was obtained by the Master against his Tennent for the Farms of the Ground, which was a Debt for some Years Duties preceeding the Assignation made to the Charger, owing to the Master, albeit the same was not decerned before the Assignation, but thereafter, which was sustained, seing nothing was alledged against the Debt owing by the Cedent to the Suspender, contained in the said Decreet. Actor. *Mowat.* Alter. *Lawtie.* *Hay* Clerk. *Vid.* 1 *Dec.* 1626.

V. *Stormont.* & *eodem die*, La. *Balbegno*. 6 *Decemb.* 1626, Lo. *Kinclaiven*. 15 *Feb.* 1627; *Cunninghame*. 15 *Novemb.* 1627, Mr. *Blake*.

Dawling's Bairns *contra* Lo. *Balmerinoch*, *January* 16. 1627.

IN an Action betwixt the Bairns of *Robert Dawling* and Lord *Balmerinoch*, for payment of 400 Merks, for the yearly Mail of a Dwelling-house, Set to the Lord *Balmerinoch*, pertaining to the said *Robert* and his Bairns, and possest by the said Defender, The *Lords* found, that the Condition anent the payment of that yearly Duty of 400 Merks, for the Mail of the said Land, ought to be proven by Writ or Oath of Party, and was not admissable to be proven by Witnesses, being in a matter above 100 Pound. Actor, *Belshes*. Alter. *Lermonth*; *Gibson* Clerk. *Vid.* 11 *Feb.* 1630, *Ross*.

Lundie contra *Gourlay*, *Eodem die*.

IN an Action pursued by *Andrew Lundie* against *John Gourlay*, for payment of 500 Merks contained in a Bond given by the Defender to the Laird of *Lundie* Father to the Pursuer, to whom he was Executor, The *Lords* having found, that the Witnesses insert in that Bond should be Examined *ex officio*, for tryal of the Cause of the Obligation and Debt therein contained, and a day for that effect being assigned to the Defender, to Summon them to compear before the *Lords*, one of the saids Witnesses being excused for Age and Sickness, and therefore a Commission being craved to Examine him, and the Pursuers contending, that in matters of this quality no Commission ought to be given, where the Ordinance was done *ex officio judicis nobili*, and for informing of the Judge in such particulars, which would occur to be enquired at the Witnesses when they should Compear, and as should occur to be asked for clearing of any Doubts, which the *Lords* would desire to be resolved of in the trying of that Process, and which could not be done by vertue of any private Commission, no more than Witnesses of Improbation could be examined by private Commissions, except only by the *Lords* themselves. The *Lords* found, that notwithstanding this Examination was ordained to be done only *ex officio*, yet that they would grant a Commission to examine this Witnes, who for Age and Sickness was not able to compear before them, and to that effect ordained the Judge to whom Commission should be granted, to examine him upon the Interrogators to be given in by both Parties, and all Articles which might give light to discover the true cause of the giving of the Bond, that thereby the *Lords* might more clearly decide in the Cause after the said Examination. Yet it is a Maxime with us, that *ea quæ sunt ex nobili officio non possunt delegari*. But *Bartol.* calls *mixtum Imperium Officium nobile*. *ad* L. 3. N. 15. h. t. & *Imperium mixtum* (*sicut Jurisdictio cui cohæret*) *potest delegari*, & *hodie etiam ea quæ competunt jure Magistratus possunt delegari*. Actor. *Aiton*. Alter. *Nicolson* & *Craig*, *Scot* Clerk.

Courtie contra *Cunninghame*, *Eodem die*.

Janet Courtie Assigney made by umquhile *Agnes Grier* to a Bond of 100 Merks, made to her by *James Cunninghame*, pursues the said *James* for payment. The Defender Alledged, that the Assignation is made by the Cedent on her Dead-bed, the Bond being Heretable. This Alledgance was Repelled in this place, but prejudice to Reduce upon that Ground *prout de jure*; for the *Lords* found that they would not in this Process by way of Exception so summarly annul the Assignation. *Hay* Clerk. *Vid.* 12 *July* 1626, L. *Craigie-Wallace*.

Fraser contra L. *Monimusk*, *January* 17. 1627.

IN an Action at the instance of one *Fraser* against the L. of *Monimusk*, for payment of 500 Merks contained in his umquhile Fathers Bond, for the which

which the Defender was conveened as behaving himself as Heir to his umquhile Brother, which Brother was served Heir to their Father, who was Debitor by Intromission with his Brothers Heirship Goods, and the Pursuer having specially condescended upon the Quantity of the Goods so intrometted with by the Defender, and upon the manner of his Intromission and Quality of the Deeds done by him to make him Heir thereby, *viz.* that he after the Defuncts decease, retained the Possession of the best Bason, and Silver Spoons, and Timber-Beds and Boords, which after his said Brothers decease, who died five years since, all this time since he hath used in his House at ordinary times of eating, as he would have used if the same had been properly his own; and the Defender Alledging that that qualification of using was not enough, except that he could Alledge that he had disponed upon these particulars, seing they were not the worse of that manner of using condescended on, specially seing the first time of the Defenders Intromission ought to be respected, at which time his Brother to whom he is conveened as Heir was then living, who being declared Idiot, and he served Tutor to him, his Intromission then as Tutor, albeit he retained the Possession since his decease, being of such Goods which he could not cast out of his House, and so in effect the Intromission was necessary, and the same not being deteriorate, and which he offered to make forth-coming als good as they were the time of the Defuncts decease, therefore he could not thereby be found to be Heir. The *Lords* Repelled the Exception, and found the using of the foresaid particulars at Table, *viz.* the Bason and Spoons washing therein, and supping and eating with the Spoons, and eating upon the Board, and lying in the Bed to be a sufficient Qualification being proven, to make the Defender Heir, notwithstanding of the offer to make the same forth-coming als good as they were; and that albeit the first time of his Intromission was as Tutor as said is, which was Repelled by the *Lords*, and the foresaid qualification of using and retaining of the Possession so long after the Defuncts decease was sustained, seing during that time the Defender, if he had intended to have been freed of the danger of being Heir, ought to have meaned himself to the *Lords*, and craved Inventar to have been made of the Goods, *&c.* as use is in such Cases, which not being done, he hath prejudged himself. Yet *I. C. Cujuscunque rei & negotii initium inspiciendum & Causa, non finis.* Actor. *Baird.* Alter. *Lermonth. Gibson* Clerk. *Vid.* 14 *July* 1626, *Johnston* contra *Mason.* 21 *Dec.* 1626, *Irwing* contra L. *Monimusk.* 6 *Nov.* 1622, *Dundas.* 2 *July* 1629, *Cunninghame.*

E. *Buckcleugh* contra *Burnet* and others, *January* 19. 1627.

THE Earl of *Buckcleugh* having intented a Double Poynding against Mr *Robert Burnet* on the one part, claiming Right as Heir served to his own Daughter, begotten by him upon his Wife, one of the seven Daughters of *William Mauld*, which Daughter was served one of the Heirs to the said *William Mauld*, as representing her Mother, and one of the saids seven Daughters, and therefore he as her Heir, who was one of the Heirs of her said Good-sir, claiming the seventh part of a Sum adebted to the said *William Mauld* by the said Earl of *Buckcleugh* on the one part, and against the rest of the six Daughters of the said *William Mauld*, on the other part, who claimed the Right of the said whole Sum, to pertain to them, seing the Right of the said whole Sum was not only established by an Heretable Contract, betwixt the said *William Mauld* and the said Earl of *Buckcleugh*, but also Infeftment of an Heretable Annualrent was granted therefore out of the Earls Lands to him in his Lifetime, so that the Right of that Contract and Sums therein contained being perfected by an Heretable real Right, and by Seasin, the Right thereof, and of the saids Sums, could pertain to none but to these who might be Heirs to the said *William Mauld*, and was Infeft in this Annualrent as Heir to him,

who died Infeft; and seing neither Mr. *Robert* Burnets Wife, who was one of the seven Daughters of the said *William Mauld* was Infeft in her Life-time, nor her Daughter was ever Infeft as Heir to her Good-sir as representing her Mother, but only served as one of his Heirs by a general Service, whereupon she was never Infeft in her part of this Annualrent controverted, therefore they contended that her Service, so far as might concern this Sum libelled, being extinct by her decease, it could not be acclaimed by her Father as served general Heir to his Daughter, who neither was Infeft, nor could be Infeft therein, seing the Contract provided the same to the Heirs of *William Mauld*; and he could never be that person who might be Heir to him, but the same behoved to pertain only to the six Daughters surviving, who were Heirs *in solidum* to the whole, the other seventh, and all descended of her Body, dying not Infeft. The *Lords* found, that seing the Daughter of the seventh Sister begotten by Mr. *Robert* Burnet, was served one of the Heirs of *William Mauld*, and that she as one of the saids Heirs had obtained the Contract foresaid, made betwixt the Earl of *Buckcleugh* and her Good-sir, Registrat at her instance against the Earl; and in respect that Mr. *Robert Burnet* was served Heir to his Daughter, albeit by a general Service only, and that he had obtained the said Contract Registrat at his Daughters instance as said is, transferred in him as Heir to her, albeit his Daughter died not seased, yet that the Right of the said Sums, contained in the said Contract, both Principal and By-runs pertained to the said Mr. *Robert Burnet*, and that the same did not so belong to the other six Sisters, as that it could not be sought but by them who was Infeft; and therefore in respect of the said Mr. *Robert* Burnets Retour as Heir to his Daughter, and of his Decreet of Transferring, and of his Daughters Retour and Decreet of Registration, which Retours and Decreets, the *Lords* found could not evanish and become extinct, they decerned the said Mr. *Robert* to be answered and obeyed, and discharged the other six Sisters, as having no right to the said seventh part, and found, that the Renunciation to be given by the said Mr. *Robert* to the Earl of *Buckcleugh*, should be a sufficient Security to exoner and warrand him of the payment thereof. Actor. *Scot*, *Burnet per se*, & *Stuart*. Alter. *Lermonth*, *Aiton* & *Oliphant per se*. *Scot* Clerk.

L. *Roslin* contra Tennents, *Eodem die*.

IN a Removing at the instance of the L. *Roslin* against his Tennents, a Procurator compearing for the apparent Heir of *George Thorbrand*, who was Infeft in the Lands, and desiring to be admitted for his Interest; The *Lords* admitted of the said appearand Heir, albeit he had no Right in his own person, but only produced his Fathers Seasin, which they found gave him Interest, as appearand Heir, to defend the Tennents from Removing, albeit he was not called, *quo casu* if he had been called, he as appearand Heir might have defended by vertue of his Fathers Right; but not being called, and the Pursuer offering also to prove, that the Tennents who were called, were his Tennents, and had payed him Maill and Duty for their Lands divers years before, so that they could not be the Excipients Tennents; therefore he contended, that as appearand Heir, he could not be admitted to stay him to Remove his own Tennents; which was Repelled, and the appearand Heir admitted for his Interest. Actor. *Belshes*. Alter. *Nicolson*. Hay Clerk.

Marques of *Hamilton* contra *Calder*, *Eodem die*.

IN an Action of Non-entry betwixt the Marques of *Hamilton* contra *Calder*, the *Lords* found, that the Extent of the Land ought to be valued according to the Quantity and Extent whereto it was valued by a Contract made by the Defender and his Mother, wherein the Land was designed to be so many

ny Pound Lands; and according to a Decreet recovered at this same Defenders instance, for delivery of the Evidents of the same Lands, wherein it was called also a Land of the same Extent; which Designations the *Lords* found sufficient against the Subscriber of the said Contract, and obtainer of the said Sentence, to bind him to that Extent; albeit he Alledged, that that Designation could not bind him thereto, seing in these Writs *non agebatur*, to what avail the Lands should be extended; but that was the adjection of the Writer, whose Designation could not make the Land more than indeed it was, and could not work against the verity. Likeas he produced a Service done since, wherein the sworn Assizers had extended the same to a far less avail, which ought to have greater Faith than a superfluous Designation idlely adjected in any Writ; which Alledgance was Repelled, and the Extent was ruled according to the said Contract Subscribed by the Party, and Decreet recovered by himself, seeing the said Service was not Retoured, nor past the Chancellary, but was upon a Reason stayed, that it should not be Exped. Actor. *Stuart*, Alter. *Nicolson*. *Gibson* Clerk *Vid.* 24 *January* 1627. L. *Glenkindie*.

Thomson contra *Herriot*, *Eodem die*.

Adam Thomson being bound as Cautioner at the Confirmation of the Testament of *Lewis Muir* and *Margaret Herriot*, Relict of the said *Lewis*, and her Brother being then obliged for his Relief. The said *Adam* pursues them to warrand him of his said Cautionry, and to that effect to find Caution, because *vergebant ad inopiam*, and they had wasted the Goods Confirmed, to be decerned to find Caution to him for his better security. The Defenders Alledged, that this Pursuit was a novelty, to seek Warrandice where the Pursuer was not able to show any distress; and the desire of finding Caution, was a greater novelty, whereto they could not be restricted of the Law. The *Lords*, albeit they inclined to sustain this Pursuit, as just and equitable, yet they ordained the Parties first to Compt and Reckon upon the Goods contained in the Testament, whereby it might be first known what became thereof, if they were extant, or to what good or necessary use the famine was imployed; and thereafter they would consider of the answer to be given anent the sustaining of this Pursuit. *Hay* Clerk.

D. of *Lennox* contra *Weems*, *January* 20. 1627.

IN a Suspension betwixt *Alexander Weems* and D. of *Lennox*, for Suspending of the Charges, whereby the Duke was charged to pay a Pension granted to the said *Alexander* by umquhile *Lodovick* Duke of *Lennox* and *Richmond*; the Decreet for Letters conform to that Pension being quarrelled, because the Duke of *Lennox* was not Summoned thereto. The *Lords* found no necessity to Summon the Giver of the Pension to the Action of Letters conform thereupon, seing he was the Pensioners Author, and he needed not to Summon his own Author. This Decision may appear to be hard, for upon a Decreet for Letters conform, the Chamberlains and others, Intromettors with the Duties of that Lordship, or Lands where-out-of the Pension is craved to be payed, are charged to make payment to the Pursuer, who of reason ought not to be charged therefore, except their Master and Lord to whom these Duties should be payed by them were called thereto; for no reason can draw their Duties from them by any Process of Law, where their Master is not decerned, to whom they are first and principally Debitors; and this form and nature of Actions cannot be more favourable, nor more priviledged, than Actions to make Arrested Goods forth-coming, which cannot be sustained without Sentence, first against the Debitor, and then that he was also called in the Process, to make the Arrested Goods to be made forth-coming; and this Pensi-

on can be of no greater effect than an Obligation, upon the which no Action for Implement thereof could be sustained, without Citation of him who granted and made the Obligation: But it was found by the *Lords*, that the Giver of the Pension needed not to be Summoned, as said is. Actor. *Burnet*. Alter. *Russel*. *Gibson* Clerk. *Vid.* 7. *Decemb.* 1630. E. of *Carrick* contra D. of *Lennox*.

Ross contra *Fleming*, *Eodem die.*

IN an Action at the instance of *Gawin Ross* against *Fleming*, for payment of the Farms and Duties of certain Lands to this Pursuer, as Heir to his Father, and which rested owing to his Father, who had Right to the Lands, and the Duties thereof were owing for certain years bygone, by the space of 28 or 30 years since the decease of his said umquhile Father, and were now acclaimed by the Pursuer, as Heir to him by vertue of a Tack of the Lands Sett to his umquhile Father, and whereto he had Right, as Heir foresaid to him. The *Lords* found, that the Action for the Farms and Duties foresaids, come not under the Act of Prescription, *viz.* the 83 *Act Parl.* 6. *Ja.* 6. 1579. but that the Pursuer had Action therefore, and might prove the same, otherways than by Writ, or Oath of Party, notwithstanding of that Act of Parliament. *Scot* Clerk. *Vid.* 10 *March*, 1627. Two men in *Glasgow*.

Dumbar of *Burghie* contra Tennents, *Eodem die.*

IN an Action of Spuilzie at the instance of *Robert Dumbar* of *Burghie* against the Tennents of *Carss*; The *Lords* sustained an Incident Diligence used at the Defenders instance, for proving of an Exception admitted to their Probation, Executed upon 60 days against the Defenders called therein, who were out of the Countrey; albeit at the Term of Litis-contestation he protested not for an Incident upon 60 days, nor declared then that the Parties were out of the Countrey; notwithstanding whereof the Incident was sustained, seing he had protested for an Incident; but the *Lords* ordained the Users thereof to make Faith, that they had just cause to use that Incident against these persons called therein, and that they were necessary Parties, without the which making Faith, they would not sustain the Incident against them. Actor. *Sharp*. Alter. *Gibson* Clerk. *Vid.* 2 *July*, 1624. *Watson* contra Lo. *Kinclevin*.

Wallace contra *Porteus*, *Jan.* 23. 1627.

IN a special Declarator, at the Instance of *James Wallace*, Donatar to the Liferent of *Thomas Porteus* of *Foord*, who held the said Lands of *Foord* of the Lo. *Yester*; against the said *Thomas* for Payment to the Pursuer of the Mails and Duties of the said Lands, since the time that the said Defender was year and day Rebel; Compeared in this Process *Thomas Lindsay* Burges of *Edinburgh*, and produced for his Interest, a Charter and Seasin of the said Lands, granted to him by *Thomas Porteus*, with a Declarator recovered at his Instance against the Defender, whereby the Tack which was Sett by the said *Thomas Lindsay*, to the said Defender of the said Lands, at the time of the Purchasing of the said Heretable Right from the Defender, was declared to be Expired, for not Payment of the Tack Duty, Conform to an Irritant Clause therein contained, in respect of the which Right and Possession of the Lands really held by the said *Thomas Lindsay*, and which were purchast by him for a preceeding Cause, a just and true Debt owing to him by the Defender, and which he sicklike instantly Instructed, for the Satisfaction whereof he had acquired the Right of the said Lands, and Possession conform thereto, therefore he Alledged that the Farms and Duties of the said Lands pertained to him, and ought not to be found to pertain to this Donatar, in respect of the Time of the Acquyring of the said Heretable Right, albeit the Defender his Author was then Rebel, yet he was not then year and day Rebel,

bel, whereby his Liferent might fall to the Superior: But it was then Lawful to him to Acquire a Disposition of the Heretable Right of the Lands from him, which he really did by Charter, and Seasin, and Possession: and his Subsequent *Rebellion*, by his remaining year and day at the Horn, ought not to be Prejudicial to his said Right, being made for a cause of Debt owing to him, preceeding the time that he was Denounced at the Horn. This Alledgeance was *Repelled*, and the Donatar of the Liferent was preferred to the Excipient: For the *Lords* found that the Vassal being put to the Horn, before the Alienation, after that Rebellion (year and day being expired and the Vassal not Relaxed) he could do nothing to prejudge the Superior in the Liferent which was Acquired to him, by the Vassals continuing and remaining Rebel, unrelaxed year and day, during the time of the running whereof he could not *medio tempore*, make any valid Disposition, whereby the Casuality of the Subsequent Liferent might be prejudged, (he not being Relaxed at the time of the said Alienation, nor at no time within year and day,) neither was it respected that the Infeftment was given for satisfying a Debt, which preceeded the *Rebellion*, seing it was only a personal Obligation; and there was no Obligation for giving of that real Infeftment of the Lands, whereupon the Exception was proponed. Actor. *Stuart*. Alter. *Nicolson*: *Hay* Clerk. *Vid. March* 19. 1628. *Rait* contra L. *Buckie*. *July* 17. 1630. L. *Ley* contra *Porteus*. *Feb.* 16. 1631. L. *Cranston* contra *Scot*.

La. *Ogilvie*, contra Lo. *Ogilvie*, *Eodem die*.

IN an Action of Registration, at the Instance of the Lady *Ogilvie*, against the Lord *Oglivie*, who was conveened as lawfully Charged to enter Heir to his Father, and for Purging whereof he produced a *Renounciation*, whereby he Renounced to be Heir to him, with an Exception therein insert *viz.* that because his umquhile Father was Obliged, in the Contract of Marriage made betwixt him and his said Father, and the Earl of *Melrose* and his Daughter, now Spouse to the Defender, to Infeft the said Defender and his Heirs, in the Lands mentioned in that Contract, and whereupon he had served Inhibition, which Contract and Inhibition preceeded this Contract, now desired to be Registrat, and so that thereby his Father was Constitute his Debitor, that therefore it might be Lawful to him to enter Heir in these Lands, vvherein his Father was obliged to Infeft him, as said is, and whereby he was constitute his Debitor for his Security, in case he might not come to the Right of the saids Lands otherwise; and which he Alledged he might lawfully do, and ought so to be found by the *Lords*, without any hazard or danger to be Heir Generally, or but any perril to ensue therethrough to him, seing this Pursuer could not have prejudice thererhrough. The *Lords* found, that either the Defender ought to Renounce *simpliciter*, without any Exception, and Reservation therein, or they could not receive their Renounciation with such a Provision and Exception, as was craved; seing if he intended to enter Heir to his Father, he behoved to do the same, upon his own hazard; for the *Lords* declared that they would make no such Provision, as was craved by the Defender, albeit the same depended upon a preceeding Cause of Debt, but he ought to seek the Implement thereof otherwise, as he pleased. Actor. *Nicolson* & *Aiton*. Alter. *Stuart*. *Scot* Clerk.

L. *Glenkindy* contra *Cranfurd*, *January* 24. 1627.

IN a Registration pursued by the Laird of *Glenkindy*, against *Cranfurd*, who was conveened, as behaving himself as Heir to his umquhile Brother, giver of the Obligation, which was desired to be Registrat; and for proving whereof the Pursuer produced a Bond subscribed by this Defender, wherein he designed himself Heir, at the least Appearand Heir to his said *Brother*; and

this being *Alledged*, not to be sufficient to make him Heir, seing in this Writ, wherein he used that Designation, there was no Reference to any *Benefit*, or whatsoever business concerning his Brother; neither was there any thing therein Insert done, or for any thing to be done in his favours, nor was it then intended, or ever meaned, that he should be thereby made Heir to his Brother; which being considered of by the *Lords*, they found that Writ was not of that sufficiency, to make the *Defender* Heir, seing he therein calling himself Heir, at the least appearand Heir, thereby resolving in an Alternative of appearand Heir; and it not being thereby craved, nor intended amongst the Parties, that he should be Heir, nor no such thing then being in hand, that *Resolution* of the Words, in the foresaid Alternative was not found enough by the *Lords* to make him Heir, or that he behaved himself as Heir to him, except he would prove the samen otherwise, than by that Writ of the Tenor foresaid. In this Process also the *Lords* found Process against the Defender, being called as behaving himself as Heir, albeit it was Alledged, that the Heir could not be called while the expyring of year and day, after the Defuncts decease, which was not expyred when this Summons was intented, conform to 76 Act Parliament 6. *Ja*, 4. *anno* 1503. which Alledgance was Repelled, seing the *Defender* was conveened, not as charged to enter Heir, but as behaving himself as Heir, which vvas his ovvn *Deed*, even as if he had been served Heir, *quo casu* Process would have been sustained, albeit vvithin the year, seing the *Defender* did not Alledge that there vvere Executors Confirmed to the *Defunct*, vvho should be answverable vvithin the year, for the *Defuncts Debts*, as that Act of Parliament requires. Actor. *Baird*. Alter. *Mowat*. *Hay* Clerk. *Vid. July* 8. 1628. *Dumbar* contra *Leslie*. *Vid.* for the last Part, *January* 19. 1627. L. *Roslin*.

L. *Wauchton* contra L. *Innerweek*, *Eodem die*.

IN an Action of the L. *Wauchton's* against the L. *Innerweek* younger, for repaying of some Sums payed by the Pursuer, as Cautioner for the Defender, with the ordinary Annualrent therefore, since the time of his payment thereof, according to the Act of Session, *anno* 1590. The *Lords* sustained this Action, for the Annualrent acclaimed, albeit the Pursuer was not compelled by Charges of Horning to pay, seing the Bond being Registrat, and the Term of Payment being past, it was distress enough to move any Person to make payment, who was unwilling upon respect to his own Credit, to abide Charges of Horning; And which the *Lords* found sufficient, to import this Action for Profit sensine, especially where the Party obliged for his *Relief*, and now called in this Action, is not able to Alledge any Reason, whereby the Pursuer might be freed of Payment thereof, at the Creditors hands. Actor. *Hope* & *Balfhes*. Alter. *Mowat*. *Gibson* Clerk. *Vid. March* 25, 1623. Sir *James Bailzie*. *November* 15. 1627. *Black*.

Arskin contra Lo. *Arskin*, *Eodem die*, 1627.

IN an Action of Reduction, at the Instance of *Arskin* against the Lord *Arskin*, founded upon a Reason of Inhibition, The *Lords* found the Inhibition null, because the Command and Warrand of the Letters of Inhibition gave power to Charge the Party, being then out of the Countrey, upon sixty days, at the Peir and Shore of *Leith*, and at the Mercat-Cross of *Stirling*, being the head Burgh of the Sheriffdom, where the Party to be Inhibited his *Lands* lay; but the saids Letters had no further Power, nor Warrand therein contained, albeit the Execution upon these Letters, now used against the Party Exhibited, bore personally apprehended within the *Cannongate*, for doing whereof there was no warrand in the Letters, so that that Execution wanting a warrand of the Letters, was not sustained; and the *Lords* Repelled the Alledgance proponed by the

the Defender, to Suſtain the Execution, Alledging, that ſeing the whole Leidges were lawfully Inhibited, as was neceſſary of the Law, and that the Execution againſt the Party was only uſed to intimate the Inhibition to him, the ſame was more clearly intimate by an Execution, made perſonally, than by any which had been made as againſt one out of the Country; and ſo that he having done not only equivalent to the command of the Letters, but more nor was therein preſcribed, his Execution ſhould be found lawful; which was Repelled as ſaid is; for the *Lords* found, that he ought to have craved a Command to do the ſame; for albeit he might lawfully done the ſame, if he had ſought it, and could not been refuſed; yet not having ſought the ſamine, he could not do it of himſelf without a Warrant. Actor. *Cunninghame*. Alter. *Hope*, *Nicolſon* & *Aiton*. *Hay* Clerk. *Vid.* 2 *Feb.* 1628; L. *Kirkconnel* con. L. *Barnbarroch*, 19 *March* 1628, *Lamb* contra *Blackburn*.

Stuart contra Feuars of *Coldinghame*, *January* 25. 1627.

IN an Improbation at the inſtance of *John Stuart* and certain of his Creditors, who had obtained Heretable Right from him of the Lands and Teinds of *Coldinghame* for Relief of their Cautionry, and which were Erected to the ſaid *John* in a Barony, and united in his Charter, granted to him by the King, againſt the Feuars of the Lands and Tackſmen of the Teinds of *Coldinghame*, the ſaid *John Stuart* being debarred *ab agendo* by Horning; and the other Purſuers who had baſe Rights to be holden of him, being quarrelled in their Right, becauſe their Seaſin was given at one place, the Lands and Teinds lying far diſcontigue, and which Seaſin proceeded from a Warrand of Charter and Precept given only by the ſaid *John Stuart*, not confirmed by the King to them; whereas it was Alledged, that no Subject had power to appoint ſuch Unions, or to Diſpone Lands to any other after that manner, ordaining a Seaſin at one place to be ſufficient for all the Lands lying diſcontigue. This Alledgance was Repelled, in reſpect of the Union given to the ſaid *John Stuart*, their Author by the King, and that he gave it to the Purſuer as he had the ſame himſelf; ſo that it was not an Union made by a Subject, but flowed from the King; it being likewiſe Alledged, that the baſe Seaſin given to the Purſuers by *John Stuart*, to be holden of himſelf, could not be a Ground to furniſh Action to the Purſuers (*John Stuarts* ſelf being debarred by Horning) to call for Improbation of theſe Defenders Writs, who were Vaſſals of the Lands as he was, and that one Vaſſal could not have this Action againſt another Vaſſal. This Exception was alſo Repelled, ſeing this Action affirmed the other Vaſſals to have no Right, but that the ſame, if any they had, was falſe; and ſo their Rights falling, the Purſuers remained Proprietars and Vaſſals of the whole Lands. It being alſo Alledged for *Blackader*, one of theſe Defenders, that no Proceſs ought to be granted againſt him for the Writs of the Lands, for the which he was conveened, becauſe his Right flowed from the Earl of *Murray* Regent, who was his Author, and whoſe Heirs of Proviſion, mentioned in his Charter of the ſame, were not called, who behoved to be found neceſſary Parties in this Action tending to evert his Right. This Exception was alſo Repelled, becauſe that perſon was called who was Heir of Line to the Earl of *Murray*, and he who repreſented the Heir of Proviſion concurred and aſſiſted the Purſuit. Actor. *Craig*. Alter. *Belſhes*. *Gibſon* Clerk. *Vid.* for this of the baſe Infeftment, 19 *Feb.* 1630, *Dowglas*, 2 *March* 1627, Heirs of the Lord *Yeſter*. For the laſt part, *vid.* 11 *January* 1628, E. *Marr*.

Agnew contra E. *Caſſils*, *January* 26. 1627.

IN a Reduction of a Decreet of Removing, purſued at the inſtance of *Agnew* againſt the Earl of *Caſſils*, founded upon a Rental of the Lands libelled, given by this Earl of *Caſſils* his Good-fir, to this Reducers Father, by

the which the said umquhile Earl received the said Pursuers Father and his Bairns, Tennents to him in the saids Lands, for payment of a certain Duty particularly expressed in the said Rental; and the said umquile Earl oblig'd himself never to Remove the said *Agnew*, who was this Reducers Father as said is, nor his Bairns from the saids Lands, and oblig'd him to warrand the same to them, for this was the Tenor of the Writ; and in the end of the same it bears these words, *by this Letter of Tack subscribed with my Hand*; whereby he called the samine a Tack, albeit the Body was conceived in the Words and Tenor of a Rental, receiving the Party and his Bairns kindly Tennents, *&c.* in respect of the which Rental, the Pursuer, who was a Bairn, and the eldest Son of the Receiver of the said Rental, Alledged that he could not have been decerned to Remove. The Defender Alledged, that the Rental was Set by the umquhile Earl of *Cassils* in *anno* 1567, to a person particularly therein-named, and his Bairns, which behoved now to be found to be expired and extinct, seing both the Setter and Receiver were deceas'd many years since, and that Rentals ought to last no longer, and the Words adjected thereto obliging the Setter never to Remove the Receiver nor his Bairns, could not extend to oblige the Heirs of the Setters, seing it was personal; for he thereby only oblig'd himself not to Remove: likeas he performed the same, for he never Removed them, but that cannot be found Obligator to bind the Pursuer to the Bairns of the Receiver, the Receiver himself, and the Setter also being both dead long since as said is. And where it was Answered, that the adjection of that Word, *Rentalling his Bairns, and obliging never to Remove them*, behoved to work something. He Answered, that it did work this to them, that if the Father, who was the special Receiver, had died in the Setters Life-time, the most that they could have craved was, that the Setter could not Remove them so long as he lived; but now he being dead, of no Reason or Practique ought it to last against the Setters Heir; for otherways, when this Bairn shall bruik during his Life-time, another of his Bairns may thereafter bruik, which he alledged to be against Law and Practique. This Alledgance was Repelled, and the Rental found sufficient to save the Bairn of the special Receiver of the Rental unremoved during his Life-time. Actor. Alter. *Neilson. Gibson* Clerk. *Vid.* 5 *July* 1625, L. *Aiton*, and the Cases there cited. 15 *March* 1631, E. of *Galloway*.

Cowper contra *Williamson* and *Bog-miln*, *Penult January* 1627.

IN an Action of Adjudication at the instance of a Woman called *Cowper* against *Williamson* and L. *Bog-miln*, whereby the Pursuer craved a Bond of some Moneys made to the Defunct, who was Debitor to the Pursuer, conceived in manner of an Heretable Bond bearing Annualrent, to be Adjudged to the Pursuer for satisfying of the Defuncts Debt, to whom the Defender called in this Process of Adjudication had Renounced to be Heir, as is used in these Cases. The *Lords* found, that this Bond, and the Right thereof, could not be craved to be Adjudged by this manner of Process of Adjudication, in respect that the Defunct had made the Bond and Sum therein-contained Movable, by making Requisition therefore in his own time, whereby it was not Heretable to be sought by Adjudication, but being thereby made Movable, would pertain to the Executors of the Defunct, and come under his Testament, and so might be Arrested or Poynded, or if the Executors of the Defunct should not Confirm it, then the Creditor might Confirm himself Executor, to the effect he might be payed, and that he might seek some other way than by Adjudication. Actor. *Aiton*. Alter. *Mcgill*. *Gibson* Clerk.

Ker

Ker contra Baillies of *Jedburgh*, *Eodem die*.

IN an Action betwixt *Ker* and the Baillies of *Jedburgh*, for payment of a Debt owing to the Pursuer, through escaping of his Debitor out of the Tolbuith of *Jedburgh*, he being there Incarcerate at the Pursuers instance, for not payment thereof, being denunced Rebel, and made Captive therefore. In this Process the Magistrats, and every one of them being desired to be decerned to pay the whole Debt *in solidum*; and two of the Magistrats Compearing, and Alledging, that they ought to be Assoilzied, because they offered to prove, that the third Baillie being in Office, took the Debitor out of Ward, without knowledge of the other Baillies; and as he alone might Incarcerate a Rebel, being charged to do the samine, so he might alone relieve him; and therefore *cum noxa caput sequatur*, they ought not to be answerable for his Fault, whereto they were not accessory, at the least they Alledged that he ought to be first discust. The *Lords* Repelled this Alledgance, for they found, that the whole Magistrats were one Body, and that they ought to be answerable for the Faults committed by any of them in their Office, for the Party might be ignorant which of them did the Fault, and therefore that they ought to compt thereupon amongst themselves, and if any one did the wrong, they had Action of the Law against the Delinquent, who ought to be answerable to the rest for the Wrong after tryal thereof amongst themselves, but that the whole Magistrats stood obliged as said is, to the Party, as one Body: But the *Lords* would not sustain the Action and conclusion of the Summons, whereby every one of the Magistrats was conveened *in solidum* for the whole Debt, but sustained the same against them as an unite Body as said is. Actor. Alter. *Sandilands*. *Gibson* Clerk. *Vid.* 10 *Feb.* 1631, T. of *Innerness*, where the contrair seems to be done.

Mackala contra *Tennent*, *Eodem die*.

IN the Cause decided betwixt *Thomas Mackala* Writer against Mr. *Joseph Tennent*, The *Lords* found, that an Obligation being of this Tenor, *viz. Where the Debitor was bound to pay the Sum therein-contained to the Creditor her self allenarly in her own life-time, and the Annualrent thereof yearly to the said Creditor during that time*; whereupon Inhibition was Execute against the Debitor, and bearing, *that the Sum should pertain to the Debitor after the Creditors decease*. The *Lords* found, that this Obligation and Inhibition was cessable, and might be transmitted by the Creditor effectually in the person of an Assigney, and also that the Assigney, or the Creditor her self might seek payment of the principal Sum from the Debitor, notwithstanding of the foresaid Clause, appointing the Sum to pertain to the Debitor after the Creditors decease, which Clause did not free the Debitor from payment of the principal Sum to the Creditor, or her Assigney, when any of them should seek it, the same being sought in the Creditors own life-time, but not being sought in her life-time, it was found that the Executor or the Heir of the Creditor would not have Right to seek it from the Debitor, in respect of the foresaid Tenor of the Bond; and therefore the *Lords* found no necessity of Caution, to make the Money forth-coming again to the Debitor after the decease of the principal Creditor, seing she or her Assigney might Dispone thereupon at their pleasure. Actor. *Aiton*. Alter. *Stuart*. *Gibson* Clerk.

Scougal contra *Binnie* and others, *January ult.* 1627.

IN an Action betwixt *Scougal* and *Binnie*, and the other Creditors of *Patrick Craig*; the which *Scougal* being assigned by the said *Patrick* to some Debts owing to him, for satisfying of a Debt due to him by the said *Patrick*, and which Debt of the said *Patricks*, he instantly instructed, and therefore craved

payment of the Debt assigned to him; the rest of the Creditors contended, that that Assignation being made by the common Debitor, who is become Bankrupt, and being made that same day upon which he fled, and so done *in meditatione fugæ*; therefore by the Act of Dyvoury, he could not prefer one Creditor to another, but seing the Pursuer hath done no Diligence to make him be preferred to the rest of the Creditors, the Assignation foresaid could not make him be preferred. This Alledgance was Repelled, for the *Lords* found the Pursuer, being a true and just Creditor, might take payment of his true Debt from his Debitor, and so might also take an Assignation for his payment, seing no other of the Creditors had done diligence against the common Debitor by Action or Arrestment, Execute before this Assignation, and that it was not qualified that the Pursuer was *particeps fraudis* with the common Debitor, nor that he was Rebel at any of the Persons Defenders Instances, or at the Horn. Actor. *Belshes.* Alter. *Gibson* Clerk.

L. *Lawriston* contra Tennents, *Eodem die.*

IN an Improbation at the instance of the L. *Lawriston* against the Tennents of *South-houses*, the Evidents made to certain persons Authors to the Defenders, being called to be improven; and the Defenders Alledging that no Process ought to be granted against the Writs, except the appearand Heirs to the persons whose Writs were quarrelled in this Action, were called thereto. This Alledgance was Repelled, seing the Defenders condescended not specially, who the persons were who were appearand Heirs, and who should be summoned, without the which were condescended upon, there was no necessity to Summon them. The like was done before *anno* 1619, in an Improbation betwixt the E. *Winton* contra Lo. *Corstorphin.* Actor. *Mowat.* Alter. *Scot* Clerk. *Vid.* 5 *March* 1630, E. *Wigton.*

Ross contra *Blair*, *Eodem die.*

IN an Action of Spuilzie betwixt Mr. *James Ross* and *Blair*; The *Lords* sustained an Action of Spuilzie founded upon a Tack, which was Alledged to want a Duty, because albeit it bear a yearly Duty, yet thereby the Setter had discharged that Duty for ever to the Tacks-man, seing he allowed it to him for satisfaction of his Bairns-part of Gear, adebted by him to the said Tacks-man, which the Defender Alledged to be alike as if it had not a Duty therein insert, which was Repelled; for the *Lords* found, that this Defender had no competent Interest to propone this; and if the Tacks-man were pursued for the Tack-duty by any who was singular Successor to him who Sett the Tack, that Clause would not liberat the Tacks-man at the hands of that singular Successor, albeit it might militat against the Setter, and his Heirs. *Gibson* Clerk.

Hay contra La. *Borthwick*, *Eodem die.*

IN a Removing pursued by *Walter Hay* contra Lady *Borthwick*, the *Lords* found a Seasin alledged upon for the Defender, being anterior to the Pursuers Seasin, & Compryssing whereon it proceeded, the same being clad with a years Possession, to be sufficient to exclude this Pursuit of Removing; albeit it was Replyed, that the Pursuers Right was clad with real Possession of the Lands controverted, by the space of 6 or 7 years; and albeit the Defenders Seasin was before the Pursuers Right, and that the Defender was a year in Possession; yet seing that Possession was Vitious, the Defender having intruded her self therein, & it not being apprehended by any Legal manner, it could not be a ground, although her Right was first, at her own hand to put the Pursuer out of his Possession, which he had lawfully apprehended by Sentence upon his Right; but she ought to have pursued upon her Right, by some ordinar lawful Pursuit, and not so summarly to take Possession at her own hand, without

without lawful Warrand; which Reply was not sustained. Actor, *Hope*, *Stuart* & *Lermonth*. Alter. *Nicolson* & *Aiton*. *Scot* Clerk.

Scougal contra *Binnie*, &c. *February* 1. 1627.

IN an Action of *John Scougals* mentioned *ult. January*, 1627. the *Lords* preferred the Assigney made by the Bankrupt, where the Assigney had intimat his Assignation, and intented his Pursuit as timously as the other Creditors of the Bankrupt, who had Arrested that same very day of the Intimation of the Assigneys Assignation, and had intented their Actions als timously, the Assignation being made before the Arrestment two days, and the common Debitor being Debitor to the Assigney, before the Debt owing to the other Creditors, and his Term of payment being before theirs, the common Debitor not being Rebel, nor charged by Letters of Horning, the time of the making the Assignation, and the Assigney not being *particeps fraudis*, *quia qui suum recipit non videtur alteri fraudem facere, & l. C. Qui habet rem ex causa lucrativa tenetur Creditoribus Actione Pauliana, licet ignoraverit Consilium fraudulentum: qui vero rem accipit ex causa onerosa non aliter tenetur Creditoribus, quam si fuerit particeps fraudis, l. pen. C. de Revoc. quæ in fraud.*

Somervel contra *Stirling*, *Feb.* 2. 1627.

IN an Action of special Declarator at the instance of *Lewis Somervel*, Donatar to the simple Escheat of L. *Edmiston*, wherein Mr. *William Stirling*, Donatar to his Liferent-Escheat, compeared; The *Lords found*, that albeit the Goods and Gear of the Rebel, which he had pertaining to him at any time, within the space of year and day after the Denounciation, would fall under the simple Escheat; yet if the same were not gifted, that is, if the Gift bear only a *Disposition of the Rebels Goods pertaining to him the time of his Rebellion*, or if it bore, *a Disposition of the Goods pertaining to him the time of granting of the Gift*; in those cases the Gift would extend no further, and would not comprehend any other Goods pertaining to the Rebel, even which he had within the year, except the Gift bear expressly, *a Disposition of all the Rebels Goods which should pertain to him within the year*; which Clause not being insert in the same, the Gift could not comprehend them; and albeit the Gift wanted that Clause, yet the Donatar to the Liferent would not have Right thereto, but there was place to the King and his Officers *de novo* to Dispone the same again to a new Donatar, by way of simple Escheat; and so the *Lords* found, that this Pursuers Gift, which was given in *August*, and bearing specially the Disposition of the Goods pertaining to the Rebel the time of his Rebellion, and of the said Gift, which was granted within the year, could not extend to that whole years Farm, but only to the half thereof, *viz.* to the *Whitsundays* Term before the Gift, and not to the *Martinmas* term after the Gift, seing the Gift was of the foresaid Tenor; but the *Lords* found, that the Farms of the Rebels own Labouring pertained to the Donatar, by vertue of that same Gift; and albeit the Gift was given in *August*, yet that it extended to the whole Farms of that Cropt, which were in the Rebels hands in Mansing, even as if he had died in *August*, not being Rebel, the same would have pertained to his Executors. Actor. *Hope*. Alter. *Gibson* Clerk. *Vid.* 25 *Novemb.* 1626. E. *Kinghorn*. 14 *Decemb.* 1621. *M'math.*

Lo. *Balmerino* contra L. *Lochinvar*, *Eodem die.*

IN an *Action* betwixt the Lo. *Balmerino* and L. *Lochinvar*, the Case thereof was, that Arrestment being made at the instance of the Lo. *Balmerino* in the hands of the Lo. *Burghlie* and *Denn-miln*, of Sums of Money adebted by them to the Lo. *Balfour* in *Ireland*, for satisfying of a Debt owing by him to the Pursuer, for lousing of the which Arrestment, *Lochinvar* having become Cautioner, and

the Debt being declared against the Lo. *Balfour*, for the which the Arrestment was laid on; Now by this Pursuit the Lo. *Balmerino* pursues *Lochinvar*, as Cautioner foresaid, for payment of the Sums Arrested, as said is, and loused by his becoming Cautioner: And in this Process the Lo. *Burghlie* and *Denn-miln* are conveened only for their Interest, nothing being concluded against them, but only that it might be tryed, that the time of the Arrestment they were Debitors to the Lo. *Balfour*, and consequently that *Lochinvar* the Cautioner should pay so much as they were then owing; and the L. *Lochinvar* Alledging, that this Order could not be sustained against him who was a Cautioner only, while the Principal Parties, in whose hands the Arrestment was laid on, were first discuss'd; and that it were first tryed by Process that they were then Debitors to the Lo. *Balfour:* This Alledgance was Repelled, and this same Order of Process sustained, without any necessity of other Precognition, or Process, or first Sentence against *Balfour* and *Denn-Miln*, seing in this same Process the Pursuer was astricted to prove, that they were Debitors the time of the Arrestment to the Lo. *Balfour*, which was found enough, albeit this Summons craved no Decreet to be given against them for that Debt, but only against *Lochinvar* the Cautioner; and found that the said Debt owing by them the time of the said Arrestment, might be proven either by Writ, or by the Oaths of *Burghlie* or *Denn-miln*; albeit it was Alledged, that it could not be proven by their Oaths against *Lochinvar*, but only by Writ; for he Alledged, that they might constitute themselves Debitors by their Oaths, but not to burden him as Cautioner, which was Repelled, in respect of his trust, by becoming Cautioner; and there was less danger in proving by their solemn Oaths, than if they had granted a Bond thereupon in Writ, which they might more easily have done (if fraud were intended) than to Swear by their Oaths; and the *Lords* found, that *Lochinvar* could be Decerned to pay no more than the quantity, which upon their Oaths they should Depone was then resting adebted, albeit more was Arrested: And albeit some was of the mind, that he should be holden to pay the whole Debt Arrested, seing the Arrestment was loused by his being Cautioner, whereby he had undertaken the whole Debt Arrested, and had so ingaged himself *suo facto* therein, which was Repelled by the *Lords*, and found, that in such cases of lousing Arrestments, the Cautioners are only subject to, and in hazard to pay the Sums truly owing at the time of the Arrestments, albeit greater Sums be Arrested. Actor. *Hope*, *Stuart* & *Lermonth*. Alter. *Nicolson* & *Belshes*. *Hay* Clerk. *Vid.* 21 *June*, 1626. Betwixt thir Parties, and what is there noted.

Stuart contra Feuars of *Coldinghame*, *February* 7. 1627.

IN this Improbation at *John Stuart's* Instance, whereof mention is made, *Jan.* 2. 1627. in which the Title of the Pursuit was an Erection granted *anno* 1621, Erecting the Barrony of *Coldinghame* to the Pursuer, with an Act of Parliament then made in his Favours, Rescinding all Acts of Parliament done before that Act, which might prejudge the Pursuers Provision, which he had before, to the Abbacy of *Coldinghame*; and the Defenders Alledging that the Lands of this Abbacy being annexed to the Crown, *anno* 1592, They had acquired Infeftment of their Lands, by vertue of that Annexation, before this Right of Erection granted to the Pursuer, and before this Act of Parliament, which Infeftment preceeding his Right of Erection, was sufficient to exclude the Pursuers posterior Right, that the same could not give him Right to pursue this Improbation, or to seek Production of any other Writs, of the Lands contained in the Infeftment foresaid, made to the Defenders, or their Predecessors, so long as that Infeftment stood, and was not Improven; for they Alledged that the said Infeftment being prior to the Pursuers Title of Erection,

and

and granted to them by the King's *Majesty*, who is *Author* of the Pursuers Right, and so both the Parties Rights being *ab uno Authore*, and the Defenders first, the same was sufficient to exclude the Pursuer, while the said Infeftment were Improven, as said is, and where the Pursuer clad himself with the Title of the Act of Parliament, restoring him against all Deeds done before, prejudicial to his Provision of that *Abbacy*, which he was provided to, before the Annexation of *Coldinghame*; The Defenders answered, that that *Act* ought not to prejudge particular Parties, who were not called thereto; Likeas in that same Parliament, where that Act was made, the Act *Salvo Jure Cujuslibet* was made, which Provides, that other Parties shall not be hurt by such privat Acts. Attour that privat Act of Parliament, in favours of the Pursuer, is but a gracious Rehabilitation, which cannot extend to prejudge other anterior Rights, granted to Parties not called thereto, especially where their saids Rights depend upon a fundamental Law, *viz.* The Annexation of that whole Abbacy to the Crown, which could not thereafter be taken away, in favours of any particular Partie, to the hurt of another, who had acquired Right, conform to that Law, and the said posterior Act being *ex gratia*, as said is, and only Rescinding preceeding Acts, so far as they might be prejudicial to the Pursuers Provision to the Abbacy, which he had of the same, before the Annexation; therefore they *Alledged* that this Provision should be produced, otherwise the Act could not be respected, in the Defenders prejudice; and it was further *Alledged* for one of the Defenders, that he had Right from the Heirs of the Earl of *Dumbar*, of the Lands of which Earl of *Dumbar* was Infeft therein, after the said Annexation; Likeas by a special Act of Parliament before the Pursuers Act of Parliament and Erection, the same Lands were specially dissolved from the Crown, and disponed as said is, whereby they ceased to be a part of the Abbacy, and consequently the Pursuer can have no Title nor Interest, to call for Production of the samen; All thir *Alledgances* were Repelled, and the Pursuer was found to have good Interest, by vertue of the said Erection, and Act of Parliament, to call for Production of the Writs of all the Lands, and others contained in his said Erection, seing the said posterior Act did restore him against all other preceeding Acts, done in his prejudice; neither was he found to be excluded from this Pursuit, by the preceeding Infeftments granted to the Defenders, depending upon the Act of Annexation, Because this case in Prelacies, and Kirk Benefices is found by the *Lords*, to differ from Cases betwixt Laicks, in Secular and Temporal Lands, where usually a Right of the Defender, before the Pursuers Right, excludes the Pursuer from seeking of Production of any further, while that be Improven, but in Lands belonging to Benefices it is not so, where a Titular or Prelat, or Lord of Erection, who comes in the place of the Prelat, is not debarred to seek Production of all Writs, of any thing belonging to his Benefice, albeit the Party should show a Right given to him by another Prelat, before the Provision granted to that Pursuer; but here it is to be considered, that this Pursuit was for Production and Improbation, and touched not upon that point, if the saids Infeftments Alledged upon by the Defenders were sufficient, whereby to bruike the Lands, or not, or if the Pursuers Right was better than their said Right, which point was not here drawn in Question in this Disput, but reserved to its own time. Actor. *Stuart* & *Aiton*. Alter. *Nicolson* & *Belshes*. *Gibson* Clerk. *Vid. July* 25. 1623. E. *Nithisdale*, *penult June* 1627. *John Stuart*. *March* 28. 1623. E. *Lauderdale*.

Ker of *Ancrum* contra Heirs E. *Louthian*, *February* 8. 1627.

IN an Action betwixt Sir *Robert Ker* of *Ancrum* contra the Heirs of the Earl of *Louthian*, containing a special Declarator, and Accessor to a preceeding

general Declarator, and concluding in the Summons, delivery of a Tack, for Production whereof, one was called as haver, and who produced the Tack called for. The *Lords*, nevertheless that the Tack was produced, yet because the Summons concluded delivery, found that the same should abide continuation, seing the Defenders, who were principal Parties called, declared they would not Compear. Actor. *Hope*. Alter. *Belshes*. *Hay* Clerk. *Vid. Nov.* 8. 1626. L. *Prestongrange*.

Mcduff contra *Mculloch*, *February* 9. 1627.

IN a Suspension betwixt M*duff* contra M*culloch*, against a Contract Registrat in the Books of an Inferior Judge, by the consent of a Procurator, for one of the Parties Contracters, the other Partie neither having subscribed the Contract, nor yet being Registrat for him; The *Lords*, nevertheless sustained the Registration, and Charges raised against him, for whom consent was given, the other party compearing instantly in this Judgement before the *Lords*, and subscribing the Contract, and consenting that Execution be granted against him, sicklike as if it had been also Registrat against him *ab initio*. Actor. *Nicolson*, Alter. *Belshes*. *Gibson* Clerk. *Vid. March* 16. 1627. *George Bruce*.

Craufurd contra *Craufurd* and *Kniblo*, *Eodem die*.

IN an Action of Double Poynding, at the Instance of *Malcolm Craufurd*, who was adebted to another *Craufurd* the Sum of 260 Merks, and this *Craufurd* being adebted to *John Kniblo* Burges of *Edinburgh* in a Debt; for payment of this Debt *Kniblo* Arrests the foresaid Sum in *Malcolm Craufurds* hands, and *Malcolm* having confest that he was owing that Sum to *Craufurd* this Creditor, but that he had given his Obligation to his said Creditor thereupon, a blank in the Name, to be filled up with any Persons Name, whom his Creditor pleased to Insert; And that he had understood sensyne, that there was Insert therein the Name of *Andrew Craufurd* of *Baidland*, who being called to this doudle Poynding, the Suspender is content to pay to any of the Parties, who shall be found to have Right; and *Baidland* Compearing, and Alledging that the Sum should be found to pertain to him, because his Name was Insert in the Bond; for albeit he had neither Borrowing nor Lending with this Suspender, yet seing his Name was in the Obligation, and that nothing Interveened which could prohibit *Craufurd*, to whom the Sum was owing truly to fill in his Name, nor to have given the Sum to him, albeit it had been filled up with the Creditors proper Name, therefore he ought to be preferred; *Kniblo* on the other part contended, that the Suspender confessing, that the Sum was due and proper to his Debitor, albeit the Bond was blank, and that he had Arrested the same as his Debitors Money, in the Suspenders hands, at which time of the Arrestment the Blank was yet unfilled up, that then it was his Debitors Money still, thereafter the filling up of another Persons Name in the Blank by his Debitor, after the Arrestment which affected it to him, cannot prejudge him, which filling up, since the Arrestment he offered to prove by the Witnesses Insert in the Bond. The *Lords* found, that after the Arrestment, nothing could be done to the prejudice of the Creditor Arrester, by filling up thereafter of a Person in the Blank, by him who was the Arresters Debitor; and so the *Lords* found the Arresters Alledgance Relevant, that since the Arrestment *Baidland's* name was Insert therein, but found that the same was only Relevant to be proven by *Baidland's* Oath, and not by the Witnesses Insert therein; for they could not take away the Obligation from *Baidland* by Witnesses, but by his own Oath, and this being so proven. The *Lords* found, that *Kniblo* should be preferred; but if it had been Alledged that the Bond, albeit blank, had been really delivered to *Baidland* before the Arrestment to his own use, that would have been

been found Relevant againſt the Arreſter, and the Inſerting of his Name therein ſince the Arreſtment would not have been enough to prejudge him thereof. Actor. *Belſhes.* Alter. *Mowat.* *Gibſon* Clerk.

Donatar of *Stuarts* Liferent contra Debitor, *February* 10. 1627.

IN a ſpecial Declarator of a Donatar to the Liferent of *John Stuart* of *Coldinghame* againſt a Debitor, The *Lords* found no neceſſity to produce the Horning in the ſaid Declarator, after the general Declarator, albeit that he Alledged, that the Horning ought now to be produced to him, that he might ſee the ſame, and oppone againſt it, which Alledgance was Repelled. Actor. *Craig.* Alter. *Belſhes.* *Gibſon* Clerk.

Roſs contra *Roſs*, *February* 13. 1627.

IN an Action of *Roſs* contra *Roſs*, whereby the Purſuer craved a Minut, and Note of an Inſtrument of Reſignation, Written upon the back of a Procuratory of Reſignation, made in favours of the Purſuer, and which Minut was written by umquhile *John Roſs* Writer, to be extended, and put in Form, as if the Writer had been on Life, and had Extended and delivered the ſame in Form to the Purſuer, in his own time, at the leaſt, to hear that Minut tranſumed, and the Tranſumpt thereof Extracted by the Clerk of Regiſter, and his Deputs, and to be als forceable, as if it had been Extracted by the Nottar, and put in Form in his Lifetime; In this Proceſs the Party, who ſubſcribes the Procuratory of Reſignation was living, and called, and compeared not; this Summons being adviſed with the *Lords*, the firſt part of the deſire thereof was refuſed; for the Nottar being dead, they found that no other could Extend the ſame; But that Part anent the Tranſuming of the Minut, as it bore, according to the Tenor thereof, without alteration, was ſuſtained, as it was written by the Nottar. Actor. *Nicolſon*, the other Party being abſent, *Hay* Clerk.

E. *Linlithgow* contra *Menzies*, *Eodem die*.

IN an Action of Spuilzie of Teinds, by the E. *Linlithgow* againſt *Menzies* of *Culterawis*, The *Lords* found an Exception Relevant to Elide the Spuilzie proponed upon payment made by the Defender, at command of the Chamberlain, to the Purſuer, to the Miniſter of the Parochin, of the old Duty, the Year lybelled, which was in uſe to be payed to the ſame Miniſter, for the ſame Teinds, the Years preceeding, at command of this ſame Chamberlain, he being ſtill Chamberlain, the ſame Year lybelled, which was found Relevant, notwithſtanding that the Purſuer Replyed upon an Inhibition, execute the Year immediately preceeding this Year lybelled; And which he Alledged, did interrupt the Alledged uſe of payment, notwithſtanding whereof the Exception was found Relevant, ſeing there was no Inhibition execute this Year controverted; neither was it found neceſſar to the Excipient, to Alledge that the Chamberlain had warrand from the Purſuer to appoint the ſaid payment, or that it was made of the Purſuers Allowance; For the Purſuer Replyed, that without that were Alledged, it could not be ſuſtained, that the Chamberlain might more prejudge his Maſter in a Spuilzie, than he might prejudge his Maſters warning, by receiving of Durie after the ſame, without the Maſters allowance, which was Repelled, and the Exception ſuſtained, *ut ſupra*. Actor. *Stuart.* Alter. *Gibſon* Clerk. *Vid. Feb.* 22. 1628. Lo. *Loudon.* *March* 23. 1622. Lo. *Gairlies*.

Samuel contra *Samuel*, *Eodem die*.

IN an Action betwixt *Samuel* and *Samuel*, for payment of a Tack-duty contained in a Tack Set by *John Forreſter*, Heretor of the Lands Sett in Tack, and which appointed the Duty thereof to be payed to the Purſuer, being a Creditor to the Setter, and which Duty was payed divers years of the Tack

to the Pursuer; The Heretable Right of the Lands being thereafter within the years of the Tack, Compriſed from the Setter of the Tack, which Compriſer compeared in this Proceſs, *viz.* the Lo. *Corſtorphin*, and claimed the Duties of the Tack to pertain to him, by the Right of his Compriſing of the Lands; the *Lords* found, that the Compriſer had Right to the ſaid Tack-duty of the years ſince his Compriſing, and not this Purſuer, notwithſtanding that the Tack expreſly bore, and appointed the Duty to be payed to him; and albeit it had taken effect by Poſſeſſion; for albeit the Compriſer, during the ſpace of the Tack, the ſame being Sett, as ſaid is, before the Compriſing, could not remove the Tacks-man, yet he had Right to the Tack-duty, ſeing the Setter of the Tack could not appoint the Duty to be payed to no other perſon effectually, ſo as it could laſt longer than he himſelf remained Heretor, and his Right being Compriſed from him, the Duty could not pertain to that perſon to whom he had appointed the payment thereof to be made, after his own Right was taken from him. This Cauſe being thereafter called 27 *Feb.* 1627. the contrair hereof was found, and the Tack-duty found due to him, to whom the Tack was appointed to be payed; which was *de novo* done over again in favours of the Tacks-man and Purſuer. Actor. *Stuart.* Alter. *Hay* Clerk. *Vid.* 13 *Decemb.* 1628. *Huntley* contra *Hume.* 11 *July* 1627. *Wallace* contra *Harvie.* 28 *Novemb.* 1635. *Moriſon.*

Kneeland contra *Baillies* Relict, *Eodem die.*

IN an Action for the Regiſtration of a Bond by one *Kneeland* againſt the Relict of *Baillie*, who was Maker of the Bond; ſhe being conveened as Intromiſſatrix with the Defunct's Goods, The *Lords* ſuſtained the Action againſt her as Intromiſſatrix, notwithſtanding that ſhe Alledged, that there was Executors Confirmed to the Defunct, long before the Intenting of this Cauſe, ſeing the Bairn was Confirmed Executor, and the Teſtament was given up by her ſelf; and that ſhe made Faith, and cauſed find Caution in the Teſtament, & that the particulars which were condeſcended on, to have been intrometted with by the Defender, before the ſaid Confirmation, were not given up in Teſtament; which neither being given up, nor Eeked ſince, diſcovered a Fraud upon her part, and ſo the Action was ſuſtained againſt her *hoc nomine*, & found it not neceſſary to put the Purſuer to take a Dative *ad omiſſa:* Alſo they found, that the ſaid Intromiſſion being proven againſt her, it ſhould import Decreet againſt her, as univerſal Intromiſſatrix, and for payment of the whole Debt, and not to that effect allanerly, to make the Goods intrometted with forth-coming to the Purſuer *pro tanto*, for payment ſo far as the ſaids Goods would amount to; but that albeit the ſame could not ſatisfie the whole Debt, yet that ſhe ſhould pay the ſame as univerſal Intromiſſatrix, in reſpect of her foreſaid fraudulent omiſſion to give up the ſame. Actor. Alter. *Sandilands.* *Gibſon* Clerk. *Vid.* 18 *March* 1624. *Barbara Cant*, and the other Caſes there cited.

La. *Borthwick* contra Vaſſals, *Eodem die.*

IN an Improbation at the Lady *Borthwicks* inſtance, againſt the Vaſſals of the Lo. *Borthwick*, The Lords found, that the Certification granted againſt the Writs not produced, Decerning the ſame to make no Faith for not production, could go no further than the Purſuers own Intereſt, which was her Infeftment of Liferent, and therefore reſtricted that Certification, that the Writs ſhould make no Faith againſt her, to be any impediment to her to bruik the ſaids Lands during her lifetime allanerly; and found that albeit the ſaid Certification was ſo granted againſt the foreſaids Writs, in her favours, as Liferentrix, yet that the ſame ſhall not be profitable to work in favours of the Fiar, or Heretor of the ſaids Lands, but that notwithſtanding thereof, theſe ſame Writs

Writs might be used against the Heretors, and should not be prejudged by that Certification, in case he should ever claim any benefite thereby, seing they were not Decerned to make no Faith at his instance. In this same Proces also the *Lords* found, that where a person who hath acquired Right *ex titulo particulari* from a stranger, to any Lands, and calls for Production and Improbation of Writs made by that person, Disponer of the Land to that Pursuer, as singular Successor to him, and calls also for Production of the Writs made by this Acquirer, and Pursuers Father, Good-sir, Grand-sir, and others his Predecessors, to whom he may be Heir to the persons called in that Action, before the time of the acquiring of his said Right from the stranger *ex titulo singulari*; yet *hoc casu* such Actions ought not to be sustained, except the Pursuer be Heir to his Father, or to that Predecessor who preceeded immediatly the time of his acquiring of his said Right, as singular Successor to a stranger, and from whom the Rights are Libelled to flow, which he quarrels; neither was it sustained, tho it was Replyed, that the Father of the singular Successor in the Right of the Lands was Infeft therein, and so he had reason to call for production of Writs made by him, except he had also Eeked thereto, that he was Heir to his Father, who was so Infeft; and consequently this Pursuit moved by the Lady *Borthwick*, upon her Husbands Right of Liferent made to her by him, who had acquired his Right from the Earl of *Lothian*, who had Compriſed the samine, and whereby he became singular Successor, and whereby the course of his Succession to his Predecessors and Progenitors in these Lands was interrupted, was not found a sufficient Title, neither to her, nor her Husband, if he himself had been living, and pursuing this Improbation, for improving of the Writs made by his Father, except he had been Heir to his Father: Albeit it was Replyed, that his Father was infeft in the Lands, seing the Compriſing deduced against the Pursuers Husband, as lawfully Charged to enter Heir to his Father, and for his Fathers Debts, was an Interruption of the course of his Succession in his Fathers Right, *ut supra*. Actor. *Nicolson*. Alter. *Hope* & *Lermonth*. *Hay* Clerk. *Vid.* 14 *July* 1626. Sir *John Hamilton*. 5 *March* 1630. E. *Wigton*.

Pyrnon contra *Ramsays* Executors, *February* 14. 1627.

IN an Action at the Instance of one *Pyrnon* a *Frenchman*, against the Executors of umquhile *Patrick Ramsay*, for payment of certain Wines sent to the said umquhile *Patrick* by the Pursuer, conform to a Letter written and sent by the said *Patrick* to the said *French-man*, giving him Commission to buy the saids Wines to his use, and to send them to him. The *Lords* found that the Pursuer could not have Action upon the said missive Letter, containing the said Commission, except that he proved that the whole body of the Letter was *Holograph*; and found it not sufficient, that the said Pursuer offered to prove that the Subscription thereof was the said umquhile *Patricks* hand Write, except it had been proven also, that the whole body was Written by him: Neither was it respected that the Pursuer contended, that there was no necessity, that the same should be all *Holograph*, being truly Subscribed by him, and that he might cause any other Write the same by his Ditement, otherwise no Write should have Faith, betwixt Factor and Merchand, except that the same were Written by the Parties own Hand, which were a great inconvenience, tending to take away all Trade and Credit betwixt Merchands and Factors, for many times Merchands that cannot write well, will direct Letters to their Factors, and will put to their Mark to the Letters; and it were hard that sicklike Letters should not be Warrand to them that answers them, specially where the Wares written for are truly sent and delivered, conform to the desire of the Letters, as in this case controverted, where the delivery of the Wines written

for by the Letter, and the price whereof was now acclaimed, was offered to be proven by the Ticket of Entry written in *Burdeaux*, and Subscribed by the Skippers, in whose Ships the Wine was Transported, and by Tickets of Entry of the same Wines in the Custom Books of *Leith*, Subscribed by the said *Patrick Ramsay*, and by the Obligation given and Subscribed also by the said *Patrick*, obliging him to pay the Custom for the saids Wines, wherein he granted that the same was Entred in his name, and to his behove, all which the Pursuer contended, proved the Defuncts Receipt of the Wines, so that there was no necessity to prove the Letter *Holograph*. All which was found by the *Lords* not to be sufficient, to produce this Action for the prices of the Wines, except it were proven, that the whole Letter was *Holograph*, which they found necessary to be proven, otherways that the Pursuer had no Action in this Process: Also the *Lords* found that the Pursuit made at the strangers instance, could not be Sustained, being pursued in his own name, he not being present, without a Procuratory were made by him, and Caution were also found *de rata &c.* which Procuratory and Caution they ordaind should be found *in ingressu litis*, before the Defender could be compelled to Dispute; and found it not sufficient that Caution was offered before Sentence, or when *Litiscontestation* should be made. Actor. *Nicol* & *Belshes*. Alter. *Hope* & *Lermonth*. *Gibson* Clerk. *Vid. February* 9. 1628. *Gerard Kirkhead. July* 12. 1632. betwixt thir parties.

E. *Cassils* contra *Mcmartin*, *Feb.* 15. 1627.

IN a double Poynding at the instance of Earl *Cassils* against one *Mcmartin*, *Andrew Cowper* Writer, and *Schaw* of *Grinock*, who had all Charged the Earl to receive and Enter them in certain Lands, which they had Comprysed from the persons Charged to Enter Heirs to umquhile *John Crawfoord* of *Skeldoun*, their Debitor, and which were holden of the Earl: The *Lords* found *Andrew Cowper* and *Schaw* of *Grinock*'s Compryings to be null in this Double-poynding *etiam ope exceptionis*, without Reduction, because after the Sentence given against the Daughters of the said umquhile *John Crawfurd*, as lawfullly Charged to Enter Heirs recovered at their instances, there was not a special Charge Execute by them, Charging the saids persons, against whom the said Sentence was given, to Enter Heirs particularly to the Lands Compryed, without the which special Charge, and that the same had been Execute, and raised after the said Sentence: The *Lords* found, that the said Compryings could not be Deduced, neither was the said Compryings Sustained, albeit the Parties Compryers Answered, that they had used a special Charge before the Compryings, which they also produced by and attour the general Charge to Enter Heirs, whereupon the Sentence proceeded, because that special Charge was Execute, and raised also before that Sentence, which the *Lords* found could not be a Ground whereupon the said Compryings could be Deduced, seing it ought to have been Execute, as said is, after the Sentence, and before the Compryings, as the inviolable Use and Custom is in the like cases; for that special Charge is a part and preparation for the Execution of a Sentence, and so cannot preceed the Sentence, therefore the Compryings following thereon were found null, *ut supra*. Actor. *Nicolson*, *Mcmartin* per *Miller*. Alter. *Hay* Clerk. *Vid*, betwixt thir parties, *February* 24. 1627. & *January* 29. 1635. L. *Balnagoun*.

Cunninghame contra *Rosse*, *Eodem die*.

IN a Suspension of *William Cunninghame* against *John Rosse*, who being Assigney made by Mr. *Matthew Crawfoord*, had Charged the said *William* for payment of some Money adebted by him to the Cedent, for the price of some Lands, bought from the Cedent by the Suspender, and which he Alledged in his Suspension he had lawful cause to retain against the Assigney, seing the Cedent in the

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Contract of Alienation of the saids Lands had Disponed the Farms of that Cropt, the year of the Alienation, which were nevertheless uplifted and intrometted with by himself, the quantity price and intromission whereof he referred to the Oath of the Cedent, and who now being *non solvendo*, the same was Alledged ought to be received against the Assigney, and that he ought not to be prejudged by the said Assignation made to his prejudice, seing as it would meet the Cedents self, the none Liquidation, and all being Elided by the referring to his Oath, so ought the same to be admitted against the Assigney. The *Lords* found that the Cedents Oath could not be taken against the Assigney therefore; seing the Debt was not liquidat against the Cedents Self, & they ordained the Money (for the same was Consigned in the Suspension) to be given to the Assigney, he finding sufficient Caution to repay the same to the Suspender, whensoever the Cedent should be Constitut lawful Debitor to the Suspender, in the liquidat Farms foresaids, Disponed to him in the said Contract, and when his Intromission therewith should be lawfully tryed; for the making of the Assignation by the Cedent, who was become *non solvendo*, was not found to be sufficient, to prejudge the Suspender of his Execution of that head of the Contract, wherein the Cedent was obliged to him, Inhibition being also Execute by the Suspender thereupon against the Cedent, before the making of the said Assignation. *Hay* Clerk. *Vid. January* 11. 1627. *Barclay*, and the Cases there cited.

Paton contra *Caddel*, *Eodem die*.

IN a Reduction betwixt *Paton* contra *Caddel*, the Case whereof was, that *Paton* having Compryfed the Liferent Right, which was in the person of one *Agnes Hume*, and having recovered Decreet for payment of the Duty of the Annualrent, whereof she had that Liferent; thereafter *William Caddel* Son to the said *Agnes Hume*, and Heretor of the said Annualrent, whereof his said Mother was alledged Liferentrix, obtained this Liferent-right Reduced for none production; the Liferentrix being called, and also *Paton* being called, who had Compriſed the samine; this Decreet Reductive being desired to be Reduced by the said *Paton* the Compriser, upon a reason bearing, that the Son could never have reduced the Liferent-right made to his Mother, because he was Heir to his Father, who by Contract was obliged to give Infeftment to his said Mother, of as much Land or Annualrent, as the Annualrent Contracted did extend to; so that he could never desire her Liferent-right foresaid to be Reduced, upon pretext of Minority and Læsion, as if he had been hurt by making of that Liferent to his Mother, he being Minor when he made the same (for this was the reason of his Reduction) seing in effect he being obliged of the Law, by this preceeding Obligation of his Fathers, he could not seek Reduction, and so it could not be Collusion betwixt him and his Mother, to take Decreet for non-production, to prejudge this Compriser thereby, who could not *per rerum naturam* have the Writs which were among themselves, and which they would not produce; this reason was found Relevant in favours of this Compriser: albeit the Defender Alledged, that his Decreet Reductive, could never be Reduced, except the Writs called for in his Reduction, had been first produced, for the production ought to be satisfied, before he could be compelled to dispute upon his reason; and if they were Reduced for non-production, yet that was this Parties own fault, who might have compeared, and used Incident against the Liferenter, or others havers of the Writs called for, which not being done, behoved to be her own fault, and Militat against her; which was Repelled, and no necessity found to her to satisfie the Production. Actor. *Fonlis*. Alter. *Scot* Clerk.

Lo. *Sempill* contra *Blair*, *Feb.* 16. 1627.

IN an Action at the instance of the Lo. *Sempill*, against *Blair* of *Halve*, for payment of the Blench-duty of a Stone of Wax, and a Pound of Pepper, for these Lands contained in his Infeftment, acclaimed by the Pursuer as Heir to his Father, who was Infeft in the Lands, and to whom the same was unpayed divers years in his lifetime. The *Lords* would not sustain this Pursuit for the years owing to the Pursuers Father, albeit he did shew that his Father was Infeft, and that he was Retoured Heir to him, but sustained the same Pursuit allanerly, for the years since the date and time that the Pursuers self was Infeft in the Land. *Item*, In this Proces the *Lords* found, that where Infeftments are granted of Lands, for payment of a Blensh-duty therein contained yearly, with this Clause, as use is in many Infeftments of this Tenor, *viz. Si petatur tantum, pro omni alio onere*, &c. That albeit the Clause bear not that word, *tantum*, but only *si petatur*, In such cases, that the Vassals cannot be conveened by their Superiors, for payment of the said Blensh-duties, except that the Superior make Requisition to the Vassals yearly, either before the Term of payment, prescribed by the Infeftment, or upon the very day of the Term for payment of the famine; and if the same ly over thereafter one year, or moe years, no Requisition being yearly made to pay the same upon ilk Term, or before the Term, to pay at the Term, as said is; in such cases, that the Superior shall never be heard to pursue his Vassal thereafter for payment thereof, in respect of the said Clause *si petatur*, which astricts the Superior to an yearly timous Requisition; And the *Lords* found, that the Blensh-duties were not adjected as any profitable Rents to the Superior for the Lands; as in the instances for paying of White or Red Roses, but was adjected as Recognizances of the Superiority, and ought not to be regarded as in Feu-Infeftments, which had *Annuum Canonem præstandum* and found that thir Blensh-duties were to be respected as personal Annual Prestations, as of Services yearly, which if they were not required yearly to be done, as in Leading of Corn or Hay in Harvest, or Leading of Peets after these years, they could not be craved. The like was done 18 *January* 1611. Betwixt the Bishop of St. *Andrews* and one *Galloway*. Actor. *Hope* & *Mowat*. Alter. *Cunninghame* & *Scot*. *Gibson* Clerk. *Vid. Penult. Jan.* 1624. L. *Carnousie*.

Lo. *Colvill*, contra *Herd*, *Eodem die*.

IN a Suspension of the Lo. *Colvill* against Mr. *Walter Herd*, who was Residenter and dwelt with his Family in *Vezon* in *France*; and who as Served and Retour'd Heir to his said umquhile Father, craved Payment of an Annualrent out of the Lo. of *Colvills* Lands, wherein his said Father died Infeft, and against *Christian Herd* Sister to the said Mr. *Walter*, who was Retoured Heir to her Father, in the same Annualrent also, before the said Mr. *Walters* Retour, and who had thereupon obtained two Sentences before the *Lords*, against the Suspenders, and so the Brother and Sister craving the Right thereof, the Sister in respect of her Prior Retour standing and Sentences foresaids, which she Alledged should give her preference, while the same were Reduced, seing also she produced a Note of an Sentence of Excommunication against her Brother for Papistry, whereby she Alledged, that he could enjoy no benefite within the Kingdom: And the Brother contending that seing he was Retoured Heir, and had of the Law the Preference to Females, the Excommunication should not Debar him from his Civil Right, and the Right due to him by Nature, seing there was also produced for him a Testificate Subscribed from the Magistrats of that Town where he remained, bearing him yet to be living, and that he had Wife and Children, begotten in Lawful Matrimony. The *Lords*, Notwithstanding of the Excommunication and prior Retours and Sentences Alledged for the Sister, Preferred the Brother without

necessity

necessity of Reduction, and found that he ought to be Answered in this Right; and if he was Excommunicat, his Right would Accresce and pertain to the King, and not to the Sister, *ex casu*. Actor. *Primrose* & *Bruce*. Alter. *Gibson*, Clerk. *Vid.* 14. *Decem.* 1627. *Beg* contra *Gemmil*, *Feb.* 10. 1636. *Murray*, *Feb.* 2. 1632. *Murehead*.

Lawson contra *Kello*, *Eodem die*.

IN an Action at the instance of *Lawson English*-woman against *Bartol. Kello*, for payment of a Sum contained in an *English*-Bond, made by the Defender to the Pursuers umquhile Husband who was Citizen of *London*, and which the Pursuer claimed, as Executrix nominate to her Husband by a Testament confirmed in *London*. The *Lords* sustained the Action at the instance of the said Executrix, and her Procurators constitute by her, to pursue upon that Bond and Testament, albeit there was no special Inventar given up, nor contained in the said Testament, the Pursuer proving that the Form of *England* was to Confirm Testaments in that manner, and that the same would furnish Actions to the Executors of the Defunct against their Debitors, albeit no special Inventar, nor particular mention of the Debt acclaimed were in that Testament, the Pursuer showing the Bond to qualifie the Debt, and that she was confirmed Executrix to the Defunct; which the *Lords* found sufficient, this being proven, or otherwise they sustained the Pursuit, the Pursuer finding Caution to warrand the Defender of this Debt at all Hands, who might claim the same from him, the option of the which two, *viz.* either to prove the Custom, or to find the Caution they gave to the Pursuer, and that one of them should suffice to sustain the Action, and this *English* Testament was sustained to produce this Action at an *English*-womans instance in this Realm; albeit it was Alledged, that no Writ could produce Action in this Realm, which dissented from the Form of Writs allowed and required by the Law of the Kingdom where the Pursuit was made, which was Repelled, Caution being found *ut supra*. Actor. *Mowat*. Alter. *Lermonth*. *Hay* Clerk: *Vid.* 9 *Decemb.* 1623, Col. *Hendersons* Bairns.

Simpson contra L. *Balgonie*, *Eodem die*.

IN a Transferring at the instance of *David Simpson* Burgess of *Dysert* against the Laird of *Balgonie*, as Heir to his Father. The *Lords* found a Service produced to verifie the Defender to be Heir, to be sufficient, albeit it was not Retoured to the Chancellary, because it was used to prove *passive*; and also found the Exception against the same to be Relevant *hoc loco*, without Reduction or any other Process, but to be received as a Nullity by way of Exception, *viz.* that the same was null, being a Service done in his Minority, without consent of his Curators, he then having Curators; which Nullity was received *ope Exceptionis*, albeit it was Alledged, that it was a Sentence which ought not to be Reduced, because it was done to his Utility, and by his own personal Compearance the time of the Service, which was Repelled. Actor. Alter. *Aiton*. *Hay* Clerk. *Vid.* 7 *Decemb.* 1621, L. *Balgony*.

Bothwell contra *Oliphant*, *Eodem die*.

IN an Action at the instance of *Adam Bothwell* against Mr. *John Oliphant*, for the Subscribing of a Contract and Registration thereof, whereby the Lands of *Burghtown* being sold by *Alexander Mowat* to the said Mr. *John*, and *Adam Bothwell* being a Contracter therein, for all Right he had to these Lands, in a Clause thereof, *Margaret Crawford* who was Tercer of her Terce of the said Lands, is set down to have disponed her Terce to the said Mr. *John*, with consent of the said *Adam*, who hath not subscribed the Contract, but only *Adam* who is nominate in that Clause to be a Consenter with her; and there-

fore the said Action being for Subscribing that part of the Contract, whereby Mr. *John* is oblig'd to pay the yearly Duty specified in the Contract for her Terce; the said Mr. *John* contended, that seing she had not subscribed the same, he had place for Repentance, and needed not to subscribe the Contract, to be thereby oblig'd to pay the Terce-duty, but might lawfully Refile. This Alledgance was Repelled, seing *Adam Bothwell*, albeit in that Clause he was nominate only Consenter with the Lady Tercer, yet he was repute a principal Party, in respect at the beginning he was named a special Party-Contracter, for all Right which he had to the Lands; and seing he did shew where the Lady Tercer had disponed her Right to him, before that Contract libelled, to whom he was oblig'd to pay that same Duty, which Mr. *John* was oblig'd to pay to her; and seing he had subscribed the said Contract, therefore the *Lords* found, that the said *Adam Bothwells* Subscription was sufficient to inforce Subscription, and also Registration against the said Mr. *John*, to the effect he might relieve the said *Adam* of paying of the said Duty; and they ordained the said *Adam* to Dispone the said Right of Terce to the said Mr. *John*, in any lawful manner he pleased, beside and after the Disposition contained in the Contract, and so sustained the Action, albeit the Tercer had not subscribed the Contract, which they found not necessary, nor to be any impediment to liberate him from Subscription. Actor. *Lawtie*. Alter. *Stuart*. *Gibson* Clerk.

Wilson contra *Lindsay*, *February* 17. 1627.

IN an Action of *Wilson* against *Lindsay*, for Removing from a Waste-Ground and some Lime-Pots and Houses. The *Lords* Repelled an Exception proponed upon the Defenders own Infeftment of these same Lands, and his Authors Infeftment likewise standing clad with 40 years Possession, because the Pursuer qualified a more pregnant Possession in his own Person of these same Lands, by Setting of the Houses, and receiving yearly Mails therefore, and by Barking of his Skins in the Lime-Pot continually, and spreading and drying them upon the Waste-Ground without Interruption; which the *Lords* sustained in fortification of the Pursuers Right, to produce Removing against the Excipient in this same Judgment, without necessity of any Reduction of the Excipients Right. Alter. *Craig*. Alter. *Gibson* Clerk. *Vid. Quod sequitur* in *William Dowglas* Case, & 18 *Novemb.* 1624, L. *Lagg*.

Dowglas and *Stuart* contra Tennents, *Eodem die*.

IN a Removing of *William Dowglas* and *John Stuart* against the Tennents of *Aymouth* and *Coldinghame*, an Exception being proponed by *Hume* of *Nynwells* upon his Heretable Infeftment, as Heir to his Good-sir, who was Infeft as Heir to his Brother, who was Infeft by the Laird of *Bamff*, who also was Infeft and in Possession conform thereto these 40 years by-past. This Exception was Repelled in this Judgment Possessor, because the Defender Alledged not, that either his own nor any of his Predecessors Infeftments were confirmed, the same being Kirk-Lands; and it was Repelled, where the Excipient Alledged, that in this Judgment he ought not to Dispute upon the validity of his Authors Right, after so long Possession. Actor. *Craig* & *Stuart*. Alter. *Nicolson* & *Belshes*. *Gibson* Clerk. *Vid.* the Case preceeding, & *Penult January* 1628, *John Stuart*.

Gardin contra *February* 20. 1627.

IN an Action of *Adam Gardin* Litster against for the Mails and Duties of a Tenement, whereto he had Right by vertue of a Comprysing and Infeftment following thereupon, the Defender clothing himself with a Tack of the said Land, Set to him by that person from whom the Lands were comprysed. The *Lords* preferred the Compryser, Infeft as said is, to the Tacksman, because

becauſe the Tack was Set after the Compryſing deduced, which could not be done in prejudice of him, who had Compryſed the Land from the Setter of the Tack before the ſetting thereof; neither was this Duply reſpected, that the Compryſing was deduced for a ſmall Sum, far within the worth of the Lands, and ſo that the Defender Alledged, that the Tack and his Compryſing might both ſubſiſt, his Tack being Set to him until the time the Sum adebted to him by the Setter was payed, for payment of the Duty therein-contained, and the Land Compryſed being far more in value and worth than both the Parties Sums; ſo that it were againſt Equity to prejudge the Excipient of his Sum, which he could never have, if his Tack ſhould be made unprofitable to him; which was Repelled, ſeing if the Compryſing was for a little Sum, another Creditor might eaſily Redeem the Land. *Actor. Kay. Alter.* *Gibſon* Clerk.

Biſſet contra *Biſſet*, *Eodem die.*

IN an *Action* of *Biſſet* againſt *Biſſet*; The *Lords* ſuſtained the Purſuit at the inſtance of an univerſal Legatar, nominate in the Defuncts Teſtament, againſt the Intromettor with the Defuncts Goods, which were ſpecially acclaimed, as coming under the Legacy; and Repelled the Exception proponed for the ſaid Intromettor, whereby he *Alledged*, that no *Action* could be ſuſtained againſt him as Intromettor, ſeing there was Executors confirmed to the Defunct before the intenting of this Purſuit, againſt whom the Legatar had only properly *Action* competent to him, and which Executors had only properly *Action* againſt the Intromettors, and not the Legatars; for he *Alledged*, that albeit of the Law, Legatars had *rei Vindicationem*, yet this is not *Vindicatio rei Legatæ*, for *Vindicatio eſt corporis alicujus certi*, for the which this Purſuit is not made, being for Sums of Money, which are ſought, not *Vindicatione ſed Condictione*: which *Alledgance* was Repelled, ſeing in this Purſuit, albeit the Intromettor was conveened to make payment, yet the Executor confirmed was alſo called; and becauſe in this ſame Proceſs, the Purſuer deſired a Contract made betwixt the Executor and Intromettor to be *Reduced*, becauſe thereby they had divided the Defuncts Goods betwixt them, and ſo had prejudged the univerſal Legatar, who thereby had the only Right thereto. This Action for Reduction of that Contract was not Suſtained, thereby to Bleid the ſtrength thereof, that each one of the two Parties ſhould not remain oblig'd to others, conform to the Tenor thereof, they being Majors the time of the Contracting; but the *Lords* Suſtained that part of the Summons, whereby the Purſuer deſired it to be declared, that the Purſuer who was a third Party ſhould not be prejudged in his Right by any Deed done betwixt them. *Actor. Nicolſon. Alter. Mowat. Hay* Clerk. *Vid.* 4 *Feb.* 1623, L. *Balnamoon* contra L. *Balcomy*. 10 *March* 1627, *Forreſter*.

Duke of *Lenox* contra *Cleiland*, *Eodem die.*

IN an Action of Transferring at the inſtance of the Duke of *Lenox*, as Executor to umquhile *Eſme* Duke of *Lenox* his Father, and alſo as Executor to *Lodovick* Duke of *Lenox* his Uncle againſt Sir *James Cleiland*, for Transferring of an Act of Litiſ-conteſtation in a Proceſs Intented by the ſaid umquhile *Eſme* as Executor decerned to the ſaid umquhile *Lodovick* againſt the ſaid Sir *James*. The *Lords* found, that ſeing *Eſme* was Executor decerned to *Lodovick*, and that he died *pendente lite*, and ſo that Debt purſued for was not Execute, therefore that that Office of Executry to *Lodovick* which was in *Eſme*'s perſon, became extinct by *Eſme*'s deceaſe, and that the Purſuer as Executor to *Eſme* could not ſeek Transferring of that Action, and as Executor to *Lodovick* he could not ſeek Transferring, becauſe no Action was purſued at *Lodovick*'s

instance; and so albeit the Pursuer was Executor to both, yet that he had no interest to seek Transferring of that Action, but that the Right of Executry whereto he succeeded, furnished him a ground of a new Pursuit. Actor. *Hope & Stuart.* Alter. *Aiton & Nicolson.* *Hay* Clerk. *Vid. ult. March* 1624, Lo. *Currichill.*

Dickson contra L. *Aitkin*, *February* 22. 1627.

IN a Suspension betwixt L. *Aitkin* against *Dickson*, whereby the special Charge given by L. *Aitkin* to the Suspender upon L. *Aitkin*'s Decreet of Letters conform generally given against all and sundry, were suspended as not orderly directed, nor execute upon a general Decreet of Letters, conform to a Tack of Teinds Set to the Charger, which he affirmed could not be Sustained by this order of Process, by a special Charge so summarly execute against a Party, who was not specially called, but the most that the Party might lawfully do, was to pursue for the Teinds by way of Action of Spuilzie, or wrongous Intromission: which Reason was Rejected, and the special Charge received to be discuss'd *hoc ordine* without further Process, in respect that the Decreet of Letters conform was given to a Tack of Teinds, Set by a Kirkman; and as the like Charges would be Sustained at a Kirk-mans instance, so to his Tacks-man. Actor. *Fowlis.* Alter. *Gibson* Clerk. *Vid. 6 Decemb.* 1626, *Jamison.* & 16 *Nov.* 1624, *Troup* contra Lo. *Herris.* 22 *March* 1637, Mr. *Henry Gibson.*

Williamson contra *Tennent*, *Eodem die.*

IN a Suspension betwixt Mr. *James Williamson* against *Joseph Tennent*, wherein the said *James Williamson* Alledged, he was wrong charged to pay 1000 Pound conform to his Bond, because the said Bond was never delivered to the Charger, but after the Subscription thereof was depositate in *Abraham Adamson*'s keeping, to be retained by him until the like Sum adebted to the Charger by the Suspenders Brother should be discharged by the Charger, which he hath not done, but by the contrair in the Depositars absence, and by the knowledge or consent, either of the Party, or of the Depositar, he hath opened the Depositars Chest, and taken out the Bond, and Registrat the samine, and charged the Suspender, which Conditions he offered to prove by the Depositars Oath. The *Lords* found this Reason Relevant, to be proven only by the Oath of the Party Charger, or Writ, but not by the Oath of the Depositar, but found that they would take the Parties Oath in presence of the Depositar. Actor. *Nicolson.* Alter. *Stuart.* *Hay* Clerk. *Vid. Penult June* 1625, *Vallance* contra *Crawford.* 22 *January* 1624, *Lermonth* contra *Alexander.* 25 *Novemb.* 1631, *Lauder* contra *Dowglas.* 22 *Dec.* 1627, *Dickson* contra *Hume.*

Service contra *Chalmers*, *February* 23. 1627.

IN a Suspension and Reduction betwixt *Service* contra *Chalmers*, both being upon one Reason, *viz.* That the Decreet desired to be Reduced, was given by the Sheriff of *Stirling*, against the Party Reducer, who dwelt within the Sheriffdom of *Perth*, and so not within his Jurisdiction; Therefore the Decreet was null, as *a non suo Judice*, and that the said Decreet was given for none compearance, to explain the Defenders Oath, the Summons being referred to his Oath, amd the Party having Compeared and Deponed, after which Deposition, the Inferior Judge had no power to Summon over again the Party, to Compear to explain his Oath; but when he first Compeared, the Judge might have Interrogat him, als far as to make the Deposition so clear as whereon to pronounce his Sentence, and ought to Judge conform thereto, and no Inferior Judge could Summon any Party over again; thir Reasons were not found Relevant, becaus the Party Reducer having Compeared in the first

Instance

Instance, as the *Decreet* proported, he could not thereafter be heard to quarrel the Decreet, upon that Reason, *a non suo Judice*, which he ought to have proponed in the first Instance, he then Compearing. And also the *Lords* found, that no Inferior Judge might Summon any Party to Compear, to explain his Oath, after it was given in the same Process, and likewise found, that albeit in this Reduction, the Party offered to come, and to depone and explain his Oath, yet for his Contumacy, being holden *pro confesso*, in the first Process, that they would not admit him now to Depone. Actor. *Nicolson*. Alter. *Hay* Clerk.

Carnegy contra *Lermonth*, *February* 24. 1627.

IN an Action betwixt *William Carnegy* and *Lermonth*, for payment of a Sum of Money contained in an Heretable Bond, whereby the *Debitor* was obliged to pay Annualrent to the Creditor, als well not Infeft as Infeft. The *Lords* found, that the Creditor might alswell pursue the Executor of the *Defunct*, as his Heir, for payment of such Heretable Sums, notwithstanding that the Bond was Heretable, and that the Heir needed not be pursued, and discust before Action were granted against the Executor: but that in Deeds which were prestable by Executors, the Creditor had in his Option and Election, either to pursue the Heir of the Defunct Debitor, or his Executor, or any of them whom he pleased to choise for payment. Actor. *Aiton*. Alter. *Hope*, *Gibson* Clerk. *Vid. December* 7. 1627. *Porteous* contra *Veitch*, and the Cases there.

Guthry contra *Guthry*, *Eodem die*.

Francis Guthry pursued *Margaret Guthry*, as Heir to her Father, who was one of the two Curators to the Pursuer, for payment of the Sum of 2800 Merks, which pertained to the Pursuer; and was lying upon Land, and was Redeemed by the Debitor, and after the Redemption, the Sum was taken up, and received by the two Curators, who, and each one of them Bound and Obliged them conjunctly and severally, at the time of the up-lifting thereof, to make the same forth-coming to the Pursuer their Minor; and therefore the Pursuer called this Defender as Heir to her Father, who was one of the saids two Curators, to repay to him the said principal Sum, with the Yearly Profits sensyne. This Pursuit was sustained against the Defender as Heir, representing only her Father one of the saids Curators *in solidum* for the whole Sum; and it was found, that it ought not to divide betwixt the two Curators, in respect that by the Tenor of the Bond, they had both obliged themselves conjunctly and severally, as said is; and also this Action was sustained against her, for the whole Profit, since the up-lifting thereof, albeit she alledged, that she was Minor, also that she could not be subject to pay Annualrent, because by the Decease of her Father, who was Curator, and so by the ceasing and expyring of his Office, there was no more Obligation of the Law, whereby the Defender could be holden to pay Profit, for by his decease the Pursuer had proper Action to Pursue *hoc ipso momento* after his decease, for payment of the principal Sum, but had no Action for Profits, especially against her who was a Minor, for *post mortem Curatoris cursus usurarum sistitur*; which Alledgance was Repelled, and the Minor Heir to the Curator found subject to pay the Profits, sicklike as her Father would have been, if he had been living, and if he had retained the Sum, after the years of his Office was expired, for his death, or the retaining of the Sum after the Pursuers Majority, could not make the Sum to rest unprofitable to the Pursuer, the same being once specially lying upon Land, and after Redemption uplifted by him, and the Pursuers Majority, and not seeking that principal Sum, was found no Cause to make his Action, for the Profits to prescribe, or become extinct. Actor. *Falch. Herriot*,

riot. Hay Clerk. *Vid. July* 1. 1625. *Goldman* contra *Goldman. February* 22. 1634. *Davidson* contra *Jack.* *

E. *Cassils* contra *Mcmarten* and *Lows*, *Eodem die.*

IN an Action E. *Cassils* contra *Mcmarten* and *Andrew Lows*, whereof mention is made, *Feb.* 15. 1627. The *Lords* Repelled the Alledgance, whereby it was Alledged, that *Andrew Low's* Compryſing was null, becauſe he had Deduced the ſame, upon an Heretable Sum of Money, the ſame not being made Moveable before the Compryſing, which could not be ſuſtained, ſeing Compryſing could not be deduced, but for not payment of Moveable Sums. This Alledgance was found could not be received in this place, by way of *Suſpenſion* or *Exception*, but only was competent to be received by way of *Reduction*, albeit it was Alledged, that it was inſtantly verified by conſideration of the Tenor of the Bond, inſert in the body of the Compryſing, which was *Repelled hoc loco*, as ſaid is. *Item*, in this ſame Proceſs the *Lords* ſuſtained the Compryſing, albeit the Letters whereby the ſame was raiſed, and the Bill which was the warrand thereof, was dated upon a *Sunday*, and the Letters Signed upon a *Sunday*, whereby the Party Alledged the ſame being done upon a *Sunday*, could not be found lawful, that day not being a convenient day for ſuch Acts, which was alſo *Repelled*, for albeit of the Law *vox Præconis debet ceſſare*, yet there was no Prohibition, which extended to Acts, which had no Citation upon that Day, and which albeit they were Judicial, yet were not matle for Compearance before a Judge; but in this Proceſs, albeit this Compryſing was ſuſtained, the *Lords* inclined to make a Statute, to eſchew the like in time to come, that no ſuch Acts ſhould be done upon that Day, the ſame being the Sabbath, wherein all Acts ſhould ceaſe, which behoved to have a warrand from a Judge, to be given by a Judge that day, ſeing that day was appointed for Divine Service, and for no other Act, *partibus ut ibi notatur comparentibus. Vid. July* 4. 1627. *Johnſton* contra *Finlaſon*, *July* 26 1628. *Michelſon* contra *Ker. Feb.* 9. 1622. *William Mortimer*, and the other Caſes there noted.

Roſs contra *Kellie*, *February* 27. 1627.

Janet Roſs Daughter to *Archbald Roſs* Baxter in *Edinburgh*, Purſues *Marion Kelly* Relict of the ſaid *Archbald*, as Executrix and univerſal Legatrix left by him, to make payment of her Bairns-part of Gear, *viz.* The third of the whole Gear contained in the Defuncts Teſtament Confirmed, ſeing ſhe was the only Bairn of the ſaid umquhile *Archbald* her Father; in this Proceſs the *Lords* ſuſtained the Purſuers Action, for her third part of the ſaids Goods Confirmed, albeit the Defender had Confirmed the Teſtament wherein the Goods was parted, only by a two fold Diviſion, *viz.* Betwixt the Relict for her own half, and the Defuncts half; And found, that albeit this Teſtament ſo Authorized, with this Diviſion done by a Judge, was a Decreet which was Alledged, could not be taken away by this manner of Proceſs without Reduction, yet that the Purſuer needed not to Reduce, but the Purſuit might come in *hoc ordine* without Reduction, ſeing ſhe was not called to the Confirmation; and alſo found, that albeit the Purſuer was Married by the Defunct her Father, in his own time, and Tochered by him, yet thereby ſhe was not ſecluded from the Legitime Portion, which fell to her by her Fathers deceaſe, the ſame not being Diſcharged the time of her Contract and Tochering; for albeit that might have been a Cauſe, to have debarred her from her Legitime as thereby being Foriſfamiliat, if there had been any more Bairns unprovided, yet there being no Bairns but her ſelf, it was found no Cauſe to exclude her from that Portion againſt the Relict, but that the Teſtament ought to have a three-fold Diviſion, neither was it found, that the Purſuer ought to offer, and give in the

the Tocher received, with the rest of the Goods Confirmed, to be divided therewith; But it being Alledged, that the Goods Confirmed were exhausted by Decreets, obtained by the Defuncts Creditors. This Alledgance was sustained, to exclude the Third, so far as the Debts should defalk; but it is here to be considered, that the special Reason of this Division was, because the Pursuers Contract of Marriage, whereby the Father had given her a Tocher bore, *That the Father gave that Sum to her, for satisfying her of her Right, which she had to her Mothers Goods, the first Wife of her Father, to whom he acknowledged, that she was Executrix:* And so the Tocher was not given *ex patrimonio Patris*. Actor. *Nicolson* & *Lawtie*. Alter. *Stuart* & *Mowat*. *Hay* Clerk. *Vid. July* 18. 1634. *Hendersons* Bairns.

Muir contra L. *Rowallan*, *Eodem die*.

IN a Suspension *Muir* contra L. *Rowallan*, The *Lords* sustained a Reason of Suspension founded upon a Promise made by the L. *Rowallan*, and referred to his Oath, albeit there was a Decreet of Removing given *in foro contentioso* against the same Suspender, for failzie in proving of an Exception, which was founded also upon a Promise, and referred to the Parties Oath, and found not proven, and albeit the Promise now admitted, was also Alledged made before the Sentence. This was against the Order after Sentence given, *partibus comparentibus*, but was done in favours of a poor person. *Gibson* Clerk.

Lawson contra *Scot*, *Eodem die*.

IN an Action betwixt *Lawson* and *Scot*, to find Caution for payment of four Bolls Victual and an half, which was the Duty contained in a Tack of Lands set to the Defender, or els to Remove, as use is in such Cases. The *Lords* sustained the Action, albeit it was Lybelled, that the Defender was only resting owing a years Duty preceeding the Summons; and that it was not Lybelled, that the Ground was unplenished, so that altho it was but a small yearly Duty, which was contained in the Tack, and so Alledged no necessity to find Caution, and that only a years Duty was owing; yet the *Lords* found, that either Caution should be found to pay that Duty yearly in time coming, or els that he ought to Remove, for the Tack Duty being little, it was the more easie to find Caution. Actor. *Mowat*. Alter. *Scot*. *Gibson* Clerk.

Lawson contra *Kello*, *Eodem die*.

IN the Action betwixt *Lawson* and *Kello*, whereof mention is made, *Feb.* 16 1627. The *Lords* sustained the Action upon a double Bond, made after the Inglish Form, for payment to the Executor of the Creditor, to whom the Bond was granted, of the single Sum contained in the Bond, with the Annualrent thereof for all Terms since the Defuncts decease, which the *Lords* sustained in place of the double Sum acclaimed, and retrinshed the Pursuit for the double, being in effect a penalty, to the said Annualrent of the single Sum, *partibus ut illic comparentibus*.

Burgesses of *Glasgow* contra Lo. *Lorn*, *March* 1. 1627.

IN a Suspension at the Instance of the Burgesses of *Glasgow*, against the Lo. *Lorn*, who had charged the Suspenders for payment of the Assyse Herrings. The *Lords* sustained the Suspension, albeit it was executed against the Charger only, and not against his Tutors and Curators, he being Minor, neither was there any warrand in the Suspension, for to Summon his Tutors and Curators, without whom had been cited, he Alledged he could not be compelled to Reason upon that Suspension; which Alledgance was Repelled, seing the Suspenders had Summoned the Lo. *Lorn* himself, to whom the Command of the Letters, and Charges produced by him, Ordained the payment to

be made, and bore no mention of his Tutors and Curators, and so they Summoned him, to whom the Command of the Letters craved the payment to be made; and albeit it was Replyed, that a Minor may make his Condition better without his Curators, yet no Legal Process can be led against him, without his Curators were cited, that also was Repelled. Actor. *Hope.* Alter. *Gibson* Clerk.

Guthrie contra *Guthrie, Eodem die.*

IN an Action betwixt *Guthrie* and *Guthrie*, mentioned 24 *Feb.* 1627. The *Lords* found, that Curators were not obliged for the profit of the Minors Money, which they had received after a Term, by the space of a Moneth, or two, or three, the Money being Consigned by the Debitor at the Term, and by dependence of Process, the same not being given up while the space of two or three Moneths thereafter; so that the *Lords* found, that the Curator could not be Comptable for that Terms Annual, subsequent to the Consignation, not being uplifted, as said is; except it could be verified that the Curator imployed the Money, and received profit therefore, the same Term, *paribus ut illic comparentibus.*

Heirs of Lo. *Tester* contra E. *Bucclengh, March* 2. 1627.

IN a Reduction at the Instance of the Heirs of Lo. *Tester*, against the Earl of *Bucclengh*; The *Lords* found, that the Pursuers, as being Retoured to their Fathers, and Infeft in the Lands Libelled, to be holden of the Lo. *Kilmawers*, who held of the King, had good Interest to Reduce the Infeftments made to to the Defender, and his Predecessors by the Kings Majesty; so that one Infeft by a base Infeftment, might Reduce Infeftments publick; But it is to be Remembred, that this publick Infeftment granted by the King, and desired to be Reduced, proceeded upon a Recognition for a fault done by the Lord *Kilmawers* Predecessors, who were the Kings Vassals, and Authors of the Pursuers Right; so that the Infeftment quarrelled, which flowed upon the Recognition, was accounted, as if the same had been given by the Lo. *Kilmawers* Predecessors, and therefore the Pursuers Interest was sustained: And it was also found, that the Pursuer needed not to Summon the Lo. *Kilmawers*, nor this Pursuers own Authors to this Reduction. Likeas it was found, that they needed not *in ingressu litis* for their Interest, show any more to verifie, that they were Infeft by the Lo. *Kilmawers* Predecessors, but their Retour, bearing them to be served to be holden of him, with the Seasin following thereupon; neither needed they in that place, before the Reason was Dispute, show that the Lo. *Kilmawers* Predecessors were Infeft by the King, and that they were his Vassals, albeit the Seasin produced and used by the Pursuers bore, that the same was given upon the Kings Precept to the Sheriff, in respect of the Lo. *Kilmawers* refusal to Sease them, which refusal in effect made rather, that the Lo. *Kilmawers* was not Superior, than that he was their Superior, except they shew'd where he was Infeft, and wherein he was their Superior, which was Repelled against the Interest, and sustained to be Disputed after the production against the Reason *in causa*, and needed not to be *instanter* shown. Actor. *Aiton* & *Stuart.* Alter. *Hope* & *Nicolson. Hay* Clerk. *Vid.* 8 *Feb.* 1628. Sir *James Dundass.* 4 *Feb.* 2631. L. *Glengairie.* 20, & 26 *March* 1630. Heirs of Lo. *Tester*, 4 *Feb.* 1630. E. *Kinghorn.* 5 *March* 1630. E. *Wigton.* 19 *Feb.* 1630. *Dowglass.* 12 *July* 1626. *John Stuart.*

Brown contra Sheriff of *Wigtoun, Eodem die.*

IN an Action betwixt *Brown*, Son to Mr. *William Brown*, against the Sheriff of *Wigtoun*, for payment of a Debt owing to the Pursuer; because after his Debitor was taken by Letters of Caption by the Sheriff, and put in Ward by him

him in the Tolbuith of *Wigtoun*, which is the Head Burgh of the Sheriffdom, he escaped. The *Lords* Found no Action against the Sheriff of the Sheriffdom, who had taken the Rebel; and put him in Prison in the Town; because thereafter *functus erat officio* as to the Rebels escaping out of Prison, except he had been Actor, or Accessory to his escaping. Actor. *Cunninghame*. Alter. *Belshes*, *Scot* Clerk.

Scot contra *Cockburn*, *March* 6. 1627.

IN an Action betwixt *Scot* contra *Cockburn*, for payment of a Bairns-part of Gear falling to the Pursuer, and which was pursued against the Executor of the Defunct: The *Lords* found an Exception of Exoneration no ways Relevantly qualified, nor instructed, which was founded upon Decreets, recovered by the Creditors of the Defunct, against the said Executor, where the Debts contained in the saids Decreets were only proven by the Executors own Oath, or her being holden as confest; which Probation of Debt, after that manner and sentence following thereupon, without other lawful Adminicle to prove the Debt, The *Lords* found not sufficient to exoner the Executors, and to prejudge either the Bairns of their Legittim, or any other lawful Creditor of the Defunct, qualifying a lawful Debt; neither did the *Lords* respect what the Executor Alledged, that where the Debts was referred to her Oath, which she knew to be true Debts, that in such Cases she could not Perjure and Mensware the same; and therefore that she ought not to be prejudged to pay the Debts, being truly known to her, and not to be exonered thereby; which the *Lords* Repelled, seing they found that other Creditors could not be prejudged, as said is; in which cases it would appear, that the Judge ought not to Decern upon such manner of Probation, but with the hazard to the Party obtainer of the Sentence, that he should be subject to relieve the Executor at all other Creditors hands, who should have more lawful manner of probation to verifie their Debt; and for that cause to be subject to refound the Money so payed by the Executor; & that the Executor here should before Sentence been recovered upon her Confession, desired the Judge to provide for this. Actor. *Scot*. Alter. *Sharp*. *Scot* Clerk. *Vid.* 13 *March* 1627. *Ker* contra La. *Covingtoun*.

Town of *Peebles* contra *Scot*, *March* 7. 1627.

A Summons was pursued at the instance of the Town of *Peebles*, against *Scot* of *Houndlshape*, and others, Craving the Ground-right and Property of the Lands contained in the Summons, to be Decerned to pertain to them, conform to their Infeftments of the samine, given by K. *Ja.* 6. and K. *Ja.* 4, and K. *Ja.* 2. and the Defenders to be Decerned and Declared to have no Right thereto, neither in Property nor Commonty. The Defenders Compearing in this Cause, Alledged, that the Action was of the nature of an Action of Molestation, and therefore ought to be Remitted to the Sheriff of the Shire, within which the Land lyes, as Judges competent thereto, and that the *Lords* of Session were not proper Judges to the same, conform to the Act of Parliament 1587. which Alledgance was Repelled, and the *Lords* found themselves Judges, seing the Summons contained no Molestation nor Dispute concerning Meiths and Marches, but only a Declarator of the Right of the Lands, contained within the bounds specified in their Infeftments. Actor. *Forsyth*. Alter. *Gibson* Clerk.

Paterson contra *Robison*, *Eodem die*.

IN an Action betwixt *Paterson* and *Robison*, whereby *Paterson* craved the Defender to be Decerned summarly to deliver to him the possession of a dwelling house in *Edinburgh*, whereof he was Heretor, and whose Heretable Right was Suspended for the Liferent of a Woman, whose Right of Liferent was reserved in his Heretable Right; and she being deceast 5 or 6 days before the

Summons, he craved the Defender, who had entered to the Possession of the said House, during the time of this Liferenters Sickness, she dying therein, to be Decerned to deliver to him the said Possession, and that the Baillies of *Edinburgh* should make an Inventar of the Goods that were in the House. The *Lords* found, that this Defender could not be Decerned so summarly to Remove, without a Warning were first made to her, seing she Alledged, that she was Liferentrix of the said House: Neither was the Reply admitted, whereby the Pursuer Replyed, that this Defender had consented to that Alienation made to the Pursuer, and so she was in effect his Author, and he needed not to warn his own Author. Which Reply was not Sustained, in respect the Defender Alledged, that that Consent was under Reduction, being Revocked by her within a Month after the giving thereof, as done by Constraint of her Husband. In respect whereof the *Lords* Found, that this Process could not be so summarly Sustained, but that a Warning should preceed. Actor. *Livingston*. Alter. *Stuart*. *Scot* Clerk. *Vid.* 16 *Feb.* 1628, *Merton* contra *Thomson*.

Stirling contra *Paunter*, *March* 8. 1627.

IN an Action for Mails and Duties at the instance of *Stirling* against *Paunter*, the Defender clothing himself with an Infestment of the Lands, whereof the Duties were acclaimed, proceeding from Mr. *David Ogilvie* who had bought the Lands, and who was found to be Debitor of the saids Mails, for not paying of the price which he was oblig'd to pay, and which he retained un-payed, because certain Deeds were not fulfilled to him; and never the less, because the *Lords* found, that it was not equitable, that he should both keep the Money, and pay no Profite thereof, and also uplift the Duties of the Lands; therefore the *Lords* by their Decreet Found, that he should pay to the Pursuer who had acquired the Annailziers Right in his person, either the Profite of the principal Money retained, or else the Profite of the Lands, wherein the said Mr. *David* having his Option, and having chused to be Debitor in the Mails of the Lands, and so Decreet being given against him for payment thereof: This Pursuit upon that Decreet, was Intented against this Defender, as Possessor of the saids Lands, by Right from the said Mr. *David*, to pay the saids Mails to the Pursuer; wherein the Defender Alledging, that he was Heretably Infeft in the samine by the said Mr. *David* before that Sentence, so that the personal Sentence against the said Mr. *David* could not make him subject to pay the saids Duties: And the Pursuer Replying, that that Decreet given upon a real Cause, albeit personally against the said Mr. *David*, ought to work for the Pursuer against all Possessors, by any Right from the said Mr. *David*, especially seing the said Mr. *David* was his Debitor before the Right made to the Defender, and before the said Right he had served Inhibition against the said Mr. *David*; likeas he was at the Horn the time of the making of the said Right, which was simulatly made by him, being Father-in-law to the Defender, who had married his Daughter; and so in respect of the Act of Parliament against Bankrupts, ought not to be respected against the Pursuer: notwithstanding of the which Reply, the Exception was found Relevant, seing the Infestment Alledged by the Defender could not be taken away *hoc ordine*, without prejudice to Reduce thereupon; for albeit he was at the Horn, yet he might Sell his Land, but I think not to the prejudice of his Creditors. Actor. *Hope* & *Nicolson*. Alter. *Haliburton* & *Stuart*. *Gibson* Clerk.

E. *Rothes* contra *Balfour*, *Eodem die*.

IN a Pursuit at the Earl of *Rothes* instance against *Balfour*, for the Avail of his Marriage, single and double. The *Lords* found, that albeit the Procuratory made to the Vassal, to come and treat, and to marry, bore not that the

Procuratory

Procuratory was then shown to the Vassal; yet that the same was sufficient, and sustained the famine, both for the single and double Avail; for nothing was then shown to declare, that the Defender doubted of the Procuratory, or desired then to see it. *Item*, They sustained Requisition, bearing, *that the Defender was desired to come and treat with the Party offered*, albeit it bore no special day, against, or at the which he was required to come and treat, seing he was desired to come and treat before the Marriage, and the day against which he was desired to come and marry was special in the Instrument; which day the *Lords* Found the Superior and his Procurator might appoint to the Vassal, to come and accomplish the Marriage, and that he needed not to require the Vassal to appoint the day; and upon his refusal, that then *eo casu* the Procurator for the Superior might appoint the famine, but the Superior and his Procurator might appoint the day to the Vassal themselves; and found it not necessary that the Party offered should have declared at the day prefixt for the Marriage, that she was then contented to marry the Vassal, neither needed the Instrument to proport the same, the same bearing, *that she was then present in the Church to have compleated the Marriage*; and also the *Lords* Found, that albeit the Vassal was not yet married, yet that they would Decern for the single, but Superceded the Execution for the double, until the same should fall by the Vassals Marriage; for so long as he remained unmarried, there was no Contempt done to the Superior, and so in the mean time no Execution could pass for the said double. Actor. *Aiton & Stuart*. Alter. *Nicolson*. *Gibson* Clerk. *Vid.* 3 & 11 *July* 1622, L. *Thornidyke*. 13 *Nov.* 1622, L. *Bass*. & 7 *Feb.* 1628, *James Maxwell*.

Stuart contra *Fleming*, *March* 9. 1627.

IN an Action betwixt *Stuart* and *Fleming*, The *Lords* found, that after the decease of the Judge and Clerk, the Intrant and succeeding Clerk might Extract any Act out of the Books of that Jurisdiction, which was Registrat therein of before, and that there needed no Transumpt or Warrant to add force thereto, as in *Prothecals*, where the Clerk of Burghs or Nottars are dead. This was in the Town Books of *Glasgow*. Actor. *Cunninghame*. Alter. *Frazer*.

Ker contra La. *Covingtoun*, *Eodem die*.

IN an Action by *George Ker* Tailor in *Edinburgh* against the Lady *Covingtoun*, for payment of a Sum promised by her in her Widow-head, and which was referred to her Oath, and whereupon her Husband protested, that she could not Swear to his Prejudice, she being now the time of this Pursuit, and since the Promise, married to a Husband. The *Lords* found, that in this and the like Cases, where the Oath of a Woman is craved upon Promise made in her Widow-head, she having a Husband the time of the seeking of her Oath, that the Woman ought to give her Oath, but the Husband should not be prejudged thereby, nor yet the same should work against him or her during their Marriage, but the Oath should be taken to work against her self, in case it fall out that she ever be a single Woman, or that she or her Husband die; and after her decease, that it may work against her Heirs or Executors, for it were against all Reason, that for want of her Oath, the Parties Action should altogether perish. *Scot* Clerk. *Vid.* 16 162, L. *Prestoun* and the La. *Whittinghame* his Spouse.

Cunninghame contra *Howston*, *March* 10. 1627.

IN an Action for Exhibition and Delivery of Writs at the instance of *Cunninghame* as appearand Heir to his Fore-Grand-sir and Fore-Good-dame against *Howston* of *Parks*, The *Lords* found, that the Pursuer as appearand Heir to his said Fore-Grand-sir and Good-dame, could not have Action against

the Defender for Production of that Writ called for, libelled to have been made to his Predecessors *anno* 1510, after so long time, and he as appearand Heir to his Predecessors, passing by his Father, Good-sir, and Grandsir, could not competently have this Action, the Defender's Father, Good-sir and Grand-sir never having pursued therefore of before; and the Pursuer not qualifying his Succession in Blood to these Predecessors, but only calling himself nakedly appearand Heir to them, neither ever qualifying how any of his mediate Predecessors betwixt him and his said Fore-Grand-sir, *&c.* were ever debarred by their Minorities, or any other lawful Impediment from this Pursuit. Actor. *Cunninghame.* Alter. *Hope & Pollock.* *Scot* Clerk.

in *Glasgow* contra there, *Eodem die.*

IN an Action betwixt two men in *Glasgow*, the Pursuers Predecessors having acquired Infestment from the Defenders Predecessors, of a Tenement of Land in Wodset, and having Set a Back-Tack to the Heretor, who gave him the said Infestment Redeemable, Pursues the Heir of the Granter of the Wodset, for payment of the Back-tack-duty, resting owing for the space of 40 years preceeding the Summons: Which Action the *Lords* Sustained for the said Tack-duty, for the said years by-past, not elder than 40 years, but within that space; but found, that no Action could be granted for any year before the 40 years preceeding the said Summons, seing the Action was prescribed for these elder years, the same not being pursued *debito tempore*, within 40 years after the date of the Tack; and Found, that the Prescription did not militate for the 40 years immediatly preceeding the Summons, seing the Back-tack whereupon the Pursuit was founded, contained *annuam prestationem Canonis*, and was not for payment of a principal Sum, but had *tractum temporis successivum*; and also the Back-tack was Set by him, who had an Heretable Infestment of the Land, who by vertue thereof, might have pursued for the whole Mails of the Land, if the Back-tack had not been Set. *Scot* Clerk. *Vid.* 20 *January* 1627, *Ross* contra *Fleming.*

Forrester contra *Clerk*, *Eodem die.*

IN an Action betwixt *Forrester* & *Clerk*, for payment of a Legacy of a Sum specially adebted by the Defuncts Debitor designed in the Legacy. The *Lords* found that albeit the Legacy was specified and designed certainly owing by such a special Debitor, yet that the Legatar could not conveen the Debitor therefore, except the Executors to the Defunct had been also conveened in that Pursuit; for they might have Alledged some Reasons why the Legacy should not have been payed, as *quod debita excedunt bona*, or some other lawful Defence, which makes them necessary Parties to have been called; so that the Process, without their Citation, or concourse, could not be Sustained. Actor. *Nairn.* Alter. *Haliburton.* *Vid.* 4 *Feb.* 1623, L. *Balnamoon.* & 20 *Feb.* 1627, *Bisset.*

Lo. *Balmerinoch* contra *Seton*, *Eodem die.*

IN an Action of Reduction of the Lord *Balmerinoch* against *Seton* of *Pitmedden*, The *Lords* found, that a Party who had Compryfed his Debitors Lands, and was Infeft therein, and who had Served Inhibition before his Compryfing, might pursue Reduction of Infestments, posterior to his said Right, made by his said Debitor since his Compryfing and Seasin, which posterior Right was the Cause why the said Debitors Lands were Recognosced, and consequently that he might Reduce the said Right, being the Grounds of the said Recognition, with the Charter and Infestment of Recognition *ad hunc effectum* only, that he might be payed of his own true Debt, for the which he had Compryfed, and was Infeft. Actor, *Stuart.* Alter. *Baird.* *Hay* Clerk.

Norbat

Norbat Englishman contra *Eodem die.*

THe *Lords* found in an Action of one *Norbat Englishman*, that Witnesses being out of the Countrey, Summoned once upon sixty days, needed not in the Terms of Denounciation and Caption, to have Diligence reported against them, upon the interveening space of sixty days, albeit they were still out of the Countrey, but that these Terms ought to proceed against them, as against other Witnesses within the Countrey. Actor. *Hope.* Alter. *Ja. Gibson.* *Gibson* Clerk.

Dick contra *Skeldon*, *Eodem die.*

IN an Action for Exhibition and delivery of Writs of Compriſed Lands, at the Instance of *William Dick*, against *Skeldon* Haver of the Writs; The *Lords* found, that a Compriser not Infeft, could not call for delivery of Charters and Seasins of Lands, nor such real rights, himself not being really Infeft, but that he might call for Production of Contracts and Bonds, the same being Compriſed; and also found, that a Compriser could not seek Production of any Writs of Lands Compriſed, nor the same to be Copied to him, except the Party from whom he Compriſed, had been called to that Pursuit. Actor. *Stuart.* Alter. *Nicolson.* *Scot* Clerk.

Ker contra La. *Covingtoun*, *March* 13. 1627.

IN an Action betwixt *Ker* Tailzor in *Edinburgh*, against La. *Covingtoun*, who was conveened as Executrix to her Husband, for payment of a Debt owing by her Husband to him, the verity whereof was referred to her Oath, in place of all other Probation, and she contending that she could not be compelled to give her Oath thereupon, because if Sentence should follow upon her Oath, it would not be a ground to infer Exoneration to her, for the Defuncts other Creditors would not allow payment to be made, conform to that Sentence. The *Lords* Found, that she ought to give her Oath, and that the Sentence to follow thereupon, if she granted the Debt, should only be prejudicial to her self, in so far as she might have any benefit as Relict, or Legatrix, or Executrix to the Defunct, but that the same should not be prejudicial to any other of the true and lawful Creditors of the Defunct, or his other Legatars; and therefore they ordained the Pursuer to find sufficient Caution, to repay the said Sum to be recovered by him, against the Executrix upon her Oath, in case that she should be distressed by the other Creditors, or Legatars of the Defunct, if the rest of the Defuncts Goods contained in the Testament should be exhausted by their Debts; and this Order they Found ought to be observed, when the like Cases occurs, *partibus ut March 9. 1627. comparentibus. Vid. March 6. 1627. Scot* contra *Cockburn*,

Meghie contra *Livingston*, *Eodem die.*

IN an Action at the Instance of *Meghie* of *Balmachie* against *Livingston*, for the Mailles and Duties of his Lands, conform to his Infeftment, a Compryser, who had Compryſed all Right and Title that the Pursuer had to the Lands, and who was also Infeft therein, Compearing and Alledging, that he could not have Right thereto, but the same pertained to him, by vertue of his Compryſing. The *Lords* Found, that the Pursuer had Right to the Duties Lybelled, and not the Compryser, because the Pursuit was for years preceeding the Compryſing, which they Found pertained not to the Compryser, albeit he Alledged he had Compryſed all Right, which the Pursuer had to the Lands, which gave him Right for all bygone Duties owing for the Lands to the Pursuer, even als effectually, as if the Pursuer had made him Assigney thereto, for the Compryſing was a Legal Assignation; and albeit it might appear, that the bygone Duty owing before his Compryſing, could not be effectually Compriſed,

the same being *res mobiles* which were affected with Arrestments, and not Compryſings, yet the Defender contended, that they being bruiked and acclaimed by an Heretable Right to the Land, they came under the Compryſing, which extended to all the Purſuers Right which he had to the Lands; And alſo he Alledged, that as he by vertue of the Compryſing of an Heretabe Contract, containing Annualrent for a Sum of Money, the Compryſer would have Right, not only to ſeek the principal Sum, but all the bygone years Annualrents, adebted to his Debitor, by vertue of that Contract, preceeding his Compriſing, ſo ought it to be in this Caſe, eſpecially where the Queſtion is only betwixt him and the Debitor, from whom he has Compryſed, and not betwixt him and any one of his Debitors Creditors, who had affected the ſaids bygone Maills with Arreſtment; which Alledgance was Repelled, and the Compryſer found to have no Right to the ſaids years Duties, which preceeded his Compryſing. Actor. *Herriot.* Alter. *Cunninghame.* *Scot* Clerk.

L. *Ley* contra *Bar*, *Eodem die*.

IN an Action betwixt *Ley* and *Bar*, for payment of the Maills and Duties of Lands to *Ley*, as having the Right of the Waird of him, who held the ſaids Lands Waird of the Prince. The *Lords* Found, that a Tack in the Defenders Perſon, clad with Poſſeſſion, was enough to exclude the Purſuer for any greater Dutie acclaimed for the Land, than the Dutie contained in the Tack, for all the years preceeding the date of that Summons; The Defender never being interrupted in the Tack foreſaid, by a Purſuit before the date of this Summons; And ſicklike they Found an Infeftment made by that ſame Perſon, by whoſe Deceaſe the Waird fell to the ſame Excipient, for a certain Feu Dutie therein contained, Relevant to exclude the Purſuit, for any greater Duty than that which was contained in the ſaid Feu Infeftment, for the ſaids years preceeding the Summons, there being no Interruption *ut ſupra*, and would not receive the Reply in this place, upon the nullity of the ſaid Feu, Founded upon the Act of Parliament, 1606. anent the not Conſent of the Superior thereto, in reſpect of the Poſſeſſion had conform *bona fide*, which was ſuſtained for the years foreſaids, wherefore no Interruption was made. Actor: *Stuart* & *Mowat*. Alter. *Hope* & *Nicolſon*. *Gibſon* Clerk. Thereafter the Purſuer took up this Proceſs by warrand of the *Lords*, and the Interlocutor foreſaid was refuſed to be Extracted, although the Defender urged, that he ought to have the Extract of the ſame, which was refuſed.

E. *Kinghorn* contra L. *Grange*, *March* 15. 1627.

IN a Reduction at the Inſtance of the E. *Kinghorn*, againſt the L. of *Grange Kirkcaldie*, for Reduction of an Infeftment granted by the E. *Kinghorn's* Forebears, deſigned in the Summons, to umquhile Sir *William Kirkcaldy* of *Grange*, of certain Lands of the Barrony of *Kinghorn*, pertaining to the ſaid Purſuers Predeceſſors, in the which Proceſs the Defender was called as appearand Heir to that Perſon, to whom the ſaid Infeftment, now deſired to be Reduced, was granted. The *Lords* found this Alledged Dilator Relevant, proponed by the ſaid Defender, *viz.* That he was denuded in favours of *George Foulis*, who was Heretably Infeft in the ſame Lands by a publick Inſtrument, holden of the King's *Majeſty*; and therefore they Found no Proceſs untill the ſaid *George Foulis* were Summoned to this Reduction, he ſtanding Infeft in the Lands. And ſo the *Lords* Found, that the Party Infeft was a neceſſar Party, to have been cited to this Reduction, albeit his Right flowed from that appearand Heir, who was called, and that the Right made to him, was not depending upon that Right, which was here deſired to be Reduced, but was acquired by that Perſon, who was called as appearand Heir in this Proceſs, from another ground,

not

not flowing from the Course of the Infeftment quarrelled, and disponed again by him to the said *George*; so that it might appear, there was no necessity to have cited him, whose Right depended not upon the Right controverted in this Process; And yet the *Lords* found no Process, while he were Summoned thereto: It is here to be Observed, that an Action of Reduction against any, who is called as appearand Heir to his Predecessor, whose Right is quarrelled, is ever sustained, so that it appears more hard that any having Right from the appearand Heir, should be found necessar to be cited, seing the Citation of the appearand Heirs self is enough, albeit he be not Infeft as Heir, but if an Infeftment to any who were called, to hear that Infeftment made to himself, desired to be Reduced, *eo casu* any having a publick Infeftment from the Persons self, whose Right were quarrelled, may with reason be reputed a Party to be cited; in this Process *George Foulis* Compearand & desireing to be admitted for his Interest, by vertue of his Heretable Infeftment, Alledged, that no Process ought to be granted in the Cause, while the Clerk of Register were Summoned thereto, seing the said *George* was denuded in his favours, whereupon the Clerk of Register was Infeft by a publick Infeftment. This Alledgance was Repelled, for the *Lords* found the said *George* could not be admitted for his Interest, to propone this Dilator upon a Right made to him, of the which Right he himself Alledged he was denuded in favours of another, and so the *Lords* found, that he could not compear to stay Process. *Actor. Hope, Nicolson & Rollock. Alter. Stuart & Aiton. Gibson* Clerk.

Inglis contra *Kirkwood*, *March* 16. 1627.

IN a Spuilzie betwixt *John Inglis* and *Kirkwood*, the *Lords* Found, that the Pursuer having Right to the Teinds, he had competent Action for the true avail and worth of the Teinds (for the Pursuer restricted his Action of Spuilzie to wrongous Intromission) against the Master and Heretor of the Ground, who had Sett the Lands to the Tennents, for payment of a certain yearly Duty promiscuously, for Stock and Teind to himself, and that by Setting of the same to the Tennents, the foresaid Action was als competent against the Master, as against the Tennent, or the actual Intromettor with the Corns, Stock and Teind-sheaves, which grew upon the saids Lands; neither was the said Action found to be only competent against the Intromettors with the Corns, as the Defender Alledged, which Alledgance was Repelled. Actor. *Nicolson*. Alter. *Foulis*. *Gibson* Clerk. *Vid.* 11 *July* 2628. L. *Findourie* contra *Lighton*.

Bruce contra *King*, *Eodem die*.

A Contract being Registrat at the instance of *George Bruce*, by way of Action as Heir to his Father, against *James King* Advocat, who was the Contracter with his said Father on the one and other parts; and *James King* having raised Letters upon that Contract, for Charging of the said *George* as Heir foresaid, to fulfill to him that which his umquhile Father was obliged to him in the said Contract; which being Suspended by the said *George* upon this reason, *viz.* That albeit the Contract was Registrat at his Instance, so that Execution might pass thereon at his instance against the said *James*; yet seing it was not Registrat at the said *James*'s instance, he could not raise Charges thereon, wanting a Warrand of Registration; and the said *James* contending that the said Contract being once Registrat, at the instance of any of the Parties, thereby Execution was also competent to the other Party against him, at whose instance the Registration was Decerned, as if it had been Registrat at the instance of both Parties. The *Lords* Found, that the Charges raised by *James King* could not be sustained, the Contract not being Registrat at his instance, especially the Registration being Exped not by umquhile *George Bruce*

Contracter, but by his Son as Heir to him, and the time of the Registration thereof at his instance, this Charger then not having desired (as the *Lords* Found he might have done) that Execution might also be used at his instance against the Heir of the said other Party, who sought the said Registration; which being omitted, and so not having Warrand for his Charges, The *Lords* Found the same could not be sustained. Actor. *Herriot*. Alter. *Bruce*. *Gibson* Clerk. *Vid.* 9 *Feb.* 1627. *Mcduff.* 29 *Jan.* 1628. L. *Whittinghame*, & 9 *Jan.* 1627. *Herring* Supplicant.

Hay contra *Ker*, *Eodem die.*

AN Ejection being pursued by *Walter Hay*, contra *Mark Ker*; and the Action, in so far as was pursued by Ejection, being Eleided by the Act of Parliament 1579. Anent Prescription, because it was not pursued within 3 years after the Deed Libelled: The *Lords* nevertheless sustained the Action for restoring of the Pursuer to the Possession of the Land, and for payment of the ordinar Duty to him, which he was in use to receive from the Tennents of the Lands, the years before the Ejection, and of all the years since the Defender entered to the Lands; and so the Pursuer passing from the Pursuit, so far as concerned any violent Deed of Ejection, or higher Profites of the Lands, and converting the same to an Intrusion in the Pursuers Possession, and Pursuit for the ordinar Duties therethrough for years bygone; and restoring of the Possession of the Ground thereafter, the Action was sustained. Actor. *Hope* & *Lermonth*. Alter. *Nicolson* & *Aiton*. *Scot* Clerk. *Vid.* 15 *July* 1626. *Mephaven*, 25 *Feb.* 1624. *Dunmuir*.

Johnston contra Lo. *Herreis*, *March* 20. 1627.

IN an Action pursued by *Johnston* of *Eschescheills* against Lo. *Herreis*, to hear and see a Reversion Decerned to be extinct, because it is therein Provided, that if the Party in whose favours it was granted did not offer the Money, whereupon the Lands was Redeemable, at the time therein prefixt, in that case it should expire; and all the Reason, he subsumed that he had failzied: The Defender compearing, Alledged, that he had really offered the Money *debito tempore*, and so had the benefit of the Reversion still competent; and the Pursuer contended, that the offer, without Consignation had been made also after the offer, could not be admitted as sufficient to stay the failzie. The *Lords* Found a real offer was sufficient, to stay the force of the expiring of the said Reversion, albeit no Consignation was thereafter made; which the *Lords* Found no ways necessar, the said offer being really and lawfully made, as said is, seing in the Clause of Reversion, there was no Provision, appointing Consignation to be made in case of refusal, to receive the Money the time of the offer. Actor *Cunninghame*. Alter. *Belshes*. *Scot* Clerk.

Knows contra *Kneeland*, *Eodem die.*

IN a Suspension betwixt *Knows* and *Kneeland*; *Knows* having obtained Decreet before the Commissars of *Edinburgh* against *M. Hill*, as Intromissatrix with the Goods of her umquhile Husband, for payment of a Debt owing by her Husband; and after the Decreet she being Married upon *Harry Kneeland* her second Husband; who being Charged for his Interest with her upon that Sentence, for payment of that Debt Decerned against her; and being both Denounced for not payment, the Wife being principal Debitor, as representing her first Husband, and for whose Debt Sentence had past against her in her Widow-hood, she deceases, after whose death *Kneeland* her second Husband suspends, because he being only Charged for his Interest for his Wifes Debt, and she being dead, he ought to be freed of all Execution. This Reason was found Relevant, for the Wife who was Principal Debitor being dead, they Found

that

that her Husband could not be astricted as Husband *pro interesse*, to pay the Debt, albeit he was put to the Horn therefore in his Wifes time, whereby the Charger Alledged, that he thereby became properly Debitor himself, being once lawfully Denounced for not payment, which should be Respected, as if he had made payment in her time, *quo casu* he could not Repeat it back again, which was Repelled: But because the Charger Alledged, that the Suspender had Intrometted with all his Wifes Goods and Gear after her decease, therefore the *Lords* Found that Relevant to sustain the same Charges against him *hoc ordine* in this same Suspension, and found no necessity to put the Charger to a new Pursuit against the Suspender, thereupon to conveen him as Intromettor. Actor. *Mowat.* Alter. *Vid.* 16 *January* 1628. *Allans* contra *Lawder.* 7 *Feb.* 29. *Brown* contra *Dalmahoy.*

E. *Cassils* contra *Aitkin*, *March* 21. 1627.

IN an Action at the Instance of the Earl of *Cassils* against *Aitkin*, to hear and see it found, that he as Baillie to the Bishop of *Galloway* (who hath not the Lands of that Bishoprick in a Regality) is not subject nor obliged in Law, by vertue of Charges of Caption Execute against him *eo nomine* as the Bishops Baillie, to take Rebels; and that no such Charges shall take effect against him, to cause him take Rebels in time coming. The *Lords* sustained this Action, and the general desire of that Summons, albeit one Party was only called thereto, who had Execute the like Charges against him *eo nomine*; And the *Lords* Found, that Baillies to Bishops, or Baron-Baillies, are not subject in Law to apprehend Rebels; these Barons, or Bishops-Lands, not having Regality, nor some other the like, or more Soveraign Power of Jurisdiction, than as Baron or Bishops-Baillies. Actor. *Nicolson.* Alter. *Scot.* *Gibson* Clerk.

Edgar contra L. *Craigmillers* Heirs, *March* 22. 1627.

A Bond being Registrat at the instance of *Thomas Edgar* against the Heir of Line, and also against the Heir-male and Provision of umquhile the Laird of *Craigmiller*, maker of the Bond; and the Heir of Line being in the Decreet of Registration ordained to be first discust, before the Heir of Tailzie should be Charged, the Party having Charged the person who was in Blood to the Heir of Line, against whom the Bond was Registrat, as lawfully Charged to enter Heir, and having denounced him Rebel, thereafter he Charges the Heir of Tailzie; who Suspends upon this Reason, that the Heir of Line was not sufficiently discust by Horning, seing there was Right competent to her as Heir of Line, which might be Comprised from her, as Charged to enter Heir, or adjudged to the Creditors, if she should Renounce to be Heir: This Reason was found Relevant, for the *Lords* Found, that the putting of the person, who should be Heir of Line to the Horn, was not a sufficient discussing of her, whereupon the Party might come against the Heir of Provision; but found, that her Right ought to be discust by Comprising, or Adjudication, or her Person by Caption, seing she Renounced not to be Heir. Actor. Alter. *Lawtie.* *Gibson* Clerk. *Vid.* 13 *July* 1626. betwixt the same Parties.

La. *Nithisdale* contra her Tennents, *Eadem die.*

IN a Removing by the Lady *Nithisdale* against her Tennents, one *Pollock* Alledged that he was Tennent to another, who had a Rental of the Lands set during the Ladies Lifetime, and during the Receivers Lifetime, who were both on Lifes, and he who was Rentaller, not being warned, and who was his Master, no Process therefore ought to be granted against the Excipient; and the Pursues Replying, that by the expres condition of the Rental, it was Provided, that if the Rentaller should put another in Possession of the Land, *ipso facto* the Rental should expire, and so seing the Excipient confessed his Possession as

Tennent to the Rentaller, the said Rental could not furnish any Exception. The *Lords*, notwithstanding of the Reply, Found no Process, while the Rentaller were called and warned, that he might Dispute upon the Force of his own Rental, which could not be taken away except himself were called. Actor *Douglas*. Alter. *Hay* Clerk.

Colledge of *Aberdeen* contra *Gardin*, *Eodem die*.

IN a Reduction at the Instance of the Colledge of *Aberdeen*, against Mr. *Robert Gardin*, a Tack being produced for satisfying the Production, and Inspection thereof had by the Pursuers Procurators, the same being accepted and the Defender desiring that he might have it up again, and that the Pursuer might take his advantage of the not production of the same, by taking Decreet Reducing it for not Production; and the Pursuer Answering, that it ought not to be permitted, that the Tack should be taken up again, after it was produced in Process, seing it was evident, and to be seen to the *Lords* by occular inspection, that the same was vitiat and razed, and ought not to have Respect nor any Faith in Judgement; neither should the *Lords* suffer it to be taken out of the Process, being so evidently appearing, in the Vitiation and Alteration thereof. The *Lords* nevertheless Found, that the said Defender might take up the said Tack, and use it, or not use it at his pleasure, seing it was not called for to be Improven; And the Pursuer might yet easily mend himself of the Law, by Intenting a Process of Improbation, wherein the Defender will either be forced to produce and use it, or else it will be decerned to make no Faith. Actor. *Hope*. Alter. *Lawtie*. *Gibson* Clerk.

Thereafter this Action being called upon the Morrow, the Defender offered to improve the Tack, which was found likewise could not be received, seing the Tack was not used; But because of the manifest Vitiation of the Tack seen to the *Lords*, albeit it was holden as not produced in the Process, yet they ordained the same to remain in Process in the Clerks hands, while the Pursuer should intent Action of Improbation of the same, which they ordained to be done with all diligence.

L. *Carse* contra his Brother, *March* 23. 1627.

IN a Suspension of the L. *Carse* against his Brother, who had charged the Laird to pay a Sum contained in his own Obligation Registrat against him, and upon the which Registrat Bond he had raised a Charge against the Laird, to enter Heir to his umquhile Father, in certain Lands wherein his Father died Infeft; and to the effect he might Compryse the saids Lands for the said Debt owing by *Carse* himself, and not by his Father, conform to the Act of Parliament 1621; and this Charge to enter Heir to these Lands being suspended upon this Reason, because he offered to Renounce to be Heir to his Father; and the Creditor contending, that he should not Renounce, seing by his Renounciation he would not be freed of the Debt, the Debt being his own Debt, which he is oblig'd to pay, so that he could not be heard to Renounce where the same would not avail him, but that he might Compryse against him as lawfully charged to enter Heir. The *Lords* Found, that he might lawfully Renounce to be Heir, after which the Creditor might seek Adjudication of the same Lands, which being the ordinar remeed of Law, competent after the said Renounciation, it would prove als profitable as a Comprysing, deduced against the Party lawfully charged to enter Heir to his Father in these Lands, from the which he renouncing to be Heir, nothing was Alledged that might hinder the Party charged to Renounce as said is; but because this Process seemed to be deduced by Collusion betwixt the two Brothers, the *Lords* declared, that whatsoever should be here done, should no ways prejudge any other. Actor, *Hope*. Alter, *Hay* Clerk.

Irwine

Irwine contra *Young*, *March* 27. 1627.

IN a Suspension betwixt *Irwine* and *Young* of a Decreet before the Commissar of *Dunkel* against the Suspender, as lawfully charged to enter Heir to his Father, who was decerned by a Decreet Arbitral to do certain Deeds to the Charger; and the Decreet being suspended, because it was given against the Defender, as lawfully charged to enter Heir to his Father, which was not proper to the Jurisdiction of a Commissar, to cognosce upon and proceed against any person *hoc nomine*, as Heir, or charged to enter Heir to his Predecessors, and so the Decreet was null as *à non suo judice*. This Reason was not Sustained, but the Decreet of the Commissar was allowed, because the Defender's Father, to whom he was charged to enter Heir, and against whom the Sentence was given *eo nomine*, consented to the Registration of the Decreet Arbitral in that Commissars Books; and so as he could not oppone himself against the Commissars Jurisdiction thereanent, no more could the Suspender who was conveened, as representing him by the foresaid Charge to enter Heir. Actor, *Nairn*. Alter. *Burnet* major. *Hay* Clerk. *Vid.* 28 *Nov.* 1621, L. *Greenock*. 18 *January* 1628, *Nasmith* contra *Ruthven*.

L. *West-Nisbet* contra L. *Moriston*, *Eodem die*.

West-Nisbet having Arrested in *Moristons* hands some yearly Annuity, which by Decreet Arbitral he was oblig'd to pay to the Laird of *East-Nisbets* Wife and Bairns, for their Maintainance and Intertainment, and desiring the same to be made forth-coming to him, for satisfying of a Debt adebted to him by the Laird of *East-Nisbet*, and which he had payed as Cautioner for him, seing the Moneys adebted by *Moriston*, albeit appointed to be payed to *East-Nisbet*, his Debitors Wife and Bairns, yet the same ought to satisfie the Husbands Debts who was living, and who was *Dominus bonorum*, and whose Money the same properly was; and the adjection of the payment to be made to his Wife and Bairns, done to prejudge the Creditors, ought not to be allowed in their Defraud; and it is more agreeable to Reason, that he and his Wife and Bairns should want, than that the Creditors who were likely to want in his Default for his Debt should be so defrauded. The *Lords* Found, that these Sums being ordained to be payed for the Sustentation, and Intertainment of the Wife and Bairns by that Decreet Arbitral, which was not a Decreet given by the *Lords* of Session, but by Friends, yet it could not be Arrested for the Husbands Debt, but the same ought to be payed and converted to their Aliment and the Sustentation of their Life, as was destinate in the said Decreet. Actor, *Nisbet*. Alter. *Mowat* & *Craig*. *Hay* Clerk.

Lo. *Balmerinoch* contra L. *Covington*, *March ult.* 1627.

IN an Action at the instance of the Lord *Balmerinoch* against the Laird of *Covington*, who held the Lands of the Pursuer by Ward-holding, for the double of his Marriage: The Defender Alledging, that he was apparent Heir to one of his Forebears, who held and was Infeft in the Office of the Crownery of *Clidsdale* by Ward-holding of the King, whereby his Marriage fell to the King; likeas the King had gifted the same to a Donatar, so that the same could not pertain to this Pursuer. And the Pursuer Replying, that that Infeftment of that Office could not prejudge the Pursuer, because the same was granted and proceeded upon the Forfaulture of Sir *James Hamilton*, who was Infeft in that Office before the Forfaulture; and it was of verity, that that Forfaultry was by Sentence of Parliament Reductive, upon Process and Citation of all Parties having Interest, Reduced and found null, with all that followed thereupon. This Reply was found Relevant, to prefer the Pursuer to the King in the Defenders Marriage, the same Infeftment of the said Office, which

depended upon the Forfaultry, having become extinct by the said Sentence Reductive, deduced in Parliament as said is; which the *Lords* Found sufficient, albeit the Defenders Predeceſſors were not ſpecially called to the Reduction, ſeing after that Reduction, none of the Defenders Predeceſſors were alledged to be Infeft in that Office, there being divers of his Predeceſſors interveening betwixt him & that perſon, who was firſt Infeft upon the ſaid Forfaultry, to whom the Defender Alledged himſelf to be apparant Heir; and ſeing it was Replyed alſo, that ſince that Reduction of the Forfaultry, the Marqueſs of *Hamilton* ſtood Infeft by the King in that Office; which the *Lords* Found Relevant, albeit the Defenders Predeceſſors Infeftments were not Reduced in particular, nor none repreſenting him called to that Reduction. Before this Interloquitor, the Parties were repute to be privily agreed amongſt themſelves. Actor, *Stuart* & *Lermonth*. Alter. *Nicolſon* & *Rollock*. *Hay* Clerk. *Vid.* 25 *July* 1623, E. *Nithiſdale*.

Crawford contra *Cunninghame*, *June* 8. 1627.

IN an Action betwixt *Crawford* and *Cunninghame*, where *Cunninghame* was conveened as Heir to his Predeceſſor, who was Cautioner for the Laird of *Leſnories* for payment of 400 Pound, which the Defenders Predeceſſors were obliged to pay, as ſaid is. In the which Action, an Exception being admitted to the Defenders Probation, and a Term aſſigned to prove the ſame, and the Act being called by the Purſuer, who ſought Proteſtation thereon, the Defenders deſired to be heard to propone another Peremptor, whereupon he was ready to make Faith, that it was *noviter veniens ad notitiam* ſince the Term of the Act; and the Purſuer conteſting, that it ought not to be granted to him, in reſpect of his Compearance in the Act and the ſtate of the Proceſs, & that the ſame had depended almoſt two years. The *Lords* Found, ſeing this was deſired to be proponed by the Defender at the firſt Term of the Act, that the ſaid Exception might be proponed and received; but firſt they took Conſideration of the Defenders probable Ignorance, whereby he could not have known this Exception of before, when Litiſ-conteſtation was made, *viz.* that it was *In facto alieno*, being anent his umquhile Predeceſſors Cautionry for another perſon, and the Exception being conceived upon Satisfaction granted by the principal Party, by ſelling of Land to the Creditor, whereof by the Law, as he might be preſumed, and was execuſably Ignorant, ſo he made Faith by his Oath in preſence of the *Lords*, that he never knew thereof, but ſince the Term of the Act; as alſo, the *Lords* took his Declaration upon the probability of his Knowledge, and after what manner he got notice thereof ſince the Term, *viz.* he declared by his Oath, that the principal Party had given him ſenſine Inſpection of the Writ, whereupon the Exception foreſaid was founded: In reſpect of the which Oath and Tryal, anent both the probability of his Ignorance, and alſo of his Knowledge had ſince the Term of the Act, the *Lords* received the Exception now come to the Defenders knowledge; but the *Lords* would not grant Incident to prove the Exception foreſaid, but aſſigned a long Term to prove, at which Term they declared they would conclude the Cauſe without further Dyets, and in the mean time, that the Defender might uſe what Diligence by Incident or otherways as he pleaſed, but to be concluded againſt the Term foreſaid. Actor. *Nicolſon* & *Miller*. Alter. *Mowat* & *Scot*. *Gibſon* Clerk. *Vid.* 9 *June* 1624, L. of *Touch* contra E. of *Hume*.

Nicolſon & *Lyle* contra *Lyle*, *June* 15. 1627.

IN an Action at the inſtance of *Robert Nicolſon* and *Lyle* his Spouſe, who was firſt married upon the Laird of *Broxmouth*, againſt one *Lyle*, Son and Heir of umquhile *Lyle* of *Stanypeth* his Father, for Regiſtration of a Bond made

made by his said Father to the said *Lyle* Pursuer his Sister, obliging him to pay a Sum therein contained, at the first Term after his Father and Mothers decease; and from that Term to pay Annualrent, in case the principal Sum were not then payed, ay and while the payment thereof. The Defender Compearing, and Alledging, that this Pursuer to whom the said Obligation was made, had no Right to the said Sum, but the same pertained to the Executors of the said umquhile L. *Broxmouth* her first Husband, in whose Goods the same behoved to be reputed to have remained; and so having Right to all Sums pertaining to her, the said Obligation being granted by the Brother to the said Pursuer his Sister, after that the said Pursuer was Married with the L. of *Broxmouth*, and during the time of their Marriage. The *Lords* Found, that this Obligation, and the Sum therein contained, pertained to the Executors of the L. *Broxmouth* her first Husband, in whose time the same was acquired; And that she nor her second Husband had no Right thereto, and Found the said Sum to be a moveable Sum, & so to pertain to the Executors of the said first Husband, albeit the Term of payment was conferred to the time of the Decease of the Mother of the Wife, acquirer of the Obligation, who survived the L. of *Broxmouth*, by whose surviving of him, and that the payment was conferred to a time after the Mothers decease, and so to a time after *Broxmouth's* decease, who deceast before her, and that the Pursuer had a Clause of Infefting of her, and her Heirs in an Annualrent, in case of not payment of the principal Sum, at the first Term subsequent to her Mothers decease, whereby she Alledged that the Bond was Heretable, and pertained to her Heirs, and could not pertain to the Executor of her Husband, in whose lifetime the Term of Payment came not, and who could not have Right to the Sum, nor prejudge his Wife thereof, yet this was Repelled; And the *Lords* Found, that it remained Moveable, and that the Husband might have discharged it, the Term not being come, so long as he lived, and so pertained to his Executors; And hereby the Woman wants her Right, which pertains to Strangers, there being no Bairns of the first Marriage, which is hard. Actor. *Nicolson*. Alter. *Craig*. *Hay* Clerk. *Vid. Jan.* 15. 1628. *Falconer* contra *Batie*, where the contrair is done, and the Sum found Heretable, and to pertain to the Heir.

Dickson contra *Achanay*, *June* 16. 1627.

IN an Action betwixt *Dickson* and *Achanay*, The *Lords* astricted the Charger to produce the Decreet whereupon the Charge was execute, and Found, that the Precept directed by the inferior Judge, giver of the Decreet, against the Suspender, satisfied not the Production in the Suspension, albeit the Sum therein contained was but fifty pound, or thereby; and albeit there was no reason lybelled against the Decreet, but only that the Suspender Alledged, that if the Decreet were produced, he would propone, and Eke some reasons of nullitie against the same, which is not in use to be done, for in matters of little Sums, The *Lords* Found no necessity to produce more than the Precept, but the *Lords* declared, that if after Production of the Decreet, the Letters should be found orderly proceeded, they would decern greater expenses against the Suspender. Actor. *Belshes*. Alter. *Scot* Clerk.

Lindsay's contra L. *Balgony*, *June* 19. 1627.

IN an Action betwixt *Lindsay's* and L. *Balgony*, for payment to them as Executors datives to umquhile *David Lindsay* of *Balgony* their Father, of the Goods and Gear contained in the Testament of umquhile *Lillias Oliphant* Grand-mother to the Defender, and who was conveened as Nevoy and Heir by progress to her. The *Lords* Found, that the Testament which was the Title and Ground of this Pursuit, could not produce this Action, seing the same

was Dated, and Confirmed in the Year 1585. And so fourty years were expired before the Intenting of this Pursuit, and consequently that the same came under the Act of Prescription, in the 5, and 7. Parliaments *Ja.* 3. Which was Found, albeit these *Acts* mentions only Prescription of Obligations, and this Title was a Testament, whereto the Pursuer Alledged these *Acts* could not extend, which the *Lords* Repelled, and sustained the Prescription of the Testament, and so much the rather, because there was no Writ extant to prove the Debt contained in the Testament, and Intromission therewith after so long time. Actor. Alter. *Aiton. Scot* Clerk.

L. *Touch* contra L. *Hardismilne*, *June* 20. 1627.

L. *Touch* pursues a Removing against *Hardismilne* and his Tennents, the Title of which Pursuit was a Seasin given to the Pursuers umquhile Father, upon a Charter granted to him and his Heirs, of the same Lands lybelled, by the same *Defenders*, and a Retour whereby the *Pursuer* was served Heir to his umquhile Father therein, with a Charge out of the Chancellary by Precept, Charging the Defender to give him Precept of Seasin upon that Retour, but no further being proceeded upon by that First Precept out of the Chancellary, The *Lords* Found, that their Title could not produce this Action of Removing, the Pursuer not being Seased, without which Seasin he could not pursue Removing, albeit the same was not only Pursued against him, who was Author of his Fathers Right, to whom he was Heir, as said is, and against his Tennents only, and so whereby the Pursuer Replyed, that the Defender could not oppon to him want of Seasin, which he wanted through his default, he being Charged as said is, to give him Seasin, and being Author of his Fathers Right, which was Repelled, and no Removing found before he was Seased. Actor. *Craig.* Alter *Belshes. Gibson* Clerk. *Vid. December* 14. 1626. *Calderwood, Jan.* 20. 1625. L. *Selmes* and the Cases there. *March* 20. 1623. Lo. *Tester. Decem.* 18. 1632. *Dalrymple.*

Lidderdale of St. *Maries Isle* contra *June* 22. 1627.

IN an *Action* of Spulzie at the Instance of L. *Isle* against some Defenders, a Tack being Set of the Teinds therein contained, to the Pursuers Father, and to the Pursuer his Son, and to the longest liver of them two, and their Heirs. The *Lords* Found, that the Tack being of the Tenor foresaid, the Father and the Son were conjunct & equal Tacksmen, and that the Benefit of the Teinds therein contained should divide equally betwixt them, so long as they lived together; and after the decease of any of them, the whole Right thereof pertained to the Surviver, being Set to the Father, and to the Son, and to the longest liver of them two, and their Heirs, as said is; And therefore because this Pursuit was moved at the Sons Instance, for certain years owing before the decease of the Father, which the Son acclaimed, as appertaining to him. The *Lords* Found, that he had only Right to the half of the saids Teinds of the years wherein his Father lived; and that his Father had Right to the other half, and consequently, that the same pertained to his Executors; and Found that the Father, all the years wherein he survived, had not Right by vertue of the foresaid Tack, to the saids whole Teinds, but to the half allenarly, he being conjunct Tacksman, in respect of the Tenor of the Tack, and that after the decease of the Father, the benefite of the whole Tack pertained to the Son Pursuer. Actor. *Lawtie.* Alter. *Gibson* Clerk. *Vid. July* 2. 1630. *John Ross* contra Town of *Perth.*

Drummond contra B. *Brughton*, *Eodem die.*

MR. *James Drummond* having charged the Barron of *Brughton* for his Fees, conform to his Obligation, containing the Sum of 200. Merks; the

the Barron Suspending, that at the subscribing of the said Obligation, he was Minor having Curators, who consented not thereto. The *Lords* Found this Alledgance Relevant against the *Reason*, That the Bond bore, *to be given to him, who was his Pedagogue for his Fees, and Service*; And that he offered to prove that he was his Pedagogue, and Served and Attended him, as the Bond bore, so that this Cause being expresst in the Bond, and the verity thereof being proven, which they *Found* probable by Witnesses, and Found no necessity to refer it to the Suspenders Oath, they Found this sufficient to maintain the Bond against the Reason of Minority, and having of Curators not consenting to the Bond, seing the Suspender *Alledged* not that his Fees were satisfied, and he Compensed *aliunde*, by any other. Actor. *Primrose*. Alter.

Sinclar contra *Bruce*, *June* 23. 1627.

IN a Suspension against *William Bruce* of *Symbester*, raised by one *Sinclar* in *Orkney*, who was Charged by Letters of Horning, to pay to the said *William* certain Sums contained in a Decreet of Spulzie, obtained by him against the Suspender The Reason was, that the Charger had used Compriſing of the Suspenders Lands for the saids Sums, whereupon he was Infeft, and which Compriſing and Seasin was a Real Execution, which behoved to make all personal Execution cease: The *Lords* Found not this Reason Relevant, for notwithstanding of the Compryſing, and Seasin, albeit the Legal Reversion was also expired, they Found that the *Charger* might also use Personal Execution by Horning and Caption against the Suspender, ay and while he were payed of his Sums; And *Found* also, that he might Retain the Right of the said *Compriſing* and Infeftment; and that he needed not to Renunce the same before he took him to the other Personal Execution, but that he might keep that Security; By the which the *Lords* Found, that he could not thereby be found to be satisfied of his Sum, and secluded from the said Personal Execution, except that the Compriser had obtained Possession of the Lands Compriſed; Neither was it respected, where the Suspender Alledged, that it was in the Chargers default, that he wanted Possession, seing he had never done diligence to recover Possession, nor could qualifie any lawful impediment, which stayed or could debar him therefrom, which was Repelled, and the Letters found orderly Proceeded, ay and while he were payed of the Sum. Actor. *Baird*. Alter. *Chaip. Hay* Clerk. *Vid. penult January* 1628. *Meldrum* contra L. *Cluny*, *.

M'millan contra *Gordon*, *Eodem die*.

MR. *John M'millan* being Assigney by *Thomas Ferguson*, to certain Teinds, which *Thomas* was made Sub-tacksman of the same to Mr *Gilbert Gordon* of *Shirmes*, who was principal Tacksman of the same, pursues *John Gordon* of *Troquhan* for the same, and referrs the quantity to his Oath; and after the day of Compearance, a Term being Assigned to his Procurator to exhibit him to Depone. At the Term he Compeared by his Procurator, and proponed an Exception, which the *Lords* Found might be proponed *in eo statu processus*, albeit it was contended, that it could not be received then; and the Exception being, that the Defender had a Sub-tack of the saids Teinds from the said Mr. *Gilbert Gordon*, their common Author, by the space of four years, before the year Controverted, which albeit it was after the Alledged Sub-Tack Set by him to *Thomas Ferguson* the Pursuers Author, and who also had served Inhibition thereupon, before the Excipients Sub-tack, yet seing the Excipients Tack was clad with Possession continually since the date thereof; and seing that he offered to prove, that the said Mr. *Gilbert* was ever in Possession of the Teinds for all years, untill the time of the Defenders Right, notwithstanding of the said Sub-Tack Set to *Ferguson*, which took never effect by Possession,

the same therefore albeit preceeding his Right, and Inhibition executed thereupon also before his Sub-tack, cannot put him *in mala fide* to have taken his Tack, and bruiked the Teinds since the date thereof, *viz. anno* 1622. This Exception was sustained to Eleid this Pursuit, and was admitted to Probation. Actor. Alter. *Belshes. Vid. February* 7. 1628. L. *Balveny*.

E. *Galloway* contra *Tailzifer*, *June* 26. 1627.

IN a Removing at the E. of *Galloway's* Instance, against *Tailzifer*, who defended himself with a Rental of the Lands Lybelled, which was Set to his Father, and his Heirs *ad perpetuam Remanentiam* by the Town of *Wigtoun*, of whom the saids Lands were holden. The *Lords* Found the Exception upon this Rental of the Tenor foresaid, sufficient to defend this Defender, as Appearand Heir to his umquhile Father, to whom, and his Heirs the Rental was Set; he proving, that it is the Custom of the Town of *Wigtoun*, that the Rentals of the like Tenor, *viz.* Set to Men and their Heirs, has ever been sufficient to maintain the Heir of the first Rentaller, after the first Rentallers Decease, in Possession of the Lands, during the Heirs Lifetime, and which was sustained, albeit the Pursuer Replyed, that that Rental behoved to be found expired after the Decease of the first Rentaller; and that it could last no longer, neither was of any force to defend his Heir, being against the nature of a Rental, and albeit by the Custom of that Burgh Setters of the Rental, it might be maintained against themselves, if they were pursuing the Defender to Remove, yet it could not be respected against this Pursuer, who was Heretably Infeft in the Lands Lybelled, by the Town of *Wigtoun*, upon the Resignation of his Author, who was also Heretably Infeft therein by them, long before the date of this Rental; which Reply was Repelled, and the Exception sustained, as said is, But the Custom was found by the *Lords* ought to be proven by some Sentence, given in *foro contradictorio* betwixt Parties, where the Judge allowed the said Custom, and Found the famen Proven; and found it not Probable by the Testimony of the Burgh, declaring that that was their Custom, nor by any Tryal showing, that the Rentallers Heirs bruiked so *de facto*, which was not Found sufficient. Actor. *Stuart* & *Nicolson*. Alter. *Scot* Clerk. *Vid. July* 5. 1625. L. *Aiton*, and betwixt thir same Parties. *March* 15. 1631.

Lindsay contra Minister of *Brichen*, *Eodem die*.

IN a Suspension betwixt Mr. *Patrick Lindsay* and the Minister of *Brichen*, who Charged the Suspender for payment of 22 pounds, as for the third of the Thesaury of *Brichen*, to which Benefice the said Mr. *Patrick* was provided, and who Suspended upon this reason, *viz.* That Chapters are restored by the Acts of Parliament 1617, and 1621. to all their Rents; and so it is, that this Benefice of the Thesaurary is one of the Chapter-dignities of the Bishoprick of *Brichen*, and so ought not to pay any of the Stipend to the Minister of *Brichen*, but should be payed by the Bishop; this Reason was rejected, and the Ministers Decreet and Charges thereon sustained, notwithstanding of the Acts restoring the Chapters; which Acts were found, as the words thereof bears, that the saids Restitutions were made in favours of Ministers, who should be provided to any of the said Chapter-Benefices and Rents, and this Suspender was not a Minister, and therefore the Acts could not Militat for him. Actor. *Aiton*. Alter. *Mowat*. *Gibson* Clerk.

Baillie contra *Robertson*, *penult June*, 1627.

IN an Action betwixt *Margaret Baillie* and *Janet Robertson*, the *Lords* Found no Process against the Defender, because she was clad with a Husband, and he not Summoned; which Alledgance was sustained, albeit she was Married since

since the Executing of the Principal Summons, because she was Married before the Execution of the second Summons of Continuation; so that her Husband should have been Summoned to Compear by the said Citation; and albeit the Act and Letters could not have been direct against him, seing he was not in the Principal Summons; yet the Pursuer by Supplication to the *Lords*, might have obtained warrand to Summon him, by vertue whereof he might have been Summoned for his Interest, likeas the Pursuer might raise a new Continuation, and give in a Supplication to Summon the Husband for his Interest, as said is. *Hay* Clerk.

Dryſdale contra *Crawfurd*, *Eodem die.*

IN an Action of Registration of a Bond at the instance of *James Dryſdale*, Executor to him to whom the Bond was made, against *Henry Crawfurd* Debitor. The *Lords* Found, that this Bond could not be sought to be Registrat at the Executors instance, albeit the same was Confirmed in the Defuncts Testament, in respect the Bond obliged the Defender to pay Annualrent therefore; whereby the *Lords* found, it pertained to the Heir, and not to the Executor; neither was it sustained, what the Pursuer answered, that he was that same person who would be Heir in Law, and that he also offered Caution, to warrand the Defender at the Heirs hands, and all others, seing he was not Retoured Heir to the Defunct; But the *Lords* Found the Proceſs might ly over while he should be served Heir, and then upon production of his Retour, he might proceed to his Cause. *Hay* Clerk.

Stuart contra L. *Wedderburn* and others, *Eodem die.*

IN a Cause of wrongous Intromission with the Teinds of *Coldinghame*, at the instance of *John Stuart* of *Coldinghame*, against the L. *Wedderburn* and others; The said *John Stuart* being provided to the Abbacy of *Coldinghame*, and thereafter the Earl *Bothwell* his Father being Forefaulted, after whose Forefaulture the Earls Posterity by Act of Parliament *Anno* 1592. being declared unhabile to bruik any Benefice in the Kingdom; And by another Act of Parliament *Anno* 1594. The Abbacy of *Coldinghame* being annexed to the Crown, & the Earl of *Hume* having acquired the Right of that Abbacy from the King, and having Sett Tacks of divers Teinds of this Abbacy to divers persons, who being conveened in this Action to repay the same Teinds, Sett in Tack to the said *John Stuart*, as he who in *Anno* 1621. was restored against this Act of Disabilitation, and his said Provision found good by the Estates, and all things done in prejudice of his Right and Provision, with all Rights made since his Disabilitation to others, being Reduced and Annulled by the said Acts; the saids Defenders defending themselves against the said Pursuit, by vertue of the saids Tacks. The *Lords* Repelled their Exceptions proponed thereupon, albeit they were purchast conform to the Laws then standing, and for Sums of Money, and Causes onerous, and which they Alledged should defend them in this Possessory Judgment, they being Possessors *bonæ fidei*, especially against a Restitution of Grace, as they Alledged this to be: seing that by Act of Parliament 1584. It is Provided, that no person should thereafter be restored, who was Forefaulted, but only by way of Grace. And by the 4 Act of Parliament 1606. It is Provided, that Restitutions by Grace should not prejudge persons, who had acquired Right of any thing belonging to the person Forefaulted from the King, as they and their Author had done. And by the Act *Salvo Jure*, the same Parliament 1621. wherein the Pursuers Restitution was done, it is Ordained, that no Act made in favours of any particular Party, should prejudge any privat Parties Right, whereby they Alledged, that the Pursuers Act could not prejudge their preceeding Rights, especially such an Act which

was not deduced upon Proceſs, and whereto they were never called, nor proceeded it upon any Citation, and ſo behoved to be a Reſtitution by way of grace: Likeas they Alledged, that they compeared in that ſame Parliament, and Proteſted that that Act ſhould not prejudge them; which Proteſtation was in effect admitted by that Act *Salvo Jure* made after the ſaid Proteſtation, and muſt work the ſame effect, as if it had been ſpecially admitted. This Alledgance was Repelled, in reſpect of the ſaid Act, which was not only found to be of the nature of a gracious Reſtitution, but contained a Ratification of the Purſuers Proviſion, and a Reſciſſion of the Deeds done in prejudice thereof, and of the Act of Diſhabilitation, and all Rights depending thereon; and that the ſaid Act of Parliament could not be drawn in Diſpute before the Seſſion, if it was formally, or well done, or not, they not being Judges thereto: neither could that Act *Salvo Jure* take away the other Act made in that ſame Parliament *ſpecificè* done *ex certa ſcientia.* The like Deciſion was done in an Action of Removing, betwixt the Earl of *Nithſdale* and *Mcklellan*, Decided 5 *July* 1627. But the *Lords* Found they would reſerve to themſelves, to conſider what ſatisfaction ſhould be made for the years Libelled to the Purſuer, after deducing of Probation upon the quantity of their Intromiſſion theſe years; which years Libelled were only the years 1625, and 1626. and ſo divers years after the Purſuers Act of Reſtitution. Likeas to interrupt the Defenders *bona fides*, he offered to prove Execution of Inhibition againſt thir Defenders, and Intentings of Actions of Spuilzie for thir ſame Teinds of divers other years, preceeding thir years acclaimed, which the *Lords* admitted to Probation, to the effect foreſaid, as ſaid is. Actor. *Aiton* & *Stuart.* Alter. *Nicolſon* & *Belſhes.* *Gibſon* Clerk. *Vid.* 25 *July* 1623. E. *Nithſdale.* 7 *Feb.* 1627. *John Stuart.*

L. *Touch* contra L. *Carnock*, *Eodem die.*

LAird *Touch* having the Eſcheat of L. *Kippinroſs*, purſues the L. *Carnock*, as Heir to his Father, which Father was adebted to *Kippinroſs*, in a Sum of Money to make payment to him of the ſame, as Donatar, who had obtained General Declarator, and thereupon had Arreſted the ſaid Sum in the Defenders hands, which by this Purſuit he was deſired to make forth-coming, and being referred all to his Oath, *viz.* both that his Father was Debitor, and that he is Heir to his Father; and the Defender Alledging, that this Purſuit could not be ſuſtained againſt him as Heir to his Father, to make the Debt Alledged owing by his Father forth-coming, except Sentence had firſt preceeded, and had been recovered upon the Debt, finding that his Father was Debitor in that Sum, and that thereafter that Sentence was transferred againſt him: And it was Alledged, that the Purſuit was againſt Form, ſo ſummarly without preceeding Sentence, to purſue him to make an Alledged Debt owing by his Father, as Arreſted in the Defenders hands to be made forth-coming. The *Lords* Repelled the Alledgance, and ſuſtained the Purſuit, which they found formally and orderly Deduced, for the Rebels ſelf might have conveened the Defender, as Heir to his Father, to pay a Debt owing to himſelf by his Father, and referred it to his Oath, and therefore the Donatar might do the ſamine. Actor. *Craig.* Alter. *Primroſe* & *Chaip.* *Gibſon* Clerk. *Vid.* 23 *Feb.* 1628. *Naſmith*, *Decem.* 9. 1626. Lord *Blantyre*.

E. of *Dumfermling* contra his Mother, *July* 3. 1627.

IN a Suſpenſion betwixt the Earl of *Dumfermling* and his Mother, where the Lady his Mother charged the Earl Suſpender her Son, upon her Contract of Marriage, as Heir to his Father, to Inſeſt her in the Lands of *Innerask*, which were Conquiſh'd by her Husband the time of their Marriage, ſeing by her Contract of Marriage her ſaid Husband was oblig'd, to provide her to her Liferent

Liferent of all Lands, which he should Conquish the time of their Marriage. The *Lords* Found the Suspender was holden to give the Charger an Liferent-Infeftment of the saids Lands, in respect of the said Clause of the said Contract of Marriage, which Clause they found no ways to be Elided by the Reason of the Suspension, which proported, that the Suspender his Father who was Contracter, was only oblig'd by the said Contract, to Provide the Lady to the Liferent with himself, of such Lands as he should Conquish during their Marriage, which words necessarly Implyed, that the Conquish behoved to be made to himself, and that he should be first Infeft therein himself, otherways it could not be repute a Conquish to him; And it was of Verity, that these Lands of *Inneresk*, albeit acquired in the time of their Marriage, was not acquired to her Husband, neither was he ever Infeft therein, but by the contrary the same was by the principal Contract of Vendition acquired to the Suspender Heretably, no mention being made therein of his Father; likeas, the Suspender was Infeft therein, and not his Father, and so the Suspender Alledged, that the Clause of the Contract could not be effectual to the Lady, to give her the Liferent of these Lands, whereof her Husbands self (if he were living) could claim no Liferent, the same being provided to his Son, without any Reservation; which was Repelled by the *Lords*, and Found, that the Liferent thereof was due to her: And albeit the Suspender further Alledged, that he stood Debitor in the same Sums which were given for the price of the Lands, or in als great Sums as the price thereof extended to, which rested unpayed the time of his Father decease, and which he as Heir behoved now to pay; so that it were against all Reason that he should be subject to pay the price of the Land, and that the Lady should bruik her Liferent thereof, as if it had been his Fathers Conquish, which could not be so repute, the price thereof lying yet on the Defenders Head. This was also Repelled, and notwithstanding thereof, the Lady was found to have Right to seek her Liferent thereof, seing the time of the buying of these Lands the Defender was but an Infant. Actor. *Hope & Nicolson*. Alter. *Alton & Stuart*. *Hay* Clerk. *Vid.* 24 *January* 1629, La. *Renton* contra L. *Renton*. 12 *March* 1628, betwixt the same Parties. *ult. June* 1629 betwixt them. 16 *July* 1625, *Knox* con. *Brown*. 14 *March* 1628, *Graham* contra *Finnie*.

The like Decision done 11 *July* 1632, La. *Bonitoun* contra L. *Harden*, where the Relict upon the like Clause of her Contract of Marriage, got her Liferent of Lands acquired by her Husband to his Son, Reserving only to the Husband his Liferent thereof. *Gibson* Clerk.

M'kenzie contra Parochioners, *July* 4. 1627.

IN an Action of Letters conform, at the instance of *M'kenzie* Minister at *Sclait* against the Parochioners thereof: The *Lords* Found, that a Gift presenting, and in that same Presentation admitting the Minister to the Kirk, the same being a Benefice at the Bishop of the *Isles* Presentation, was sufficient thereon to seek Letters conform; and that there needed no other several Collation nor Institution, the Benefice being given by the Bishop of the Diocy, who was Patron, and conferred by him by his Gift to the Minister *pleno jure*; and because there compeared another Minister, who Alledged, that upon another Gift granted to him by the same Bishop, of the same Benfice, that he had obtained Letters conform in his favours, so that no other Sentence could be granted to another. This Alledgance was Repelled, in respect this Pursuer Replyed, that he was actual Minister, and served presently the Cure at the Kirk, and had done the same these 18 years past; which being proven, the *Lords* preferred him, notwithstanding of the other Sentence of Letters conform. Actor. *Foulis*. Alter. *Gibson* Clerk. *Vid.* 11 *Dec.* 1632, L. *Lugtoun*. 10 *Dec.* 1628, L. *Ley*.

Lesly contra *Lesly*, *Eodem die.*

IN an Improbation betwixt *Lesly* against *Lesly* and *Alexander Harvie* Spouse to the Defender, wherein the Defender was conveened for Production and Improbation of whatsoever Bonds, Contracts, Obligations, Charters, or Precepts, made by the Pursuer, or by that special person to whom he was Retoured Heir, and to these Defenders *nominatim*. The *Lords* Sustained this Action and Clause conceived in these general Terms, albeit that the Pursuer condescended not, neither of the Dates of the Writs, nor of the Tenor nor Contents thereof; Wherein They Found, that he needed not be more special, seing he pursued by that general Clause for Writs made by himself, or by that one person allenarly to whom he was Heir, and not by any other his Predecessors, to these same Defenders themselves, and not to any of their Predecessors, so that they could not pretend ignorance of the Writs, if any was made to themselves. *Scot* Clerk.

Edgar and *Johnstoun* contra *Finlason*, *Eodem die.*

IN a double Poynding betwixt *Edgar* and *Johnstoun* against *Finlason*; The *Lords* Found, that a Bond made to the said *Robert*, whereby *Walter Finlason* was oblig'd to pay a Sum to the Creditor foresaid at the Term, and failzieing thereof, to Infeft him at his option in an Annualrent therefore; Providing always in the same Bond, that notwithstanding of that Clause of Infeftment, the Debitor should pay at any Term thereafter the principal Sum with Annualrents, which should be owing for the time, without Requisition, that that Bond of this Tenor, was a sufficient Ground whereupon Compryfing might be Deduced by the Creditor against his Debitor for the principal Sum, and for the By-gones owing before the Compryfing; which Compryfing the *Lords* Sustained, albeit the other Party Alledged that the same was null, being Deduced upon an Heretable Bond, never being made Movable by a preceeding Charge, without which had preceeded, and that thereby the Bond was made Movable, he Alledged that no Compryfing could be Deduced thereon; which Alledgance was Repelled, in respect of the foresaid Provision of the Bond, which gave the Creditor als great liberty to Compryse as he might Poynd therefore, and there needed no other preceeding Charge to have made it Movable, except he had intended to prosecute personal Execution against his Party by Letters of Horning; and albeit that the Creditor in the denunciation of his Compryfing, had denunced his Debitors Lands, to be compryfed for more Annualrents than was resting the time of the Compryfing, and that the other Party Alledged, that therefore the Creditors self had acknowledged, that his Bond remained an Heretable Bond, and so that no Compryfing could be Deduced thereon, seing he had denunced to Compryse for a Terms Annualrent subsequent to the date of the Compryfing, which he could not have done, if he had not thereby acknowledged the Sum and Bond to be Heretable, and to be subject to Annualrent; yet this Alledgance was Repelled, seing, albeit the Denunciation was made so, yet the Compryfing was only Deduced, and the Debitors Lands compryfed for the Annualrents which were owing for Terms expired before the Compryfing, which Compryfing could not be prejudged by the Denunciation containing greater Sums, the same being restricted by the subsequent Compryfing following thereupon. Actor. *Nicolson* & *Cunninghame*. Alter. *Hope* & *Belshes*. *Gibson* Clerk. *Vid.* 24 *January* 1627. E. *Cassils* contra *Lowis*.

Campbel contra *Campbel*, *July* 6. 1627.

IN a Suspension betwixt *Campbel* against *Campbel*; The *Lords* Preferred Tutors Testamentars nominate to a Minor (whereof the Laird of *Langshaw*

was

was one) to the Tutor Dative in the administration of the Minors Goods, notwithstanding that the Tutor Dative Alledged, that he ought to have been preferred, seing the Tutors Testamentars had fallen from their Office, there being six years since the Defuncts decease who nominate them Tutors, during the which space they had done no Diligence, neither to Administrate the Minors Affairs, nor to care for her Person, as was incumbent to them of the Law, until now that the Tutor Dative had intented this Pursuit in favours of the Minor, and that the said Tutor Dative having married the Minors Mother, hath had the only care of her all this time; likeas the saids Tutors Testamentars were Curators to the Heir-Male, who in this Process was conveened for that Deed which he was oblig'd to fulfil to this Pupil, so that they could not be both Curators to the one Party, and Tutors to the other: Which Alledgance was Repelled, seing they Found, that this Cessation of the Tutors Testamentars could not prejudge them of their Office of Tutory, which they were now willing to Administrate, albeit after six years expired, in regard there was no prejudice sustained by the Minor, nor done to her in the mean time, which could be qualified any ways; and although they were Curators to the Heir-Male, who was charged to fulfil the Deed libelled for the Pupil, to whom they were Tutors, yet that was found no Impediment to them to continue Tutors, seing the Heir-Male offered real and ready Obedience, and to fulfil the Obligation to the other Pupil, so that it was no litigious Dispute betwixt these Parties, which could hinder the effect of the Tutors Administration of their Pupils Goods, and therefore the Testamentars were preferred to the Dative. It is to be here considered, that of the Law *quamdiu speratur tutela testamentaria non est locus Dativæ vel legittimæ*, also *Vitricus de jure non datur Tutor suo Privigno*; and this Tutor Dative, before the Tutory Dative, had married the Mother of this Pupil, to whom he acclaimed to be Tutor; also the *Lords* Found, that the Laird of *Rowallan*, who was Father to the Tutor Dative, being one of the Tutors Testamentars, who having Renounced to be Tutor by his Renunciation subscribed by him, and once produced before the *Lords*, albeit that thereafter he took up the samine, and desired to be admitted to the Tutory with the rest of the Testamentars, Alledging that he might repent and return to the Office; yet in respect of the said Renunciation, the *Lords* Found that he ought not to be Tutor, but only the rest of the Testamentars, and that he could not come back again. Actor, *Hope*. Alter, *Scot*. *Scot* Clerk. *Vid.* 22 *Feb.* 1628, *Colquhoun*. 4 *July* 1629, L. *Lanshaw*. 15 *July* 1631, *Grant* contra *Grant*. 17 *Dec.* 1631, *Auchterlony*.

E. *Annandale* contra *Murray*, *Eodem die*.

IN a general Declarator of umquhile the Laird of *Cockpules* Escheat, at the instance of the Earl of *Annandale*, Donatar thereto made by the King since the Rebels decease, against Mr. *Richard Murray* of *Cockpule* his Brother; The *Lords* preferred the Pursuer to another Donatar, Compearing and Alledging, that he was made Donatar thereto by the King, and had obtained Declarator thereupon before the Rebels decease, so that it could not be Declared again at the second Donatars instance; which Alledgance was Repelled, and the said second Gift Sustained, because it was Replyed by the Pursuer the second Donatar, that the first Gift could not be respected, being taken to the Rebels use, and upon his own Charges, and he continuing Rebel thereafter unrelaxed, the King had Right by continuing of his Rebellion to Gift his Escheat or Liferent to another Donatar, who ought to be preferred to the other; and the Defender contending, that the first Donatar had Right to the Rebels whole Goods, which he had then at the time of the said Gift, notwithstanding that the Gift was taken to the Rebels own use, and notwithstanding

he thereafter continued at the Horn unrelaxed, because he Alledged the King might gift the same to the Rebels self, where no Creditors compeared to quarrel the same, and where no Party was prejudged thereby; for the King being only interessed in that Rebellion, his Majesties Interest was taken away by his Gift, which being once given, there could not (except there had been a new Rebellion to make a new cause of Vacation to the Kings Majesty) be any new Gift effectually given to a second Donatar; which Alledgance was Repelled, for the *Lords* Found, that the first Gift could not be effectually given, neither to the Rebels self, nor to any other to his use, he remaining still Rebel after the Gift, and that the Rebel continuing Rebel unrelaxed, was not capable to receive the famine, albeit no Creditor were prejudged thereby, nor compeared to oppone the said Gift, but that there was place to confer a new Gift to any other Donatar, notwithstanding of the said first Gift, which second Donatar might als lawfully quarrel the said first Gift, as any Creditor might have done; likeas it was Found als Relevant, being proponed for the second Donatar, as it would have been being proponed for a true Creditor; and also the *Lords* Found, that although the first Gift had been valuably given to a Donatars own behove, yet if the Donatar should thereafter either Dispone or Transact for Sums of Money or otherways, the Right thereof to the Rebel, and that he should after that Disposition remain unrelaxed; that the King might Dispone valuably a new Gift of the same Escheat to another Donatar, as being acquired, and as a new Purchase made by the Rebel after the first Gift, whereto the King had Right by the continuing Rebellion, and the Acquisition by the Rebel of these Goods while he was Rebel, which being so acquired after the first Gift, by the Rebels remaining so, it gave place to the King of new to confer them. Actor. *Hope & Burnet.* Alter. *Nicolson.* *Scot* Clerk. *Vid.* 25 & 28 *Nov.* 1626. E. *Kinghorn* contra *Wood.*

In this same Process, the persons who of Law would have been Executors to the Rebel, being called, and proponing the Exception foresaid upon the said prior Gift and Declarator, and Alledging that the Donatar, who had obtained Declarator, had made one *Grahame* Assigney thereto, who had transacted with them for the saids Goods Escheatable, and so that this Pursuer could not seek a Declarator upon that which is declared already, seing they behoved to be comptable to him who had obtained the said first Gift, and which was declared. The *Lords* Found, that this Alledgance was not competent to these Excipients to be proponed by them, albeit they were specially called in this Process, but the same was only competent to the Donatar and his Assigney.

L. *Pitmedden* and Lo. *Elphingston* contra *Smith*, *July* 7. 1627.

IN a Removing pursued by *Pitmedden*, and the L. *Elphingston* against *Smith*, the time of this Warning, whereupon this Removing was pursued, the Defender had an Heretable Infestment of the Lands Lybelled, standing and clad with Possession, which was Reduced by the Pursuer; After the making of the warning, the Removing intented thereupon depending in the meantime undisputed, but lying over, not mentioned betwixt the Parties, and after Sentence of Reduction, whereby the Defenders Right was taken away, which was standing when the Warning was made, The Pursuer Insisting in his Removing, and the Defender Alledging, that his Infestment foresaid standing untaken away the time of the Warning, albeit sensyne Reduced, was enough to produce Absolvitor from that Warning, while he were Warned of new again. The *Lords*, in respect of the said Sentence of Reduction, which Reduction was Intented before the Warning foresaid was made, and the Defender thereby Summoned before the Warning, for eschewing of Pleas, and un-necessar Actions betwixt Parties, Decerned the Defender to Remove, in this same Process,

ceſs, by vertue of the foreſaid Warning; but Aſſoilzied him from all violent Profits, and found him *Poſſeſſor bona fide*, and ordained him to Remove from this Land after Separation of this Cropt, which was laboured before the Sentence Reductive, and that he ſhould poſſeſs the Barn-yeard, and alſo the Barns, and likeways an Houſe for winning and threſhing of the Corns, while *Beltane* thereafter. Actor. *Baird*. Alter. *Oliphant*. *Gibſon* Clerk.

Wallace contra *Harvy*, *July* 11. 1627.

IN a Suſpenſion betwixt *Wallace* and *Harvy*, *Harvy* having Compriſed certain Lands from *Wallace* his Debitor, and being therein Seaſed, obtained Decreet of Removing, which being deſired to be Suſpended and Reduced upon this Reaſon by *Adam Wallace*, Becauſe the ſaid *Adam* had obtained Tack of the ſame Lands, from whom they were Compriſed, and that for Sums of Money truly adebted to him, which Tack was Set before the Lands was Denunced to be Compriſed; and the Compriſer Anſwering, that he ſhould be preferred to the Tackſman, becauſe albeit the Tack was Set of a date anterior to his Denounciation, yet the ſame was conferred to a time of Entry, before which Entry his Compriſing was perfected, ſo that the Tack not being clad with Poſſeſſion before his Compriſing, and by Conſequence not being Real, his Compriſing interveening before the Entry, albeit after the date thereof, was ſuch an Impediment, which renders the Tack ineffectual, which could not be Real by Poſſeſſion before the Entry; and therefore cannot prejudge his Real Right of Compriſing, it being a Deed Legally done in ſeeking Execution neceſſar for his juſt Debt, whereas the Tack was a voluntar Deed, done betwixt two Good-Bretheren, and ſo the more Suſpicious; And the Suſpender oppoining his Tack anterior to the Compriſing, and offering to prove the Verity of the Debt, owing to him by the Setter thereof, and Alledging that his Tack being Set in May 1623. And the Entry to be at *Martinmaſs* the ſame year, which could not be ſooner, in reſpect the Cropt growing upon the Lands that year, the ſame being poſſeſt by Tennents, the Interveening Compriſing ought not to prejudge his Tack, eſpecially ſeing his Compryſing was leſs real than his Tack, before that he was Seaſed upon his Compriſing; it being true that he was not Seaſed while the year 1625. two years after the Compriſing, and time of Entry of the Tack, whereas the Tackſman, the firſt year after the Entry, *viz.* the year 1624. And alſo the year 1625. had obtained Decreet againſt the Tennents, for the Duties of the ſaids Lands, and payment conform thereto. The *Lords* preferred the Tackſman in this Poſſeſſor Judgment to the Compriſer, albeit the Compriſing was Deduced, and ended before the Entry of the Tack, ſeing the Compriſer had done no diligence two years after the Compriſing, to obtain himſelf Seaſed thereon in the Lands, ſo that his Compriſing without Seaſin being no more Real Right, than the Tack, without Poſſeſſion, before the Entry; and the ſame Tack before Seaſin upon the Compriſing, being clad with Poſſeſſion, was ſuſtained to maintain the Tackſman in Poſſeſſion, while his Tack ſhould be taken away, in ſome ordinar Purſuit, by way of Action, or by ſome better Argument, but if Seaſin had been timely taken upon the Compriſing, or Diligence done to have obtained the ſame. The *Lords* inclined *eo caſu* to think, that the interveening Compriſing before the Entry of the Tack, would have been an Impediment, why the Tack would never have been effectual againſt that Compriſer, no more than it could have been prejudicial to any, who before the Entry had Heretably bought the Lands from the Setter of the Tack; But the not doing of diligence, to obtain Seaſin ſo long after the Compriſing, without the which Seaſin or Diligence it was not Real, was the Reaſon of this Deciſion, the Compriſer was alſo Brother in Law to him from whom he Compriſed, and the Tackſman was his Brother. Thereafter upon

the 17 *July* the *Lords* preferred the Compriser, because the Tacksmans Decreet and Possession were condescended on by him, to be after the Compriser's Seasin, whereas if they had been before his Seasin, the Tack thereby would have been Real, and was the cause of the Tacksmans preference, but the Compriser being Seased in the Tack was clad with natural Possession and Decreets, the Compriser was preferred; and also because he Alledged, that the Common Author, from whom he Compriſed, remained in Real Possession of the Lands himself to the time of his Seasin, which was admitted to his Probation, albeit the Tacksman Alledged that the Summons, whereupon the Decreet followed, was Execute before the Compriſers Seasin; and that he had been in natural Possession before the Seasin, of the Maills and Duties; likeas before the same, the Possessors of the Lands being Tacksmen to his *Author*, they took new Subtacks of him, and acknowledged his Right, and payed to him their Tack-Duties, which was all Repelled, as is above-written. Actor. *Nicolson.* Alter. *Cunninghame.* Scot Clerk. *Vid. Feb.* 13. 1627. *Samuel* contra *Samuel*, *July* 20. 1622. blank in the Names. *November* 25. 1635. *John Morison.*

Rowan contra *Shaw*, *July* 12. 1627.

IN a Suspension betwixt *Rowan* and *Shaw*, where a Bond was made by a Debitor, granting him to have borrowed from umquhile *Ferguson* some Money, which the Debitor obliged himself to pay to his said Creditor, or to another called *Shaw*, or to either of them presenters of the Bond, and their Heirs and Executors; which Sum being craved from the said Debitor, after the decease of *Ferguson* the principal Creditor, by the Creditor of the said *Ferguson*, who had Arrested the same, and also the said Sum being craved by the Executors of *Shaw*, who was adjected in the Bond, acclaiming the same to be due to them, seing the payment by the Bond was appointed to be made to one of the two presenters of the Bond, and their Heirs and Executors, and that they had the Bond, & so contended the Right of it to pertain to them, and not to *Ferguson*, nor his Creditors. The *Lords* Preferred the Executors of the Person adjected, in respect of the Tenor of the Bond, appointing payment to be made to one of the Presenters, or their Heirs or Executors; For albeit the Bond was not presented by *Shaw* in his own Lifetime, and that the Sum was the proper Money of *Ferguson*, yet it was found als due to his Executors, as to *Shaw* himself, seing they had the Bond; and albeit by the Civil Law, *Adjectus solutioni non potest petere sed tantum potest solutionem accipere*, yet that agrees not with our practise, whereby *Adjectus potest etiam petere*: And albeit by our practice, *is possit petere*, yet if he and the principal Creditor were contending for the Sum, the principal Creditor lender of the Money would be preferred to the adjected, nevertheless here the Executors of him who was Adjected, were preferred to the Creditor of him, who principally was Deduced in the Obligation, for if he had been living, the *Adjectus* would have been preferred to himself, because the saids Executors of the Person Adjected had the Bond in their Possession the time of his Decease, & it was found *in bonis ejus*, and amongst his Writs, after his decease; and that the principal Creditor *Ferguson* lived four moneths after him, and never sought the Sum; likeas the time of the date of the Bond, he was owing greater Sums to the Person Adjected, than the Sums contained in this Bond, which were presumptions, that the Bond was given to the Person Adjected, at the very making thereof, for satisfaction of that Debt *pro tanto*, and this Alledgance was admitted to Probation, and was the cause of this Decision, preferring the Person Adjected to the Principal & his Creditor, seing there was nothing qualified to infer Simulation, or that the Bond came in his hands, by any undirect, or unlawful means; and it was not respected, that it was Alledged, that the Debitor had payed this Sum to the Creditor, who had Arrested. Actor. Alter. *Millar. Hay* Clerk. *Vid. Feb.* 2. 1628 L. *Duffus.*

B. *Galloway*

B. *Galloway*, contra *Inglis*, *Eodem die*.

IN an Action betwixt the B. of *Galloway* contra *Thomas Inglis*, to hear him be Decerned to desist from the Office of Proctor-fiscal to the Commissar of *Kirkcubright*. The Defender defending himself with a Right of that Office, gifted to him by the Commissar, and that the Commissar had power, and Right to Confer the same to him, the Commissars Gift containing power granted to him to admit Procurators, and other members of Court. The *Lords* Found that the Commissar, by vertue of the Gift of the Tenor foresaid, had no power to Constitute an Procurator fiscal, albeit thereby he might admit other Procurators to procure in his Court; and that the Right to make Procutor-fiscals or Clerks, belonged only to the Bishops within their Diocies, and not to their Commissars, whereanent look to the Act of Parliament 1609, Anent the granting of the Commissariots to the Bishops. And the Clerk further Alledging, that the Commissar had a Gift from the last Bishop, of that same Office, which gave him Power also to make Deputes therein, and this Clerk being received and Admitted by the said Commissar, who had the foresaid Right and Power, and being by vertue thereof in possession many years, the same ought to defend him against the Pursuit of the Bishop, in this Possessor Judgment, while the Commissars Right were taken away by some ordinary pursuit, which Alledgance was Repelled, and the foresaid Gift Found null, for seing the Commissar could not be both Commissar and Procurator-fiscal as his own Gift fell, so also the Power to depute to himself in that place, which was not Compatible to him to bruik, became Extinct. Actor. *Mowat*. Alter. *Belsbes*. *Gibson* Clerk.

King, contra *Ker*, *July* 13. 1627.

IN a Pursuit by *Margaret King* Relict of *David Heriot* Gold-smith, against *George Ker* Taylor in *Edinburgh*, for refounding to the Pursuer of certain Sums payed by her to the said *George* in Tocher with the Pursuers Daughter, Married upon the said *George*, seing that her Daughter died within the year after their Marriage without Children: and therefore the Pursuer craved Repetition of the Sum payed by her, and also to be free of Payment of the rest, Conditionat to be payed by her to him; This Action was sustained at the mothers Instance, who was Contracter and obliged to pay the Tocher, neither was it respected what the Defender Alledged, that he ought not to Repay that which he had received, and Imployed as his own money: And also what he Alledged, that this and the like Actions were Competent to Fathers, who Tocher-ed their Daughters, it being *peculium profectitium*, in the which the Father had *plenum Dominium*, yet it was not so priviledged to the Mother, who paying with her Daughter Sums in Contentation of her portion natural, & other Goods, which might fall to her by Decease of her Father, The like Action could not be Competent to her; for in this case the Defender Alledged, the money was the proper money of the deceast Daughter, and pertained to her self, which if any Repetition thereof could be granted, was only Competent to the Heirs and Executors of the Daughter, and not to this Pursuer: this Alledgance was Repelled, and the pursuit was Sustained at the Mothers Instance, who contracted only for the Tocher and payed it, for the Defender was Found ought not to retain the money, nor have any benefit by that Marriage, it being so dissolved within the year without Children, *quo casu, restitutio hinc inde est bona fide facienda, tanquam nunquam fuisset Matrimonium*. But the *Lords* Ordained the Pursuer to find Caution, to liberat the Defender at the hands of the Heirs and Executors of the Defunct, and all others who might pretend Interest in this Sum Lybelled, or trouble him thereanent. Actor. *King* & *Heriot* Alter. *Gray*. *Hay* Clerks.

Noble contra *Noble*, *July* 14. 1627.

John Noble Tutor to *Alexander Noble* his Pupil, having obtained the Pupil delivered to him in presence of the *Lords*, by a preceeding Decreet, obtained by him against the Mother of the Bairn, and her Husband detainers of the Bairn for the time, he now pursuing the said Pupils Mother and her Husband, who was Infeft in liferent, and was in possession of his whole Lands, and who also had the Gift of his Waird and Marriage, for an yearly Modification, to be given for the Intertainment of the said Bairn, and the Defenders Compearing and offering to Intertain the Bairn her self, and to keep him. The *Lords* admitted the Mothers offer to Intertain and keep the Bairn her self, and Found in respect thereof, that the Bairn ought to be delivered to her for that Effect, and therefore that no modification ought to be given to the Tutor, which was so Found, albeit that by a preceeding Sentence as said is, against the Mother, the Bairn was Decerned to be delivered by her to his said Tutor, and that conform thereto the Bairn was in the Tutors keeping, and also albeit the Mother was Married with a second Husband. *Gibson* Clerk.

This was thereafter altered, and the Bairn ordained to remain with the Tutor, and the Action for Aliment sustained.

La. *Boyn* contra her Tennents, *Eodem die*.

IN an Action of Removing, betwixt the La. *Boyn* contra her Tenments, the Defenders Alledging, that the pursuer was not specially Infeft in some particular Lands, wherefrom she desired the Defenders to be Removed; and the Pursuer Replying, that they were part and pertinents of the Lands, contained in her Seasin, and that the same lay Contigue together; and the Defenders Alledging, that they lay discontigue, and had other Lands Interjected betwixt them, whereon they specially condescended. The *Lords* preferred the Pursuers Reply, upon part and pertinents, and the lying of the same Contigue, to the Defenders Exception, and Duply upon discontiguity. *Actor. Lawty.* Alter. *Baird. Hay* Clerk.

Lyming Donatar of *Walkers* Escheat, *July* 17, 1627.

IN a Declarator of Escheat of *Archbald Walker*, at the Instance of *Thomas Lyming*, Donatar thereto: The *Lords* sustained Process upon the Gift, albeit it was Sealed after the Execution of the Summons, seing he produced an Instrument requiring the keepers of the Privy-Seal, to Seal the same *Debito tempore* before the Summons, which for their absence not being then done, they Found the Instrument Supplied it.

L. *Fairnies* Bairns contra L. *Aiton*, *Eodem die*.

IN a Reduction at the instance of L. *Fairnie*, against the L. of *Aiton*, for Reduction of an Infeftment *super capite Inhibitionis*. This Inhibition was quarrelled, because it was Execute against the Party prohibited at the Mercat-Cross of *Couper*, being the Head Burgh of the Sheriffdom; and these Executions, albeit duly Registrat, yet seing the same was again by a new Execution published at the Mercat-Cross of St. *Andrews*, as the Head Burgh of the Regality, where the Liedges were openly Inhibited; betwixt the which Publication, and the other Execution at *Couper*, there interveening the space of an year and more, at the which last Publication, no special Execution, nor Prohibition was made to the Party Inhibited to *Annailzie*; therefore the Defender contended, that the Inhibition could not be sustained; for he Alledged, that the first Prohibition made specially to the Party, not to *Annailzie*, being Execute an year before this last Publication made at St. *Andrews* to the Leidges, *not to buy nor block*, could not be a warrand to make that last Publication to subsist, except the Party had been also at that same time, or about that time,

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de novo prohibited to sell; and that the said Inhibition, whereof the said Executions had so great discontinuance of interveening time betwixt them, ought not to put the Subjects *in mala fide* to have in any time thereafter Bargained with the Party, sicklike as if he had never been Inhibited at all. This Alledgance was Repelled, and the Inhibition sustained, seing the Party was once lawfully Prohibited, and there was no necessity that he should be prohibited over again, at the time of the second Publication against the Leidges. This is to be marked. Actor. *Nicolson*. Alter. *Aiton*, *Gibson* Clerk.

Ker contra the Minister of *Ancrum*, *Eodem die*.

IN a Spuilzie at the instance of Sir *Robert Ker*, against the Minister of *Ancrum*; a Compriſing produced of the Tack of the Teinds of that Paroch being quarrelled, because it was not the Principal Compriſing, authorized with the Seal of the Compriſers, and Subscription of the Judge; neither was it warranted as a Transumpt, Decerned to be doubled by a Sentence of a Judge, but was only Extracted by the Clerk to that Compriſing, whose Extract ought not to have Faith, that being no ordinar nor publick Judgment, and the Clerk being but a privat person, after the Compriſing was ended, he could not at his own hand, without a greater Warrand from a Soveraign Judge, effectually Copy, or Extract the same, to produce Action thereon, as an Authentick Writ. This Alledgance was Repelled, and the Compriſing so Extracted sustained, as sufficient to produce Action. Actor. *Stuart*. Alter. *Hay* Clerk.

July 18. 1627.

IN a Suspension betwixt contra a Decreet being quarrelled as null, because it was pronounced and dated after the Cause therein contained, was by the *Lords* Letters and Summons of Advocation Advocated, and after the Party obtainer thereof was Summoned by the said Summons of Advocation, to compear before the *Lords*, and albeit the Judge was not discharged to proceed, whereby it might be Alledged he was in probable ignorance of the Advocation, and so might lawfully proceed in the Cause, the Advocation thereof never being intimate to him; yet the Suspender Alledged, that that could furnish no excuse to the Party, who knew of the Advocation, and who after the same was intimate to him by Citation, as said is, can never be found to have done *bona fide*, in insisting in that Action before the Judge thereafter, but the Decreet ought to be found null, as done and insisted on by him *contra mandatum Judicis*, which he could not misknow; this Reason was not sustained, but the Decreet was approven, notwithstanding of the Advocation and Citation of the Party Obtainer thereof, seing the Judge was not discharged, who not being acquainted Legally with the Advocation, cannot be repute to have contemned the Authority of the Lords. *Vid.* 18 *July* 1623. *James Cranston* contra *Hume* of *Slegden*.

Crawfurd contra *Grier*, *Novemb.* 14. 1627.

IN a Suspension betwixt *Crawfurd* and *Grier*, wherein *Grier* being Decerned by the Commissar of *Aberdene*, as Executor to his Father, to pay to *Crawfurd* the Defuncts Relict, her third part of the Moveables; and the Executor Suspending, that the whole Gear was exhausted by a Sentence, recovered at the instance of a Creditor of the Defuncts, which extended to a greater quantity than all the Defuncts Goods extended to, so that there could be no Third. This Reason was not found Relevant, but the Relicts Decreet for her Third, notwithstanding of the Debt, was found should have effect, in regard that the Exception upon that Debt, was competent to have been proponed by the Suspender, before the Sentence was obtained by the Relict, and was then known to him; so that his omission then to propone the same, was

found a Cause to exclude him now, that he could never propone any Argument upon that Debt, to stay the payment of the Third to the Relict; and this was the rather found, because the Debt was owing by the Defunct to this Suspenders self, he being a Bairn of the Defuncts, begotten upon a prior Wife, and having an Obligation made to him by his Father, of a Sum of Money, which was the Debt acclaimed, and which exhausted the Gear Confirmed, and to the which Obligation and Debt therein contained, he had made another of his Brethren Assigney, after Litis-contestation was made in the Relicts Cause for her Third, and which Assigney had obtained Sentence against the Suspender, before the Relicts Sentence, so that the Exception upon the Sentence for the Debt, being emergent since Litis-contestation in the Relicts Cause, and being competent to have been proponed before the Relicts Sentence, the Decreet for the Debt being obtained before it; and being omitted to be proponed as said is, by the Executor, who might have proponed that Exception upon that same Debt, for Retention of the Goods, for satisfying thereof, and so not proponing the same, that omission was found to exclude him therefrom in all time coming, although nothing could be said against the verity of the Debt, or that it was not owing; & albeit the Suspender also was a poor ignorant man, in whom *ignorantia Juris, & in damno vitando* is excusable; And the *Lords* understood, that the Commissars of *Edinburgh* are ever in use to decide, that where an Executor is Confirmed, at the time of Confirmation, if he as Executor protests not that his accepting of the Office be without prejudice of any Debt owing to himself by the Defunct, that the omitting to make such a Protestation, excludes him ever from seeking of that Debt thereafter; which I think should not be sustained where the Debt is true. Actor. *Hay.* Alter. *Baird.* *Hay* Clerk.

Gullan contra *Dunmuir*, *Novemb.* 15. 1627.

IN a Spuilzie at the instance of *Gullan* contra *Dunmuir*, an Exception of Poynding being proponed, and a Reply being made for Eleiding thereof, that the Goods Libelled (being Oxen) were Plough-goods, and drew in the Plough, and Laboured the Ground the day immediatly preceeding the Spuilzie, albeit the Pursuer then had more Goods beside him, which would have satisfied the Debt. The *Lords* Found the Exception Relevant, notwithstanding of the Reply, seing the Act of Parliament whereupon the Reply is founded, *viz.* the 98 Act, 6 Parl. *Ja.* 4 *Prohibits Plough-goods to be Poynded the time of the Labouring*; and this Spuilzie was committed, as is Libelled, in *Octob.* which the *Lords* Found not to be the time of the Labouring of that Ground, it being a Mountanous High-land-ground in the North: And seing the Pursuer Replyed only, that they were in the Plough one day & no more before the Spuilzie, which was not sustained, and therefore the Exception was admitted; which I thought the more hard, seing nine Oxen were Poynded for 80 pounds only. Actor. *Gibson.* Alter. *Gibson* Clerk. *Vid.* 22 *Novemb.* 1628. *Watson* contra *Reid.*

Black of *Largo* contra *Dick*, *Eodem die.*

IN a Suspension betwixt *Patrick Black* of *Largo* against *William Dick*, as Assigney constitute by *Archibald Primrose* to certain Sums adebted to him by the said *Patrick Black*, The *Lords* Found, that the Act of Session made *anno* 1590, which appoints Annualrents to be payed to Cautioners by the principal Debitor, since the time of payment making by Cautioners, albeit the Bond bore no Annualrent, where the Bond bears, that the Principal is oblig'd to relieve the Cautioner of all Coste, Skaith, and Expenses, should militate in favours of any, who provides himself of the like Relief of Skaith, Damnage, and Interest, by taking of any other person bound to him therein, albeit he, in whose favours that Clause of Relief is conceived, be not Cautioner for the other,

other, but that they be both bound to the Creditor *æque principaliter*, and not as Principal and Cautioner; and becauſe Mr. *Black* deſired Compenſation and Allowance of a Sum, wherein he and *Archibald Primeroſe* were adebted to a Creditor, whereof the ſaid *Archibald* was oblig'd in the Bond to relieve the ſaid *Patrick Black*, and which the ſaid *Patrick* had payed, being ſtraitned by Charges, which all preceeded long before the Aſſignation made to *William Dick*; in reſpect of the which Diſtreſs and Payment, he Alledged that he ought to have Retention in his own Hands of ſo many of the Sums acclaimed from him by *William Dick*, and the Annualrents thereof ſenſine effeiring thereto, ſeing he was ſubject in Annualrent to the ſaid *Archibald Primeroſe* for his Sums. The *Lords* would not allow the Compenſation for the Annualrents of theſe Sums againſt *William Dick* the Aſſigney, ſeing there was nothing extant in Writ before *William Dicks* Aſſignation, to verifie that Mr. *Black* payed that Sum, whereof *Archibald Primeroſe* ſhould have relieved him, for the Payment was made by *William Geichan*, Brother in Law to the ſaid Mr. *Black*, which *William Geithan* at his Payment making obtained an Aſſignation to the Bond in his own Name from the Creditor, and no Record was extant in Writ, that it was done to Mr. *Blacks* behove before the Aſſignation made to *William Dick*, albeit that *Geichan* preſently offered to make Faith, that all was to Mr. *Blacks* behove, which was conceived in his Name, and offered to Aſſign the ſame; whoſe Declaration the *Lords* Found could not prejudge the Aſſigney, being made after his Aſſignation; and becauſe Mr. *Black* took the Aſſignation under Truſt to another than to himſelf, albeit he was the only true Payer of the Sum, the ſame yet ſtanding in the perſon of *Geichan*, who was not denuded before the Aſſignation made to *Dick*. The *Lords* refuſed to allow the Annualrents againſt *William Dick*, without prejudice to ſeek the ſame againſt *Archibald Primroſe*, *prout de jure*. Actor. *Hope* & *Nicolſon*. Alter. *Stuart* & *Lawtie*. *Scot* Clerk. *Vid.* 26 *July* 1622, L. *Buckie* contra L. *Eſſilmonth*. 11 *January* 1627, *Barclay*, and the Caſes there cited.

Inglis contra *Kirkwood*, *November* 17. 1627.

IN a ſpecial Declarator of the Laird of *Ochiltries* Eſcheat, purſued by *John Inglis* the Donatars Aſſigney, againſt *Gilbert Kirkwood*, an Incident being uſed for proving of an Exception, founded upon a Back-bond granted by the Donatar or his Aſſigney in favours of the Rebel: The *Lords* Found, that the Maker of the Back-bond needed not to be Summoned in this Incident, as is otherways neceſſary, that the Maker of Writs be Summoned in other ordinary Actions, purſued againſt Havers of Writs for delivery of theſe Writs; but in this Incident it was not found neceſſary, that the Maker of Writs ſhould be Summoned, when any Writs were called for to be produced by the Havers of the famine to this effect only, *viz.* to prove any part of a Cauſe, and not for delivery of the ſame to the Party, who craved Production by the Incident; neither was it found neceſſary to the Uſer of the Incident to libel therein, or to prove that the Writs called for were delivered to the Party, in whoſe Favours they were made as his own Evidents, and ſo without qualifying of that Point or Citation of the Makers, the Incident was Suſtained, and when any third perſon is called as Haver, The *Lords* Finds, that *eo caſu*, there is either a neceſſity to libel, at leaſt to prove that he had the Writs ſince he was Summoned in the Cauſe, or elſe that he had fraudfully put them away before the Intenting of the Cauſe, and that it was not ſufficient to prove that ſuch third perſons had the Writs before the Intenting of the Cauſe only, except it be alſo proven, that they committed Fraud in putting of them away; which Fraud the *Lords* Found (being only generally conceived, and not ſpecially qualified) might only be proven by the Oath of the third perſon, who was conveened as Haver.

Actor. *Hope* & *Nicolson*. Alter. *Stuart* & *Gibson*. *Gibson* Clerk. *Vid.* 30 *Jan.* 1629, Captain *Crawford*.

L. *Clackmannan* contra *Burn*, *Eodem die*.

IN an Action for Poynding of the Ground for an Annualrent disponed out of the same, at the instance of the Laird of *Clackmannan* and *Burn*; The *Lords* Preferred an Infeftment of the Property Alledged on by the Defender Compearing in this Cause, albeit granted by a base Holding of the Giver thereof, as the Pursuers Infeftment of Annualrent was also granted to be holden of the Granter, both the Infeftments proceeding from one Author, *viz.* L. *Balnamoon*, to the Pursuers Infeftment of the said Annualrent, which was posterior to the Excipients Infeftment of the Property, seing the said prior Infeftment of the Property was clad with Possession; neither was the Reply Sustained, whereby the Pursuer Alledged, that albeit his Infeftment of Annualrent was posterior, yet seing it was Confirmed by the Kings Majesty, who was Superior of the Lands, before ever the Infeftment of the Property was clad with Possession, and before any Confirmation, therefore he ought to be preferred, his Right foresaid becoming publick by the Confirmation, which Confirmation preceeded any Possession, acquired by the Defender of the Property; which Reply was not respected, but the first Infeftment preferr'd, albeit not clad with Possession before the Pursuers Confirmation, being not the less clad with Possession at any time when the Pursuer had no Possession; and albeit the Defenders Infeftment was not Confirmed, yet it was preferred to the posterior Infeftment of the Annualrent Confirmed before the Defenders Possession; and the *Lords* Found, that the Confirmation made not the Pursuers Infeftment publick, seing it was granted to be holden of the Givers self, and not of the Superior. Actor. *Hope*. Alter. *Aiton* & *Nairn*. *Hay* Clerk: *Vid. Penult Jan.* 1628, betwixt the same Parties.

Adam and his Curators contra *Fairholm*, *November* 20. 1627.

IN a Removing Pursued by *Adam* and his Curators against *Fairholm*, the Defender defending himself by a Tack, Set by a Minor with Consent of his Curators to him of the Lands libelled. The *Lords* Repelled the Exception, in respect that the Tack foresaid was Set and Consented to by Curators, chosen by the Minor since the first Act of Curatory was made, which first Curators had not Consented to that Tack, and who being lawfully chosen, they remained still Curators to the Minor, until they were lawfully and orderly Removed and discharged by a competent Judge; and which not being done, there could no other second Act of Curatory be made, nor no other Curators of new again could be thereafter given to him, and therefore the said Tack being subscribed by another new chosen Curator, and not Consented unto by the Curators chosen by the first Act. The *Lords* Repelled the Exception, and Found the Tack null, as wanting the Consent of the first chosen Curators standing unremoved; but this was received *ope Replicæ*, without necessity of Reduction, against a Tack clad with Possession, and Consented to by Curators, conform to an Act of Curatory standing unreduced. *Hay* Clerk. *Vid.* 5 *Dec.* 1627, *Rollock* contra *Corsbie*.

Rollock Finlay's Relict contra *Corsbies*, *Eodem die*.

IN an Action moved by *Jean Rollock* as Executrix to umquhile *Patrick Finlay* her Husband, against *Corsbies* as Executors to umquhile *Corsbie* their Father, who was Cautioner for *Walter Finlay*, Curator to the said umquhile *Patrick*, *de fideli administratione*, for payment to her of 400 Merks received by the said *Walter* Curator foresaid for his said Pupil. The *Lords* Sustained this Process and Action against the Executors of the Cautioner, albeit it was Alledged, that

in

in this case of Cautionry for Curators, the *Lords* are not in use to sustain Process against the Cautioner, until the Curators self be fully discust, both in their Persons, Goods and Lands, and till that be fully done, the Cautioner cannot be conveened, which Alledgance was Repelled, and the Process Sustained against the Cautioners Executors, but the *Lords* Declared, that they would give no Execution against the Minors Executors, until the said Curator was fully discuss'd. This seems contrary to the *Lords* Practique, as it is marked *Dec.* 9. 1623. at the *Nota*, anent Cautioners. Actor. *M'gill.* Alter. *Hay* Clerk. *Vid.* 5 *Dec.* 1627, betwixt the same Parties.

Lackie contra *Cunninghame*, *Eodem die.*

IN a Reduction pursued by *Lackie* contra *Cunninghame*, a Bond of 400 Pounds being desired to be Reduced, upon the reason of the Act of Parliament 1579, ordaining Heretable Writs and others of Importance, to be Subscribed by two Nottars and four Witnesses, otherways to be null. This Reason was found Relevant to reduce this Bond, albeit it was Subscribed by two Nottars, and three Subscribing Witnesses, and albeit one of the two Nottars was Insert as Witness in the Bond, which the Defender Alledged to be as Sufficient, as if four Witnesses had been Insert, seing one of the Nottars being Insert witness, made up the fourth, and that one of the two might Lawfully be witness: Likeas there was three witnesses beside, which Subscribed as Witnesses, and which Subscription should be more respected, than if four Unsubscribing Witnesses had been Insert in the Bond; Likeas the Bond was not of that Importance, whereon the Act of Parliament could Strick; which Alledgance was Repelled, and the Reason Sustained, For the *Lords* Found, that the Act of Parliament required two Nottars, and beside them other four Witnesses, and that a Nottar could not be Witness to his own Deed, So that this Bond came under the said Act of Parliament. Actor. *Ayton*, & *Mowat.* Alter. *Cunninghame* & *Primerose*. *Hay* Clerk. *Vid.* penult *March* 1626. *Greive* contra *Cant*, and the Case here following.

Robertson contra *Abercrombie*, *Novem.* 21. 1627.

IN an Action betwixt *Robertson* and *Abercrombie*, for Payment of the Sum of 500 Pound, contained in a Bond made by *Robertson* to *Anderson*, and whereto *Anderson* had made the said *Abercrombie* Assigney. The *Lords* Found, that the Bond could produce no Action, because in Effect it had but one Witness Insert therein, and so it was null of the Law, for there were only two Witnesses Infert therein, whereof *Andersons* self was one, and so he being made Witness to the Bond, conceived in his Favours (which the *Lords* Found could not Lawfully be) and there being but another beside him, the Bond was found to be as if it had contained only one Witness, for he could not be Respected as Witness, and so the Bond was Found null; which Decision differs not much from the Decision Immediatly preceeding here noted, that a Nottar might not be Witness to his own Deed. *Hay* Clerk. *Vid.* the Case preceeding, *Lackie* contra *Cunninghame*.

Dumbar contra *Williamson*, *Novem.* 23. 2627.

IN an Action of Poynding of the ground betwixt *Dumbar* contra *Williamson*, wherein personal Execution was Concluded against the granter of the Infeftment of the Annualrent, for the which Action was Intented as well as Real against the ground. The *Lords* Sustained the Action against the granter of the Infeftment for Payment *personali actione* as was desired, as well as for the Real by Poynding of the ground, Notwithstanding that the Pursuer was Infeft only in the said Annualrent, not by him who was conveened personally for payment, but by one *Williamson* her Husband, who was Infeft

therein by the Defender. The *Lords* Found, this personal Action als Competent to the Successor, who was Infeft by him, who first acquired Right from the Heretor of the Land, now Defender, as it would have been competent to the said first Acquirer himself, against him, which was so found, albeit the said Pursuer, singular Successor to the said first Acquirer, as said is, was not made Assigney to the personal Contract, concerning the Alienation of the said Annualrent made betwixt the Heretor and the Annualrenter; but that the Pursuer was only Infeft therein by the said first Annualrenter. In this Process the *Lords* also Found, upon the 11 of *Decemb.* 1627. that the Renounciation made by the Husband, who was first Infeft before this Seasin given to his Wife, now Pursuer, made in favours of the Defender, Disponer of the Annualrent, was not *habilis modus*, to denude the Husband, and to prejudge this Right, thereafter acquired by the Wife, except it had been Resigned or Disponed by Charter and Seasin, seing it was first established by Seasin; and also Found, that the Pursuer might lawfully pursue personal Action against the said first Disponer, as well as real against the Ground, notwithstanding the said Renounciation made before the Pursuers Right; For which *Vid.* 27 *July* 1626. L. *Anstruther*. Actor. Alter. *Cunninghame*. *Gibson* Clerk.

Gourlay contra *Novemb.* 24. 1627.

IN a Suspension betwixt *Gourlay* in *Leith*, and anent the Exhibition of a Coffer, for the which there was Decreet given at the instance of the Charger, as Executor Confirmed to the Defunct, and in the Testament among the Inventar of the Goods, the Coffer being given up by the Executor, at the estimation and value of 100 Merks; The Suspender offering to pay that 100 Merks, the price put by the Executors self thereon in the said Confirmed Testament, whereby he Alledged he ought to be fred of Exhibition of the Coffer, specially seing it was his own Estimation, Confirmed & Sworn with the rest of the Inventar, the time of the Confirmation; and if he would Alledge the same to be of any more worth, he ought to Eek the same to the Testament, and Confirm it before he can be heard to pursue or seek the samine; and there is place to the Executor *ad omissa*, or *male appretiata*, to acclaim the same, and not to this Executor, who hath given up the foresaid price. The *Lords* Found, that the Executor Confirmed, notwithstanding of his up-giving of the Coffer at the foresaid price, might seek Exhibition of the Coffer, & was not holden to accept the said Price Confirmed, in case the Coffer be yet extant; & that the Executor needed not to Eek the greater price to the Testament, to the effect the same should be Confirmed, until the time the same were first Exhibite, that he might know, at what avail and further price the same should be Confirmed; and therefore that the Defender was not fred by the offer of the price Confirmed, but was holden to Exhibite the Coffer, seing it was not controverted by him, but that it was extant. Actor. *Hope*. Alter. *Mowat*. *Gibson* Clerk.

L. *Drum* contra his Tennents, *Novemb.* 27. 1627.

IN a Removing L. *Drum* contra his Tennents, an Exception proponed for the Defenders, and admitted to their Probation, *viz.* That they were Tennents to *Crawfurd*, who was appearand Heir to his Father, who was Heretably Infeft in the Lands, and in continual Possession, at the which Term Assigned to prove, a Discharge being produced by the Pursuer, Subscribed by the Tennents, whereby they Renounced the proponing of this Exception, in respect whereof the Pursuer craved a Sentence, seing no other person was called. In the Process Compeared one for *Crawfurd* the appearand Heir, and proponed the same Exception upon his Fathers Right, and their Possession; and Alledged,

ed, that the Tennents Renounciation ought not to debar him, to follow out the Probation of the said Exception, which was Found by the *Lords* he might resume and prosecute, albeit the Tennents past from the same; and that their Colluſion with the Purſuer ſhould not prejudge their Maſter, albeit the ſaid *Crawfurd* was not called in this Proceſs, but becauſe the ſaid *Crawfurd* had nothing to produce, to ſhew either where himſelf, or his Father, or Predeceſſors were Inſeft in the Land; therefore it was found he could not be admitted for his intereſt, and thereupon Sentence was given. Actor. *Primeroſe*. Alter. *Mowat*. *Gibſon* Clerk. *Vid.* 29 *June* 1626. La. *Glengarnock*.

Tennents of *Eaſt-houſes* contra *Hepburn*, *Ult. Novemb.* 1627.

IN a double Poynding at the inſtance of the Tennents of *Eaſt-houſes*, contra *Hepburn* and others, the Relict of an Husband, who died in *September*, purſuing for the Duties of her Terce, whereto ſhe was Kenned. The *Lords* Found, that ſhe had Right to her Terce of that Term preceeding *Martinmaſs*, before the which the Husband died (the Husband having deceaſt in *September* of before, as ſaid is) and the Terce was of an Annualrent, wherein the Huſband died Inſeft; the Terce of the which Term was found due to the Relict, albeit the Husband died before the *Martinmaſs*, and ſo before the expiring of that Term, whereof the Annualrent was acclaimed; and albeit the Relict was not ſerved to her Terce ſundry Terms after her Husbands deceaſe, yet the ſame was drawn back to the time of his deceaſe. Here the Queſtion was betwixt the Heir and the Tercer; but if the Executor had acclaimed the Term, there might have ſome Queſtion been moved with her; albeit I think ſhe would have been preferred to the Executor, ſeing the Heir had rather Right to that Term than the Executor. Actor. *Hay*. Alter. *Lermonth*. *Hay* Clerk. *Vid.* 25 *Novemb.* 1624. *Crawfurd* contra *Fleming*.

December 5. 1627.

IN an Action at the inſtance of as Executor Dative, Decerned *ad omiſſa* againſt for payment of the omitted Goods: The *Lords* Found no neceſſity that the Principal Executors Confirmed, ſhould be Summoned in this Purſuit, they being Summoned to the Decerning of the Purſuer Executor *ad omiſſa* before the Commiſſars. Actor. *Gibſon*. Alter. *Herriot*.

Rollock contra *Corsbies*, *Eodem die*.

IN an Action betwixt *Rollock* and *Corsbies*, whereof mention is made 20 *Novemb.* 1627. The Defenders Alledging, that they nor their Father could not be conveened as Cautioners for the Curator by this Act produced, becauſe before this Act of Curatory, there was another Act of Curatory, whereby the Minor had choſen Curators, who had accepted and given Curators to him; which Act ſtanding, there could no new Curators thereafter be lawfully choſen, untill the time the firſt had been Removed, or that Act lawfully taken away, as is Statute 35 *Act*, 6 *Parl.* Q. *Mary*, *Anno* 1555. And therefore the ſecond Act was null, and conſequently the Cautioner for the Curator in the ſecond *Act*, could not be conveened. This Exception, albeit verified *inſtanter*, was Repelled, and the Action ſuſtained againſt the Cautioner in the ſecond *Act*, which the *Lords* Found, could not be Impugned by the Cautioner, being his own Deed, and that he nor his Executors could not oppone againſt the ſame: But the *Lords* reſerved Action to Reduce upon that Ground *pront de Jure*. It is always to be remembered, that the Cautioner was conveened here, for payment of a particular Sum Intromitted with by that ſecond choſen Curator, whereof Reaſon craved, that he ſhould make payment to the Minor, being his Intromiſſion, and the Cautioner was not conveened for the

Curators omission; in which case the matter would have been more considerable. *partibus ut illic comparentibus, Vid.* 20 *Novemb* 1627. betwixt the same Parties. 25 *Novemb.* 1624. *Ramsay*, & 20 *Novemb.* 1627. *Adam* contra *Fairholm.*

L. *Bamff* contra his Tennents, *Decemb.* 7. 1627.

IN a Removing by L. *Bamff* against his Tennents, the *Lords* Found an Exception Relevant, proponed for the Defenders, that they were Tennents to one condescended upon, who was Heretably Infeft in the Lands Libelled, and who was not Warned, and found it not needful, that the Tennents should say, that their Master was lawfully Infeft, as the Pursuer contended, that he should be astricted to say; for he Replyed, that if they Excepted not upon a lawful Infeftment, the Exception could not be admitted; which the *Lords* Found the Tennents could not be astricted to do, seing their Master might only be compelled to Dispute upon the lawfulness of his own Right. Actor. *Baird.* Alter. *Gibson* Clerk. *Vid.* 26 and *penult January* 1628. *John Stuart.*

Lauder contra L. *Aitkin, Eodem die.*

IN a Removing Pursued by *Lauder* contra L. *Aitkin*, The *Lords* preferred the Pursuer, who had Compriſed the Lands, and was Infeft therein by vertue thereof, and Conform thereto in Possession year and day, by receiving of the Maills and Duties of that House Compriſed from the Tennents Possessors to the Defender, albeit he Defended himself with an Heretable Infeftment of that House Lybelled, given to him by him, from whom the Lands was Compriſed, before the Compryſing and Denounciation thereof; And that he Alledged that he was presently, conform to his said anterior Heretable Right in Possession of the House, which was Repelled, and the Pursuer preferred, in respect of his Compriſing, and Possession year and day; And in respect he Replyed, that the Possession which the Defender had of the Land presently, was acquired by him but only before this Pursuit, by entering to the void Possession of the House, when the Tennent possessor thereof Removed at the Term, and so being obtained after such a clandestin and unlawful manner, could not be profitable to him against this Pursuer; which was so Found, neither was it Found needful, to put the Pursuer to any other Action of Intrusion, thereby to recover his Possession, but admitted the same *ut supra* to be tryed in this Removing; & the Defender also defending himself with the Liferent-Escheat, and General Declarator obtained by him of this same Author, of his Heretable Right, and which was declared before the said Compriſing and Denounciation, and his Possession foresaid, this Exception was also Repelled, in Respect of the said Reply, and because there was no special Declarator. *Actor.* Alter. *Foulis. Vid. penult January* 1628. *Hamilton* contra *Broun*, & *March* 25. 1628. L. *Black-burn* contra *Gibson.*

L. *Clackmannan* contra L. *Fingask, Eodem die.*

IN a Contravention betwixt *Clackmannan* and *Fingask*, The *Lords* Found no necessity that Letters of Laborrows should contain a Charge and Command to the Messenger Executor thereof, to take the Oath of the Party, at whose Instance the Charges was to be Execut, that he dreaded bodily Harm of the Party to be Charged, and that the Letters and Charges of Laborrows might be sustained, albeit they bore no such Command within the Body thereof, and albeit the Messenger Executor took no such Oath, and Found that the omitting of that Clause in Letters, and the Officers not taking of the Parties Oath, was no cause to make the *Act* of Cautionry to cease, which was found by the Party for Obedience of the Charge, or to infringe the force of the Letters of Laborrows,

as

as if they had been null for that defect; But if the Party Charged had Suspended the Charge, and desired the Chargers Oath foresaid, before he had found the Caution, he would not have been compelled to have found the Caution, untill the time the other Party had given his Oath. But this Decision upon hope of agreement, was not pronunced. *Actor. Hope. Alter. Aiton & Hay. Hay* Clerk.

Porteous contra *Veitch & Hay, Eodem die.*

IN a Suspension betwixt *Porteous* against *Veitch* and *Hay*, anent the Imployment of a *Sum* to the use of the Relict, who was appointed by her umquhile Husband, to be provided to her Liferent thereof; The *Lords* Found, that the Heir, who was only Charged in this Process, would get his Relief against the Executors, upon the Moveable Gear of the Defunct, who was obliged; and that the Executor would be obliged to give Moneys to be Imployed, and that Facts of that nature, *viz.* for Imployment upon Annualrent yearly, was prestable by Executors: It is here to be considered, when such Sums are Imployed by Executors to the use of Liferenters, whom to the same shall pertain, after the Liferenters Decease, whether to the Heir of the *Defunct*, being obliged to Imploy the same to the Relict, for her Liferent, and to his Heirs thereafter, or to the *Executors*, the Sum being first Moveable, and so which should have pertained to them; and if the Executors by the said Imployment be for ever excluded from all Right thereto, as it appears they are: In this Process also the *Lords* Found, that a Bond bearing a Sum to be payed at the Term therein contained, with so much for the Annualrent thereof, from the time of the borrowing, to the time of payment; and bearing no other Clause of payment of Annualrent thereafter, not to be an Heretable Bond, but to be Moveable, and to pertain to the Executors, and to come under Testament. Actor. *Hope & Stuart.* Alter. *Burnet & Nicolson, Scot* Clerk. *Vid. Decem.* 13. 1627, betwixt the same Parties. *March* 14. 1628. *Graham. Feb.* 26. 1629. *Douglas. Feb.* 24. 1627. *Carnegy. & Feb.* 17. 1632. *Kinnaird. Decem.* 11. 1632. *Shaw* 12. *March* 1622. *Fairly. March* 29. 1626. *Couston. June* 13. 1629. *Inglis. July* 4. 1628. *L. Kinblackmonth. Decem.* 2. 1628. *Zaire*, where it appears otherwayes decided.

Falconer contra Heirs of *Beatie, Decem.* 11. 1627.

IN a Registration pursued by *John Falconer* as Assigney by progres, made by *Andrew Wilson Scotsman*, Resident with his Wife and Family in *Germany*, to a Bond of 1000 Merks, owing to him by *Robert Beatie* Burges in *Montross* against the Heirs of the said *Robert Beatie*; It being Alledged, that the first Assignation made by *Wilson*, which was made in *Germany*, where the said *Wilson* dwelt, was null, because it wanted Witnesses insert therein, and so could not produce Action by the Law of this Realm, which Alledgance was Repelled, and Process sustained thereupon; The Pursuer either proving, that it was the Custom in that part of *Germany*, where the Assignation was made, that such Writs are sustained without Witnesses, or els finding Caution to warrand the Defender at the Cedents hands, any of the which two being done, The *Lords* would sustain the Assignation, albeit made betwixt two *Scotsmen*, and albeit pursued in *Scotland*, and Dis-conform to the *Scots* Laws. *Actor. Falconer.* Alter. *Mowat. Scot* Clerk. *Vid. Jan.* 15. 1628. betwixt thir Parties. *Feb.* 15. 1630. *Harper* contra *Jaffrey. Novem.* 15. 1626. *Galbraith* contra *Cunninghame. Jan.* 18. 1628. *Nasmith.*

Falconer contra Heirs of *Beatie, Decem.* 12. 1627.

IN the above-written Action of *Falconer* and *Beatie*, whereof mention is made, *Decem* 11. Immediately preceeding, The *Lords* Found the Obligation therein mentioned, whereby the Debitor was obliged to pay ten merk for

ilk 100 Merk, with the principal Sum at the Term of payment in the said Obligation, to be an Heretable Bond, albeit it bore no Clause of Infeftment; and also Found, that an Assignation made by the Creditor of that Bond, altered not the nature thereof, to make the same, and Sum therein contained, to become Moveable, in the Person of the Assigney, by making of the said Assignation, but Found it remained still Heretable in the Person of the Assigney, the Bond being of the Tenor foresaid *Partibus ut supra. Vid. Jan.* 18. and *Feb.* 23. 1628. *Nasmith* contra *Ruthvens.*

Tennents of *Dryup* contra Sherif of *Forrest*, *December* 13. 1627.

IN a double Poynding at the Instance of the Tennents, Possessors of the Lands of *Dryup*, who were distressed for the Duties of the saids Lands, by the Sheriff of *Forrest*, on the one part, who had Compriſed the saids Lands for a just Debt from *Scot* of *Dryup*, and conform to the Compryſing, was Heretably Infeft in the same Lands, diverse years before the Cropt 1626. Which was now drawn in question; And which Duties of the Cropt now controverted, he had Arrested, and so craved to be answered of the samen; and on the other part, they were craved by another Creditor to the said *Scot* of *Dryup*, who upon a *Regiſtrat* Bond, had Charged and Denunced the Debitor, and had Arrested the saids Duties Lybelled, long before the Sheriffs Arrestment. The *Lords* preferred the Compriſer, who was Infeft as said is, to the Creditor Arrester, albeit the Creditor, who had Arrested, claimed Preference, as doing more timely and lawful Diligence than the Compriſer, seing diverse years being past after his Compriſing and Infeftment, he had suffered his Debitor to retain the Possession of the Lands Compriſed; and had done no Diligence upon his Rights, to recover Possession, as he might have done, which is a great Presumption of simulation, and could not therefore give any preference to him, against this Arrester, who had done all which was necessar of Law to recover his payment, notwithstanding whereof the Compriſer being Infeft, as said is, was preferred, and the Retention of Possession, by the Debitor was found no Impediment to this Preference. Actor. *Scot.* Alter. *Stuart. Gibson* Clerk. *Vid. July* 28. 1625. Tennents of *Hayning. March* 24. 1626. *Gray. Feb.* 4. 1623. L. *Saltcoats.*

Hepburn contra Tennents of *Fairnflat*, *Eodem die.*

IN a Spuilzie of Teinds by *Hepburn* contra the Tennents of *Fairnflat*, The *Lords* Found an Exception proponed for the Tennents Relevant to liberat them, founded upon payment made by them to their Master, *viz.* *Robert Lighton*, of the same Teinds of the Cropt Lybelled, who had Right thereto before the Pursuers Right, which payment was sustained for the saids Tennents, albeit the Pursuer Replyed, that this Payment could not be sustained to liberat them, seing their Masters Right could not so much as Defend himself, if he would Compear and Alledge, and so cannot Defend them; for he would Refer, as he presently Refers to his Oath *simpliciter*, that his Right is antedated, and so could not prefer him to the Pursuer; Likeas the Master being admitted for his Interest, in this same Process, and proponing this Defence to liberat the Tennents. The *Lords* had Found the said Reply upon the antedating of this Right Relevant, which being so once found against himself, his passing from his interest, and now proponing it for the Tennents, cannot make it more Relevant for them, to Elid the Judgment, where the Master had once Compeared, and now will pass from his Interest, and propone it only in the name of the Tennents, and that they must be found in *bona fide* to pay their own Master, who was Heretor of the Lands, the Teinds whereof this Spulzie was pursued, and who had payed to him a certain Duty promiscuously for Stock & Teind together: Likeas the Pursuer Replyed, they could not be found in *bona fide* to have payed

ed, seing before their payment the Pursuer had served Inhibition upon the same Teinds, which Inhibition was Intimat to them particularly, after which they must be repute to have payed *mala fide*, even as if they had payed after Arrestment; And so he Replyed, that they payed after Inhibition execute particularly against themselves; and to one who had not a Right, but antedated, and which was already found in the Process against their Master, so the Exception should be Repelled; notwithstanding whereof the Exception was sustained, and the payment made after the Inhibition Found to be *bona fide*, being made to their Master, who was Heretor of the Ground, albeit they never Allegded that he was their Master of any preceeding year, or that they had payed him the Duty of any other year before the year lybelled, either for Stock or Teinds, but only that they had payed to him a certain Duty for Land and Teind the year lybelled promiscuously, as they had done divers years before to *Graham* of *Fairnflat* their Master, from whom this Defender had acquired the Right of the Lands and Teinds; Likeas this same *Graham* was also Author of the Pursuers Right to the same Teinds, and so was common Author to them both. Actor. *Stuart* & *Gibson*. Alter. *Hope* & *Mowat*. *Gibson* Clerk. *Vid. March* 22. 1628. Mr. *Patrick Murray*, &c. *ult. Jan.* 1628. L. *Cleghorn*.

Veitch contra *Hay*, *Eodem die*.

IN a Suspension betwixt *Veitch* and *Hay*, the Relict having Charged the Heir to her Husband, to Imploy a Sum to her in Liferent, conform to her Husbands Bond to that effect, as is noted here *Dec.* 7. 1627, the Heir Alledging that the Husband having in his Litetime imployed a greater Sum to himself, and to the Charger his Wife in Liferent, and since his decease, she and the Executor uplifting the famine, albeit the same was a Movable Bond; yet seing she had uplifted as much as this Sum, which she now craves to be imployed, she being so full handed, she cannot come upon the Heir, but ought to make that, wherewith she hath Intrometted her self, forth-coming for the Imployment craved by her against the Heir. This Reason was Sustained, and the *Lords* Found, that the Relict and the Executor having uplifted as much of a Movable Bond as would serve for the Imployment craved, that it should be applyed by the Relict for satisfying the Imployment acclaimed, seing the Heir would have his Relief thereof against the Executors, albeit Sentence were given against the Heir in favours of the Relict; which Sentence, the *Lords* Found ought not to pass against him, and to put him thereafter to seek his Relief against the Executor, seing her self was full handed, as said is, of as much as this would extend to, which is now acclaimed; and if she sustained any prejudice, as that the Imployment foresaid hereby came off her own half of the Movables, which befel to her by her Husbands decease, whereas the said Imployment should come off the whole Movables, and not off her half allenarly. The *Lords* Found, that the Relict might have her recourse against the Executors, that the said Imployment might be made of the whole Movables, and not of the Relicts half intrometted with by her allenarly, *partibus ut illic comparentibus*. Vid. *supra* betwixt the same Parties *Dec.* 7. 1627.

Hepburn contra *Lyle*, *December* 14. 1627.

UMquhile *George Lyle* being oblig'd by his Bond to pay a Sum to *Francis Lyle* his Brother, *Mary Hepburn* Relict and Executrix of the said *Francis* Pursues the Son of the said *George* as lawfully charged to enter Heir to him for payment thereof; and the Defender Alledging, that the Sum contained in the Bond was vitiate and superinduced, as might be seen to the *Lords* by Ocular Inspection, for the Sum was made 500 Merks, whereas truly the same was less. The *Lords* having seen the Bond, and by Inspection finding the Letters of *Five* to be superinduced above some other Letters, whereof the ve-

stiges yet appeared, and were seen unto the *Lords*, whereby it was likely that the Sum was less than Five; therefore They Ordained the Pursuer, User of the Bond, to approve, either by some Writ, or by the Witnesses insert in the Bond, or by some other lawful Adminicle, that the Sum of *Five* was the true Sum owing, and contained *ab initio* in the Obligation; which Probation the *Lords* Found necessarily was incumbent, and lay upon the User of the Bond, seing it was seen by the *Lords* to be superinduced, and Found it not necessary, that the Defender should be oblig'd to Improve the samine, albeit the Pursuer abode at the same. Actor. Alter. *Craig*. *Gibson* Clerk.

Dickson contra *Dickson*, *Eodem die*.

IN an Action for delivery of a House, Pursued by *Dickson* Heir to the Heretor thereof, against *Dickson* his Relict, who defending her self with a Charter made to her of the House libelled during her lifetime by her Husband. The *Lords* Sustained that Exception upon the Charter against the Heir who was Pursuer, albeit no Seasin had followed thereon in the Makers Lifetime. And it being further Replyed by the Pursuer, that that Charter could not furnish any Defence to the Relict, because it remained ever in the Defuncts hands and keeping, so long as he lived, and was never delivered to her, nor became her Evident in her Husbands Lifetime, but being amongst the Defuncts other Writs the time of his decease, was after his decease found amongst the Defuncts Writs then intrometted with by her: Which Reply the *Lords* Found Relevant to be proven by the Defenders Oath, albeit she Alledged, that the Reply was not Relevant, and that she ought not to be compelled to give her Oath, how that Writ came in her Hands, seing the same being now in her Hands, and being an Evident made in her favours, it was sufficient to her, either to produce Action thereon against the Heir of the Maker, or to defend her against the Heirs Pursuit, seing the same was never Revocate by her Husband, and that he had done no Deed before his decease to derogate thereto: Which Duply was Repelled, and the said Reply was Found Relevant. Actor. *Craig*. Alter. *Hope* & *Belshes*. *Gibson* Clerk. *Vid. Penult June* 1624, L. *Silvertounhill*.

Beg contra the Baillies of *Lanark*, *Eodem die*.

John Beg being Retoured Heir in some Lands in *Lanark* as Heir to his Good-sir, Charges the Baillies of *Lanark* to Infeft him therein, who Suspends, and in the Suspension compears one *Gemmil*, and is admitted for his Interest, and Alledgeth, that the Charger cannot be Infeft as Heir to his Good-sir, because his Father was Infeft in the Lands since his Good-sirs Infestment, which Father had disponed the Land to this Defender, who thereupon was Infeft therein, which Writs he all Produced; notwithstanding whereof, the *Lords* Found, that the Baillies ought to have given Infestment to the Charger, he being Retoured Heir, which Retour standing, ought to receive Obedience, for it might be that the Fathers Seasin was false, or might fall for some just Cause, which behoved to have its own tryal, and could not be received *hoc loco* against the Retour standing, but reserved the same *prout de jure* to be pursued by Reduction, albeit it would have been a good Defence, the time of the Service, to have stayed it. *Vid.* 16 *Feb.* 1627, Lo. *Covil* contra *Herd*. 10 *Feb.* 1636, *Murray*, where some different thing is done.

Donaldson contra *Brown*, *December* 17. 1627.

IN an Action for Exhibition of Writs, Pursued by a *Flaming* born in the *Low-Countrys*, begotten upon the Daughter of Captain *Donaldson Scotsman*, by his Father who was a *Flaming*, and not a Native of this Realm, against *William Brown*, who was conveened for Production of certain Bonds in his custody, made to the said Captain *Donaldson* his Good-sir by his Mother:

In

In the which Pursuit, the Pursuer being a Pupil, was Authorized by a Tutory-Dative given to him by the Kings Majesty; and it being Controverted, if the King might give a Tutory-Dative to a Stranger, Native of another Realm, seing none could be Served Tutor lawfully to him in *Scotland*. The *Lords* Sustained this Tutory-Dative, not as a general Gift of Tutory, but *ad hunc effectum* to Authorize the Pupil, as an Administration to assist him in the Action libelled *in hoc particulari negotio*, even as if the Goodsir upon the Pursuers Mothers-side had left a Tutor to the Pupil in his Testament, for the giving of any particular Estate by him to the Pupil, which would have been effectual in *hoc negotio*, if it had been done in Testament, and not being done in Testament, the Prince might grant an Administration als effectual in favours of the Pupil, for recovering of that, which by the Law of this Kingdom might befal to him, wherein if the King dispensed with his own Interest, no other could quarrel the samine; and by the said Grant of the Gift, the King had ceded his own Interest to the Tutor in favours of the Pupil; but the *Lords* Found, that there ought to be produced an authentick Declaration, and Tryal taken by the Magistrats or Judges within whose Bounds the Pupil dwelt, that he was the eldest Son of these Persons, and so that he was apparant Heir to his said Good-sir, whereby he might be known to be that Person, who had Right to Pursue as apparant Heir to his said Good-sir for the Writs libelled, according to the Laws of this Realm, which is not used, nor necessary to be done in Facts amongst *Scots*-men. Actor. *Lermonth*. Alter. *Belshes*. *Gibson* Clerk.

Dickson contra *Hume*, *December* 22. 1627.

IN an Action Pursued by one *Dickson* as Heir to his Father, against *John Hume* of *Slegden*, for Payment of the Sum of 8000 Merks payable to his Father by the said Defender; and the said Defender Excepting upon a Discharge of the Sum made to him by the Defunct, which he produced; and the Pursuer Replying, that that Discharge was consigned in the Nottars Hands who writ the same, to remain with him until the Defender had perfected an Obligation of so much of the said Sum as was resting unpayed, that the Obligation might be delivered to the Defunct, and the Discharge to the Defender, and being then Blank in the Sum unfilled up therein, they were both consigned in the Nottars Hands to be keeped by him, until the Sum should be insert in the Bond; and that thereafter, the one Party should take up the Bond, and the other the Discharge; likeas the Nottar had the Blank-bond subscribed by the Defender yet in his Hands, and that the Discharge was riven out of the Nottars Hands violently by another Person, who had delivered the same to the Party. This Alledgance was found Relevant to be proven by the Nottar Depositar, and Witnesses insert, their Depositions, and by the Declaration of the Person, who was the away-taker of the Discharge violently, and was found proven by their Declarations; neither was the Oath of the Party, Haver of the Discharge, and in whose Favours it was granted, found necessary to be taken in this Probation, but there was also used for Proving of the foresaid Reply, a Writ produced, subscribed by the Defender, Haver of the Discharge, granting the Receiving of the Discharge from the Nottar, and Obliging him to Warrand him thereof at all Hands, and of all Imputation which the Nottar might Sustain by his delivery of his Discharge to him, which Writ the *Lords* Found imported as much, as that he had only borrowed the Writ from the Nottar, and was a Confession that it had not become his Evident, likeas the Blank-bond was produced by the Nottar, which the *Lords* Found, with the Depositions foresaid, clearly proved the Reply: And it is to be considered, that in this Process, before the Alledgance was Discuss'd and found Relevant, the foresaid Nottar and Witnesses, and he who took away the Discharge, were Ordain-

ed to be Examined *ex officio*; and being Examined *ex officio*, and thereafter the Parties being heard upon the relevancy of the Exception and Answer, the said Reply was found Relevant, and also found Proven by the same Depositions taken *ex officio*, and by the foresaids Writs used in Supplement thereof. Actor, *Nicolson & Craig*. Alter. *Hope & Belshes*. *Gibson* Clerk. *Vid.* 22 *Feb.* 1627, *Williamson*, and the other Cases there Noted.

Aitkin contra *Hewart*, *January* 9. 1628.

IN an Action Pursued by *John Aitkin* as Legatar to his Mother against Mr. *Peter Hewart* one of the Executors Testamentars, for Payment of the Legacy; Litiscontestation being made, and some Exceptions admitted to the Defender's Probation, upon Diligence done by him and the rest of the Defuncts Executors, there being three Executors of all, whereof he was only one, for the recovering in of the Defuncts Gear; and upon Payment made to sundry of the Defuncts Creditors, of Debts owing by her to them, and Incident being used by this Defender against the Son of umquhile *Alexander Mowat*, who was one of the saids three Executors, which umquhile *Alexander* had the keeping of the saids Writs, both Discharges and Diligences done; likeas the Incidents bore, that the Writs foresaids were in the Hands of the said umquhile *Alexander* when he died, and were Intrometted with sensine by his said Son, who was conveened as Haver thereof, for Production of the same with his Tutors and Curators generally. The *Lords* would not Sustain this Incident against this Minor, being then not of the Age of 11 years, but past 10 years of Age, seing they Found, that he, nor no other of that Age, being within 12 years, could be conveened as Haver, for in that Age they Found that he could not be capable of Intromission, and so that neither Incident nor principal Action could be Pursued against him *hoc nomine* as Intromettor: And this was Found, albeit it was Replyed and Libelled also in the Summons *specifice*, that the Writs Libelled were in the Minors Fathers Hands the time of his decease, and then were in his Custody, and that sensine the same were in the Defenders Hands, who medled with these Writs *per expressum*, and retained the Possession thereof, and had them still in his Custody; likeas also, in Fortification thereof, the Pursuer offered to prove, with the Summons of the Tenor foresaid, that the Defender was Heir to his Father, and so was subject in Law to make the Writs forthcoming, which his Father had when he died, and wherewith he himself had Intrometted: All which were Repelled, seing it was Found that one of that Age could not be capable of Intromission, neither was it respected, that he was conveened with his Tutors and Curators generally, and could not be otherways Summoned, seing he had neither Tutor nor Curator specially given to him. Actor. *Hope*. Alter. *Aiton*, *Stuart*, *Mowat* & *Lermonth*. *Scot* Clerk. *Vid.* 19 *June* 1628, E. *Marr*, and the Cases there.

Rule contra L. *Aiton*, *January* 11. 1628.

IN an Action betwixt *Rule* and the Laird of *Aiton*, for payment of 900 Pound contained in a Compt-Book of Debursing, given out by the said *James Rule* Pursuer for the Defender, and confessed to be owing to him by the said Defender, and Subscribed with his Hand. The *Lords* Found the said Subscribed Compt sufficient to Produce this Action, and to be Obligator against the Defender, albeit the samine was not Subscribed before Witnesses, nor had any Witnesses Insert therein, as was Required by the Act of Parliament 1579: And as the Defender Alledged, it ought to have had, otherways that it was null; which Alledgance was Repelled, except the Defender had therewith denyed the Subscription of the said Compt to be his Hand-writ; which not being Alledged, the *Lords* Found the Compt not to be null, albeit it wanted Witnesses,

neſſes, neither Found it neceſſary that the Purſuer ſhould prove the verity of the Subſcription, to ſupply that defect of want of Witneſſes, except the ſame had been Alledged not to be the Defenders Hand-writ, ſeing the Reaſon of the ſaid Act of Parliament requiring Witneſſes was, that the Verity of the Writs might be known. Actor, Alter. *Belſhes*.

E. *Marr* contra his Vaſſals, *Eodem die*.

IN an Improbation betwixt the E. *Marr* contra his Vaſſals, wherein the Defenders were conveened for Production and Improbation of Writs of the Lands Libelled, made to their Fathers, Good-firs, Grand-firs, and other ſpecial Predeceſſors enumerat in the Summons, & to any other their Predeceſſors generally, to whom they may ſucceed *Jure Sanguinis*, as uſe is in ſuch Actions: It being Alledged for L. *Pitſligo*, one of the Defenders, that no Proceſs nor Certification could be given againſt him for any Writs made to his Predeceſſors, becauſe his Deſcent was from a ſecond Brother of *Pitſligo*, whoſe elder Brother had Daughters, who of the Law would be Lineally and Generally Heirs to their Predeceſſors *in Sanguine*; and which Daughters had Perſons deſcended of them on life, upon whom the Defenders condeſcended, and who not being called, no Proceſs could be granted in this Action; And the Purſuer Replying, that theſe Heirs Female were denuded of their Right in the perſon of the Defenders Predeceſſors, to whom he might ſucceed *Jure Sanguinis*. The *Lords* Found the Exception Relevant, and no Proceſs to be granted, while the appearand Heir to theſe Daughters were called; For this Defender could not be Heir *in Sanguine* to that perſon who had Bairns of his own, of whom there were Deſcendents yet living, ſo that he could not be the right Contradictor to maintain, or who could be conveened to produce the Writs made to his Predeceſſors, there being others extant nearer in Blood, as ſaid is, to the Succeſſion, *viz.* the Deſcendants of the elder Brother: And where it was Replyed, that the Right was devolved by the ſaids Daughters, in the perſons of this Defenders Predeceſſors, to whom he was Heir in Blood; the *Lords* Found nevertheleſs the Exception Relevant, for they Found the greater neceſſity to Summon ſome to repreſent the ſaids Heirs-Female, ſeing they were Authors to the Defenders, who were called in his Right; And the *Lords* Found in this Cauſe, and all the like Improbations, that the Clauſe whereby the Defenders are called for Production of Writs, made to any other their Predeceſſors, to whom they may ſucceed *Jure Sanguinis*, beſide the Clauſe of the Summons, whereby they are called for Production of the Writs made to their ſpecial Predeceſſors, enumerat in the Summons, ſuch as Father, Good-fir, Grand-fir, ought to be ruled, adjoyned, and underſtood, as repeated in ilk Predeceſſor Libelled, *viz.* That the Defender called, is and ſhall be holden to produce only ſuch Writs made to any of the ſpecial Predeceſſors, particularly named in the Summons, as to whom he may ſucceed *Jure Sanguinis* (which words, *to whom he may ſucceed Jure Sanguinis*) The *Lords* Finds, and Declares, ſhall be holden as repeated, and ſubſequent to ilk Predeceſſor contained in the Summons; and that that Clauſe is not to be taken, as if it had only relation to the General Clauſe, anent Evidents made to any of the Defenders Predeceſſors, attour and beſide thoſe who are ſpecially Deſigned in the Summons, but that it muſt be alike underſtood, both for the general, and for the ſpecial. And where the like Actions are purſued againſt Parties, as Heirs of Proviſion, or of Tailzie to their Predeceſſors, The *Lords* Finds no neceſſity to Summon the Heir of Line, where the Purſuit is Retrinſhed only to the Writs, concerning theſe Lands, which is provided to the Heir-male, or of Tailzie and Proviſion. Actor, *Hope, Stewart, Aiton*, & *Nicolſon*. Alter. *Belſhes* & *Mowat*. *Gibſon* Clerk. *Vid.* 5 *March* 1630.

1630. E. of *Wigton*. 18 *March* 1628. Lo. *Cathcart*, & 25 *January* 1627. *John Stuart*.

Dowglass and *Acheson* contra *Gilbert*, *January* 12. 1628.

IN two Actions to make Arrested Goods forth-coming betwixt *Dowglass* and *Gilbert Acheson*, two Creditors to *Michael Gilbert*, Minister of *North-Berwick*, who Arrested in the Good-man of *North-Berwicks* hands some Moneys adebted by him to the said Debitor, and some Victual for his Stipend, and desiring him to make the same forth-coming; The *Lords* preferred *Acheson* to *Dowglass*, albeit *Dowglass* had intented his Action against *North-Berwick* before *Achesons*, and had cited him before the other: Likeas the day of Compearance in his Summons was past, before the other Party had raised his Summons; which the *Lords* Found not to be any cause of his Preference, as the Party Alledged it ought to be, the reason whereof was, because this priority of his Action was not found to be any more timely Diligence than the other Parties was, which was done after him; seing that first Diligence was raised, execute, and done before the Term of payment came of the Debt Arrested, and the other posterior in time was found to have done all lawful Diligence, which could be required, seing immediatly after the Term of payment was come he Arrested, & upon the morrow thereafter he raised his Summons; & now being in this Action as far advanced as the other Party was in his Summons, that prior *nimia Diligentia* could not give the preference to the other, who had omitted to do nothing, but had used all lawful Diligence in due time, which could be profitably and effectually done; and therefore seing his Debt was anterior to the other Creditors Debt, and his Term of payment before the other Parties Term of payment, and that he had Arrested first, and before the Arrestment made by him who first cited. The *Lords* preferred him, as said is, and had no respect to the said first Citation. In this Process many of the *Lords* were of the mind and opinion, that an Action to make Arrested Goods forth-coming, Intented before the Term of payment of that Debt come, which is desired to be made forth-coming, albeit it desire the payment to be made only after the Term of paymen tbe past, is not a just and lawful Diligence; but that another using Diligence, and Pursuing immediatly after the Term of payment, will be preferred to him. Actor. *Aiton*. Alter. *Dunlop*. *Scot* Clerk. *Vid.* 3 *July* 1628. *Scot*.

Falconer contra *Beatie*, *January* 15. 1628.

IN a Registration by *Falconer* contra *Beatie*, whereof mention is made 11 *December* 1627. Umquhile *Robert Beatie* is obliged to pay to *Andrew Wilson* 1000 Merks, at the first Term after the decease of the said *Andrew Wilson's* Mother; the said *Andrew* makes *George Crighton* Assigney thereto, and after the said *George's* Decease, the Laird of *Ruthven* is served Heir to the said *George Crighton*, and makes *John Falconer* Assigney to the same, who Pursues *William Beatie*, as Heir to the said umquhile *Robert*, for Registration of the said Obligation; the Tenor of the Bond was to pay the Sum, as said is, after the decease of the Cedents Mother, and to pay Annualrent therefore for all Terms thereafter, ay and while the Sum were repayed. The Defender Alledged, that this Bond could not be Registrat at the instance of the Assigney made by *George Crightons* Heir, because *George* dying before the Term of payment, *viz.* before *Andrew Wilsons* Mother, who was yet living, and the Term of payment being conferred to the first Term after her decease, so that the said *George* dying before the Term, albeit the Bond be of the nature of an Heretable Bond, seing it bears Annualrent, yet seing it took not effect in the Cedents lifetime, to become Heretable for the Cause foresaid of his decease before the Term, he Alledged

ed that the Bond and Sum therein contained, pertained to the Executors of the ſaid umquhile *George*, and could not pertain to his Heir, nor to an Aſſigney made by the Heir. This Alledgance was Repelled by the *Lords*, and the Bond found to pertain to the Heir of the ſaid *George*: And it being further Alledged, that the ſaid umquhile *George* obliged himſelf to the ſaid *Andrew*, the time of the ſaid Aſſignation made to him, that if he had died before the ſaid *Andrew*, that the Money ſhould return again to the ſaid *Andrew*; and the ſaid *Andrew* being yet on life, and *George* dead, no other having Right from *George* could purſue therefore. This Alledgance was alſo Repelled, ſeing the Defender neither Alledged, that he had Right from *Andrew*, nor had made payment to him, without which this particular Bond was but perſonal, and would produce Action to *Wilſon* againſt *Crighton* only, but would not ſerve to liberat this Excipient, who remained Debitor; albeit he contended, that *Crightons* Aſſigney, in reſpect of his Back-Bond preceeding, could not have Right to ſeek the Sum; which was Repelled by the *Lords*. Actor. *Falconer*. Alter. *Scot* Clerk. *Vid.* 15 *June* 1627. *Robert Nicolſon*, 12 *Decemb.* 1627. Betwixt thir Parties, *viz. Falconer*. 23 *Feb.* 1628. *Naſmith.*

Finlaſon contra *Luikup*, *January* 16. 1628.

IN an *Action* for payment of Houſe-Mails betwixt *Finlaſon* and *Luikup*, the Defender *Alledging*, that he being purſued before the Town-Court of *Edinburgh*, at the ſame Purſuers Inſtance, for the double Mail of the Houſe, he there proponed an Exception, that he had delivered the Keys in *Anguſt* after the Sentence of *Removing* at the Purſuers Inſtance, againſt him, which Keys was then received by the Purſuers Wife, which Exception in that Judgement was found *Relevant* and *Proven*, and in reſpect thereof Abſolvitor was given, which Decreet ſtanding he Alledged ought to produce *Abſolvitor* from this Purſuit. The *Lords* Found this *Exception* nowayes Relevant to meet this Purſuit, for the ſingle Mail of the Houſe Lybelled, for the Term interveening betwixt the *Whitſunday* and the *Martinmaſs* ſubſequent, in the midſt of the which Term the Keys were Alledged to be delivered to the Purſuers Wife, ſeing the delivery of the Keys in *Auguſt* was not ſufficient, to liberat him from the ſingle Mail the Term foreſaid, albeit it was found Relevant before the Town-Court to Elid the Purſuit made there, for the Double Mail, but the ſame was found ſufficient to Elid this Purſuit, for all the reſt of the Terms acclaimed, except that one Term; And the *Lords* Found, that that Decreet was enough to produce this *Abſolvitor*, and that the Defender needed not to prove his Exception in this Judgement *de novo* again, *viz.* anent the receipt of the Keys, but Found it ſufficiently proven by that other Decreet, albeit the Purſuer contended, that it ought *de novo* to be proven in this Judgment, *quia deducta coram uno Judice non probant coram alio*, ſpecially in an inferior Court, and where the Caſe alſo Differs, that Purſuit being made upon violence for double Mail, and this Purſuit for ſingle Mail, whereby the Actions differed, which was Repelled, and the Decreet found ſufficient. Actor. *Lawtie*. Alter. *Aiton*. *Gibſon* Clerk.

Allans Executors contra *Lauder*, *Eodem die.*

IN an Action betwixt *Allans* as Executors Confirmed *ad omiſſa* to their Fathers Goods, againſt one *Lauder*, as Intromettor with his Wifes Goods after her deceaſe, and which Wife, being the Purſuers Mother had Intrometted with the ſaids omitted Goods, and was Married upon the ſaid *Lauder* now Defender, her ſecond Spouſe; The *Lords* Aſſoilzied from this Purſuit, becauſe it was Found, that the Huſband Defender, having only continued after his Wifes Deceaſe, in the Poſſeſſion of his Goods, which he had before his Wife died, and while they lived together, that continuing of the Poſſeſſion retained by him, there being no other Deed lybelled of any other Intromiſſion

with any Goods of his Wifes *de novo*, after her deceafe, befides that which he had in his Marriage, it could not make him vitious Poffeffor, nor produce this Action againſt him, as againſt a wrongous Intromettor, but the Purſuer might cauſe Confirm the Wifes Teſtament, and cauſe Charge the Defender to do the ſame, whereby they would evict the Deads part, and it would be made lyable to them, for any thing they might evict againſt the Defunct, for her Intromiſſion with the ſaids omitted Goods, out of her firſt Husbands Teſtament. Actor. *Gibſon*. Alter. *Hart*. *Gibſon* Clerk. *Vid March* 20. 1627. *Knows* contra *Kneeland*. *Feb*. 7. 1629. *Broun* contra *Dalmahoy*.

Naſmith contra *Ruthvens*, *January* 18. 1628.

IN a Suſpenſion betwixt *Naſmith* and *Ruthvens*, wherein *Hary Naſmith* having obtained Sentence againſt *Alexander Crichton*, as Executor to umquhile the Laird of *Ruthven* before the Commiſſar of *Dunkel*, for payment of a Sum contained in the L. *Ruthvens* Bond, and having Arreſted for ſatisfying of that Decreet, in the hands of the Relict of the ſaid umquhile Laird of *Ruthven*, and in the hands of the now La. *Ruthven*, certain Goods and Gear; This Arreſtment and Decreet foreſaid, obtained by him, is transferred before this ſame Judge, *viz.* the Commiſſar of *Dunkel*, in the Perſon of *James Naſmith*, as Brother and Heir to *Hary activè*; and the ſaid Relict, and now Laird of *Ruthven* are decerned to make the Arreſted Goods forth-coming, being referred to their Oaths, and they holden as Confeſt; Which Decreet being Suſpended by them. The *Lords* Found, that the Commiſſar of *Dunkel* might be Judge to an Action of transferring of his own Decreet; And ſicklike Found, that he might be Judge to Actions purſued at the Inſtance of Heirs of any Defunct, albeit he might not be Judge to Actions, where the Defenders were purſued as Heirs to Defuncts; For the Purſuit of any purſuing as Heir, hindered not the Commiſſar to proceed in any Action, where the matter drawn in Controverſie, and where the nature of the Action was proper to ſuch conſiſtorial Juriſdictions, and here the Obligation, which was the ground of the Purſuit, made to *Hary*, was Heretable, and therefore the Decreet thereupon was transferred in his Heir, who had the Right thereto, ſeing it would not belong to *Hary's* Executors, except for by-gone Annualrents owing before his deceaſe. And therefore the Letters were Found Orderly proceeded, notwithſtanding of the Reaſons of Suſpenſion, containing the two Arguments abovewritten. This laſt part was altered upon the 23. *Feb*. 1628. where the Sum was Found to pertain to *Hary's* Executors, and not to his Heirs, as is there obſerved, and conſequently the Decreet obtained at the Inſtance of the Heir of *Hary* was null. *Vid. November* 28. 1621. L. *Greenock*, *March* 26. 1624. *Liddel* contra *Robs*. *March* 27 1628. *Irwin* contra *Young*, *Decem*. 11. 1627. *Falconer*.

Lo. *Lindſay* contra La. *Aiton*, *Eodem die*.

IN a Suſpenſion betwixt the Lo. *Lindſay* and the Lady *Aiton*, of a Decreet obtained before the Commiſſars of St. *Andrews*, for a Houſe-Mail in *Couper*, pertaining to the Lo. *Lindſay*, poſſeſt by her; The *Lords* rejected that Reaſon of Suſpenſion, bearing, that the Sum decerned was an hundered and twenty pounds, and ſo out with the bounds of his proceeding, being a Civil Matter, *viz.* For Houſe-Mails, albeit referred to the Parties Oath, ſeing he could not Judge by Oath, where the matter exceeded fourty pounds, notwithſtanding whereof the Decreet was ſuſtained, being for three Terms of an Houſe-mail, and ſo each Term being fourty pounds, the Matter behoved to be reſpected, as three ſeveral Heads, and ſo in effect *totidem Libelli*, albeit all were contained in one Purſuit: In this Proceſs the *Lords* Found, conform to the Cuſtom obſerved, that the Commiſſars of *Edinburgh*, in civil Matters which are referred to Parties Oaths,

Oaths, cannot Judge in Matters, where the same exceeds an hundred merks, and the other Inferior Commissars, where the same exceeds fourty pounds, and that their Decreets are null, if they contain any more in civil Matters, albeit referred to the Parties Oath. *Actor. Stuart.* Alter. *Aiton. Gibson* Clerk.

Seaton contra *Seaton*, *Eodem die.*

IN a Pursuit by *Seaton*, as Executor Dative to his Goodsir, and having licence against *Seaton* of *Schelin*, for payment of certain Duties of Lands pertaining to the Pursuers Goodsir, Intrometted with by the Defender, of many years bygone, contained in the Summons; The *Lords* Found no Process upon that Pursuit, while the Pursuer produced his Goodsirs Right to the Lands, whereof he acclaimed the bygone Duties from the Defender; and Found, that his Licence and Decreet, decerning him Executor Dative, was not enough to be a Title, to give him interest to Pursue this Action *per se*, without the production also of his Goodsirs Right foresaid, no more than his Goodsir, if he were living, would be heard to pursue, without shewing his Right to the Lands for his interest; And his Executor could be in no better estate, neither was it respected, that the Pursuer offered to prove the same *cum processu*; And that he Alledged, that this should be sufficient to him, who probably could not have his Goodsirs Right, he not being his Heir, which was Repelled, and this Right foresaid was Found necessar to be used for his Title. Actor. *Nicolson.* Alter. *Mowat.* Scot Clerk.

L. *Halkerton* contra *Falconer*, *Eodem die.*

IN a double Poynding betwixt L. *Halkerton* and *Hew Falconer*, Commissar of *Murray*, who both acclaimed from the Laird of *Allardes*, certain Sums of Money, adebted by him to *Falconer* of *Ballandro*, who was common Debitor to both the Parties, the one, *viz. Halkerton* seeking the same from *Allardes*, as Assigney made thereto by *Ballandro*; and the Commissar seeking the same, as a Creditor, who had Arrested in *Allardes* hands, and had obtained Decreet against him, to make certain of the Annualrents of the principal Sum forthcoming to him, upon *Allardes* Oath and Confession, whereto he had referred the Debt, and whereupon he had obtained Decreet before the *Lords*, in *June* 1627. for so many of the Annualrents, which *Allardes* then in his Oath had granted him to be adebted; for the prineipal Sum was not Arrestable, being owing by an Heretable Bond; *Halkertons* Assignation, was before the Arrestment, which Arrestment was execut in *anno* 1625. and the Annualrents controverted for, were for the years 1626. and 1627. and so for the two Cropts, after the year wherein the *Arrestment* was execut, albeit in the Execution, both all the bygone *Annualrents*, and also the Annualrent for all Terms and years to come were *Arrested*. The *Lords* Found, that the Arrestment could not extend to any Annualrents of any years to come, subsequent after the time of the executing of the Arrestment, albeit the same was specificè made, both of bygones, and in time coming; for they Found, that the Annualrents of years thereafter could not be Arrested, by that *Arrestment*, and that the same could not extend thereto, but only to the Annualrents owing, and which the Debitor was owing at the time, or to such Terms as was begun, and running at that time, and could not comprehend Terms which began after the Arrestment; and therefore preferred the Assigney to the Arrester, notwithstanding of his Sentence, which decerned him to be payed by *Allardes*, of these Terms foresaids, and superceeding the Execution, while the Terms decerned should be past: And Found the *Assignation* preceeding the Arrestment to be sufficient, for the Assigneys Probation, albeit it had never been Intimat, seing the Assigney had received payment from *Allardes* as Assigney for divers

Terms of the Annualrent, after his *Assignation*, and before the Arrestment, which was as good as an Intimation; neither was it respected, what the Arrester Alledged, that the Debitors self had received payment divers years of the Annualrent from *Allards*, since *Halkertouns* Assignation, which he Alledged to be a presumption of Simulation betwixt the Cedent and Assigney; which was Repelled, in respect of divers other years since, and before the Arrestment, payed to *Halkertoun*, as Assigney; and so the Assigney was preferred. Actor. *Hope* & *Falconer*. Alter. *Gibson* Clerk.

contra *Mckenzie*, *Eodem die*.

IN a Removing betwixt contra *Mckenzie*, the Pursuer desiring Removing from her Terce, whereto she was Kenned and served; and the Defender Alledging, that he bruiked the two part with the third *pro indiviso*, and he could not know what was the Pursuers Third, to the effect he might remove there-from, seing all the whole Lands were Mountains, and Grass-ground, and not Arrable Lands, whereby the Terce could be known by it self, which cannot be in this case where all is in Grass & Pasturage. The *Lords* Repelled the Exception foresaid, of occupying *pro indiviso*; But the *Lords* Found, that if the Defender would offer obedience to Remove from the Third, that then they would grant Commission, either to the Sheriff, or to some ordinar Judge, either to Stent the whole Lands, and the holding thereof, that the Pursuer might have the Third part of the Sowms & the right of Pasturage upon the Lands proportionally, conform to the relation to the Two part; so that the Defender should hold no more Goods thereon, but according to the Two part of the Sums, whereto the whole Lands should be extended, that the Pursuer might have liberty, as said is, to Pasture according to the proportion of her Terce; or else that the whole Lands should be mett and measured by the said Judge, & that the third part thereof should be laid apart to the Pursuer, for her Terce, to be used by her at her pleasure; and that the Defender should have no more but the quantity of the two part of the Lands, being justly mett, as said is; and which Tryal the *Lords* Found might be taken in this same *Action* of Removing, if the Defender did offer therein obedience to Remove. Actor. *Gibson*. Alter. *Mowat*. *Gibson* Clerk.

Edington contra Tennents, *January* 24. 1628.

IN an Action for Mails and Duties of the Lands of *Clattie*, at the instance of *James Edington*, against the Tennents thereof: The *Lords* sustained the Pursuit, the same being Pursued for the Farms and Duties of the Lands, of the Crop 1627. the Summons being raised in *December*, the samine year 1627. and so before the Terms of payment were past, *viz.* Before *Candlemass*, seing the *Lords* Found, that the samine might be sought by Pursuit and Process, after the Legal Terms, *viz.* of *Whitsunday* and *Martinmass* were past; The Decreet following upon that Process expressly containing, that the Defenders should only be Decerned to pay after that *Candlemass* was past. *Hay* Clerk. *Vid.* 26 *June* 1628. Lady *Edmonstoun*.

Aidie contra Gray, *Eodem die*.

John Aidie Pursues *John Gray* in *Leith*, for payment of a Debt owing to him by the Defenders Father, for which payment he was conveened as Intromettor with his Fathers Goods, *&c.* The Defender Alledged, that he could not be Pursued as Intromettor, seing he was Confirmed Executor to his Father; which Alledgance was sustained, in respect whereof, The *Lords* Found no Process against him *hoc nomine*, as Intromettor, and nevertheless that the Defender was Confirmed Executor *post hanc litem captam*; yet the said Alledgance was sustained, seing he was Confirmed within year and day after the Defunct his Fathers decease; But the *Lords* in the same Action sustained Process

ceſs againſt the Defender as Executor, ſeing he himſelf was Executor, who was conveened as Intromettor, and ſo there was no reaſon to put the Party to any new Proceſs againſt him, ſeing he had once deduced his Proceſs Legally, in a lawful manner, againſt him who then was only Intromettor; and his being Executor *ex poſt facto*, by that Deed done by him ſince, could not imped the courſe of his proceeding againſt him in this ſame procedure, as Executor; albeit if any other by the Defenders ſelf had been Executor, the Party behoved to purſue that Executor by a new Proceſs, and the Proceſs againſt the Intromettor would have ceaſed, and ſo the Defender being Executor, had *beneficium Inventarii*, which he as Intromettor could not have. Actor. *Primroſe*. Alter. *Mowat*. *Hay* Clerk.

Thomſon contra *Kilgour*, *Eodem die*.

IN a double Poynding betwixt *Thomſon* and *Kilgour*, The *Lords* Decerned *Kilgour* to be anſwered of the Maills of a Tenement, and preferred him to *Thomſon*, ſeing *Kilgour* was Infeft in the Property of the Land, by a publick Infeſtment, four days before the Seaſin of an Annualrent, given by that ſame Author of *Kilgours* Right to *Thomſon* alſo, albeit *Thomſons* Right depended upon a Procuratory of Reſignation made in his favours by the common Author, for Infeſtment to be given to him of that Annualrent, diverſe years before the Heretable Right made to *Kilgour*, to the which date of the ſaid preceeding Procuratory, he Alledged, that his Seaſin ſhould be drawn back, and that he ſhould be preferred to the other, eſpecially ſeing ſince the ſaid Procuratory he had uplifted the Malls of the ſaid Tenement, for ſatisfying of his ſaid Annualrent divers years, which ought to Corroborat his Right in this Poſſeſſor Judgment, ſeing alſo that his Seaſin depending upon that Procuratory, was but four days after *Kilgours* Seaſin; notwithſtanding whereof *Kilgour* was preferred. Actor. *Dunlop*. Alter. *Gibſon* Clerk.

Kennedy contra *Mcdougall*, *January* 25. 1628.

IN a Suſpenſion betwixt *Kennedy* and *M'dougal*, *Kennedy* being Decerned, as lawfully Charged to enter Heir to her Father, to pay a Debt of her Fathers, which Decreet was given againſt her, ſhe Compearing, and offering to Renounce to be Heir; and a Term being divers times aſſigned to her Compearand to produce the ſaid Renounciation, and failzieing to do the ſamine, ſhe was Decerned, as lawfully Charged *in foro contradictorio*, as ſaid is. This Decreet was Suſpended upon Production of a Renounciation to be Heir, which Renounciation the *Lords* Found might be received by way of Suſpenſion, notwithſtanding of the foreſaid Decreet given againſt her Compearing as ſaid is, without any other Proceſs for Reducing of that Decreet, ſeing the Suſpender was then at the giving of the Sentence, and yet was this time of the reaſoning of the Suſpenſion, ſtill Minor. Actor. *Nicolſon*. Alter. *Primroſe*. *Scot* Clerk.

L. *Drum* contra Tennents of L. *Leſmore*, 26 *January*, 1628.

IN a Suſpenſion betwixt L. *Drum* and ſome Tennents of the L. *Leſmore*, for Suſpending of a Decreet of Spoliation of Teinds, obtained before the Commiſſars of *Aberdene* againſt them by L. *Drum*, the quantity whereof was referred to their Oaths, and they holden as confeſt, upon the quantity Libelled, and for not Compearance a Decreet was given conform to the Libel, which they Suſpended, becauſe it was manifeſtly known, that ſuch quantities of Corns never grew at any time upon the Lands Libelled; and therefore the Charger ſhould be holden, either to take the Suſpenders Oath, yet upon the quantity, notwithſtanding of his Sentence, or elſe he ſhould prove the quantity, otherwiſe take it to his own Oath *de credulitate*; and the other Party opponing his

Decreet, the *Lords* Found it not reasonable to allow the Quantity contained in the Sentence, which was notour to be exorbitant, neither would they astrict the Charger to refer the same again to the Suspenders Oaths, nor take their Oaths now after Sentence upon their own Contumacy, and so that he could not be compelled to prove the Quantity, he having chosen Probation of before by their Oaths, and they not compearing as said is; but if the Party had been present, they thought it reasonable that he should give his own Oath *super credulitate*, and as he might learn by true Information what the Quantity was: as was done before in the Action of the like nature, betwixt Mr. *Robert Lumsdale* contra where the Obtainer of the Sentence being present at the Bar, was ordained to give his Oath; but because the Charger had obtained a Sentence of Spuilzie of Teinds of the same Lands, against the same Parties, for other years besides these controverted, which was recovered upon Probation, whereby the Quantity was proven by Witnesses; and because the Laird of *Drum* was not present to give his Oath *super credulitate*, as was in the other Case where the Party was present, therefore the *Lords* restricted the Quantity of this Sentence to the like Quantity, which was contained in the said former Decreet obtained upon Probation, and found the Letters orderly proceeded therefore, and no more. Actor. *Mowat*. Alter. *Davidson*. *Gibson* Clerk. *Vid.* 13 *Jan.* 1625, L. *Duffus*, and the other Cases there cited.

Adie contra *Gray*, *Eodem die*.

IN the Cause betwixt *Adie* and *Gray*, mentioned *supra*, *January* 24. 1628, the Pursuit being Sustained against the Defender as Executor, albeit confirmed *post litem captam*; and therefore the Defender, who by the Confirmation had *beneficium Inventarii*, Alledging that the Goods confirmed were exhausted by Payment made by him to Creditors of the Defunct, to whom this Defender was Cautioner for his Father the Defunct, who had Regiſtrat their Bond against this Excipient, the Terms of Payment being all by-past, and the Bonds Regiſtrat before the Intenting of this Pursuit, and Payment also made before the same. This Exception was Sustained, albeit the Pursuer Replyed, that this Defender being oblig'd as Cautioner for his Father, his paying of the Creditors, could not make Defalcation of the Defuncts Goods to the Defender, seing the Defender behoved here to be considered as another Crediror of the Defuncts; and so seing the Pursuer had Intented his Action against him for his Debt, before he was confirmed Executor, he cannot be debarred, but must have the Defuncts Goods made forth-coming to him, being first in his Diligence, there being no Pursuit moved against the Excipient by any other of the Defuncts Creditors; for albeit he was Cautioner for the Defunct, and had payed for him, yet that behoved to be respected, as done for Liberation of his own Debt, he being bound himself, and cannot have respect to the Defuncts Debt, no Pursuit being moved against him as Executor to the Defunct, but as a Cautioner who was personally oblig'd, neither can the Relief seeking upon the Defuncts Gear by the Defender, which makes him a Creditor to the Defunct, be respected to be more valiable to him, but from that time when he was confirmed Executor, and that is after the Pursuers Diligence, so that his being full-handed with his Fathers Goods, they cannot be retained by him for satisfying of his own Debt totally, and to prejudge the Pursuer of his, but ought to be made forth-coming proportionally to them all *pro rata*. This Reply was Repelled, for the *Lords* Found the Defender might defalk and exhaust the Goods in the Testament, for Relief of the Sums payed by him before the Intenting of the Pursuers Cause, wherein he was preferred to the Pursuer, albeit he Intented this Cause before the Confirmation, but if the Payment had been made since the Intenting of this Cause, it would have been more question-

able,

able, if it should have been allowed to the Pursuers prejudice; likeas the second *February* 1628, in this Cause, the Defence being reformed and restricted, that he was only Cautioner for the Father, whereof the Terms of Payment were past before the Intenting of this Cause, albeit neither Sentence nor Payment was before this Cause, yet he had Reason to retain for his Relief of the Debts confirmed, whereof the Term was past as said is, for he was an inevitable Debitor. This Alledgance was Repelled, seing no Payment was made before the Confirmation, and so he ought only to come in *pro rata* with the other Creditors. Actor. Alter. *Mowat. Hay* Clerk. *Vid. Penult Jan.* 1628, *John Stuart* & 16 *Feb.* 1628, *Marshal* contra *Byres.*

Captain *Annand* contra Tennents, *Eodem die.*

IN a Removing by Captain *Annand* against his Tennents, the Defenders Alledging that they were Tennents to their Master, who was Infeft in the Lands libelled before the Pursuers Seasin produced, and by vertue thereof who had been sundry years in Possession. The *Lords* Sustained this Exception, the same being proponed for Tennents, and Found no necessity that the Defenders being Tennents should be compelled, either to Alledge that their said Master was Infeft by one having Power, or that he was ten years in Possession of the Lands, but Sustained the samine, without Alledging any further. Actor. *Dunlop.* Alter. *Mowat. Hay* Clerk. *Vid.* 7 *Dec.* 1627, L. *Bamff*, where this same was done.

The Commissar of *Dunkel* contra *Abercrombie*, *Eodem die.*

THE Commissar of *Dunkel* Pursues one *Abercrombie* as Heir to his umquhile Father, which Father was Tutor-Dative to a Minor, for Payment of the Duties of the Minors Lands the years of his Tutory, and which were craved either as Intrometted with by the Tutor, or *propter omissionem*, for not meddling with them, was sought from him, to which Duties the Commissar was made Assigney. In this Pursuit the Defender being conveened by sundry Alternatives, one whereof was, that he behaved himself as Heir to his Father, by payment of sundry of his Fathers Debts since his Fathers decease to his Creditors. The *Lords* would not Sustain this Alternative, for they Found, the Paying of the Fathers Debts by the eldest Son, *qui erat apparens hæres*, could not make him to be that person to represent his Father as Heir, nor as *gerens se tanquam hæres*; sicklike the *Lords* Found, that the Minors Father dying Infeft in Lands, and being by vertue thereof in Possession of the same divers years, and at the time of his decease, the Tutor ought to be Comptable for the Duties of the saids Lands, although never Intrometted with by him, seing he ought to have Intrometted therewith, or to have done Diligence, and shew where he was debarred lawfully; and wherein the *Lords* Found the Tutor to be lyable to the Minor, albeit the Minor was not Infeft, for that behoved to be repute the Tutors fault, who ought to have procured the Minor to be Infeft, his Father dying Infeft and in Possession; also it was Found, that no Process could be granted against the Heir of this Tutor-Dative for any omission of the Tutors, seing the Tutor had never found Caution *de fideli administratione* after his Tutory; and as without Caution the Tutor could never have pursued *activè*, so it was Found, that except he had found Caution, he could not be pursued by the Minor *passivè*; which Decision is hard, because it was seen and shown to the *Lords*, that the Tutor had accepted the Office, and had Sworn and made Faith before a Judge, that he should do his Duty, so that his omission to do that which was his own fault, ought not to have been found profitable to him: But so the *Lords* Found, albeit no Defender was compearing to dispute in this Cause, but occurred to the *Lords* allanerly in considering the Process. Actor. *M'gill.* Alter. *Hay* Clerk.

E. *Roxburgh* contra L. *Langtoun*, *Eodem die*.

IN a Spuilzie of Teinds by the Earl of *Roxburgh* against the Laird of *Langtoun* and others, it being proven that the Corns Spuilzied were after the Spuilziation casten in the L. *Langtouns* Barns, and were Threshen there, and thereafter Disponed of by him: The *Lords* Found this Receipt, and Using of the Corns, to be a Ratihabition, and consequently Found the Spuilzie proven against him, albeit he was not the actual Spuilzier, but that others were proven to have actually committed the Act of Spuilziation. Actor. *Nicolson*. Alter. *Hay* Clerk.

Bar. *Achyle* contra L. *M'clain*, *Eodem die*.

IN an Improbation Pursued by the Baron of *Achyle* against *M'clain*; The *Lords* Found that the Pursuer being Infeft in the Lands Controverted, whereof the Evidents were called in question by Right flowing from the Bishop of the *Isles*, who was libelled to be Heretably Infeft in the same Lands, and was Author to the Pursuer, might call for Production and Improbation of all Writs of the same Lands, made to the Defender by the said Bishop of the *Isles*, albeit the Pursuer shew'd not where the Bishop was Infeft himself, seing he called only for Production of Writs made to the Defender by the Bishops self; for as the Bishop might himself Pursue the Defender for any Writs of the Lands, made by him to the Defender personally, albeit he had never been Infeft, so might this Pursuer having Right from the Bishop competently seek the same, for the Bishop was in effect common Author to them both, and so might seek Improbation of the Writs made by himself to any of them as said is: And this was Found, albeit that it was Alledged, that one who was not Infeft could not pursue a Party for quarreling of a Real Right of Lands, that Pursuit being only competent to them, who had a Real Right themselves, and which might produce the like Action. Actor. *Hope* & *Mowat*. Alter. *Nicolson*. *Hay* Clerk.

D. of *Lenox* contra *Howstoun*, *January* 29. 1628.

IN a Removing by the Duke of *Lenox* against *Howstoun*, for Removing from the House and Yards of *Inchinnan*, pertaining to the Duke: The *Lords* Found a Rental made by umquhile *Lodovick* Duke of *Lenox* to this Defender, whereby he was Rentalled kindly Tennent to the Duke of *Lenox*, and his Heirs in some Acres of Land, and also in the keeping of the said House of *Inchinnan*, to be a sufficient Title to exclude the Pursuer from this Action of Removing of him from the said House, wherein he was Rentalled Keeper as said is; and the Exception founded upon the said Rental was Sustained, albeit it was Replyed, that the same Rental was no Title to exclude the Master from the use of his own House, neither was a Rental of that Tenor, *viz.* appointing one to be Keeper of the House, of that force as to give a Warrant to the Receiver, to keep the same longer than the Granter pleased, seing Rights to keep Castles and Houses are constitute by Securities of another Nature, and more valid in Law than such Rentals can be of; likeas he Replyed, that the House and Yards are all decayed, by the neglect and abuse of this Defender, whereby he had fallen from the benefite of the Rental; all which was Repelled, and the Exception Sustained. Actor. *Hope* & *Burnet*. Alter. *Hay* Clerk.

Lo. *Whitinghame* contra *Spence*, *Eodem die*.

IN a Suspension at the instance of the Lo. *Whitinghame* against *Spence*; The *Lords* Found, that a Party in whose favours some Clause of a Contract is conceived, albeit he be not Contracter in that Contract, may raise summar Charges upon that Clause, against the Party oblig'd to fulfil the same to him, and that he needs not to seek Implement thereof by an Action, or by seeking Registration of the Contract at his instance, but that Charges may be raised thereupon

thereupon summarly, which the *Lords* Sustained, the Contract being Registrat before, betwixt the principal Parties Contracters. *Actor. Douglas.* Alter. *Belsbes.* *Vid. Decem.* First 1630. *Feuars of Chapelton.* 9. *Jan.* 1627. *Herring. Jan.* 15. 1635. *Shanks.*

Stuart contra Tennents of *Coldinghame*, *Penult January* 1628.

IN a Removing pursued by *John Stuart* contra Tennenrs of *Coldinghame*, The *Lords* Repelled an Exception proponed, for the L. of *Wedderburn*, upon his Infestment of the Lands lybelled, flowing from his Author upon whom he condescended, by vertue whereof he Alledged he was twenty years in Possession of the saids Lands, which Exception the *Lords* Found not sufficient to defend him, albeit clad with so long Possession, against this Removing, except he also had Alledged therewith, that his said Author was Infeft in the same Lands; for he ought to condescend, that he was Infeft by one having power, otherwise the Exception was Found, could no ways be Relevant. *Actor. Stuart & Craig. Alter. Hope & Belsbes. Gibson* Clerk. *Vid.* Feb. 17. 1627. *Douglas. Decem.* 7. 1627. L. *Bamff.* & *July* 15. 1628. Lady *Maxwel. Jan.* 26. 1628. Captain *Annand* contra his Tennents * *Decem.* 9. 1626. Lo. *Buccleugh.*

L. *Clackmannan* contra L. *Balnamon*, *Eodem die.*

IN an Action of Poynding of the Ground, at the L. *Clackmannans* instance, against L. *Balnamon*, an Exception being proponed for *Arbuthnet* of *Findoury*, upon an Infestment of an Annualrent, out of the Lands Lybelled, by vertue whereof, he was year and day in Possession of the said Annualrent, out of the Lands contained in his Infestment, whereby he Alledged, that the Lands could not be Poynded at the Pursuers instance, for the Pursuers Annualrent, but with Reservation of this Excipients Right. This Exception was Found Relevant, notwithstanding of the Reply, that the Pursuer Alledged, that his Infestment was prior to the Excipients, by the space of an year, and both the saids Infestments being base, his Priority behoved to give him preference; Likeas he Alledged, that his Right was not only prior, but was also in effect made publick, by Confirming of the same by the King's *Majesty*, and Registration of his Seasin thereof, in the publick Registers; which Confirmation, albeit the Infestment was granted to be holden Base of the Giver, with the Registration foresaid of the Seasin, being Insert in publick Registers, made the Obscurity of his Right to cease; Likeas he was in Possession by receiving of a Terms Annualrent, from the Giver of the Infestment, before the Excipient; all which was Repelled, seing he was not year and day in Possession, before the Excipients Right and Possession; Likeas the *Lords* Found the said Confirmation and Registration, made it not publick, the Holding beeing Base. Actor. *Hope.* Alter. *Gibson. Hay* Clerk. *Vid. Novem.* 17. 1627. betwixt thir same Parties.

Lo. *Gray* contra *Graham*, *Eodem die.*

IN an Action by the Lo. *Gray* contra Mr. *James Graham* and his Wife, founded upon a Promise made by them to him, which was referred to both their Oaths. The *Lords* Found, that the Wife ought to give her Oath, albeit her Husband Alledged, that her Oath of the Law ought not to be taken upon the Promise lybelled, seing the Pursuers Summons bore the same to be made by her, in the time of her Marriage, with this present Husband, and since they were Married together, so that she could not Depone thereon; for albeit she should confess the Promise, it would neither be Obligator against the Husband, if he should deny the making of any Promise, neither would it be Obligator against her self, albeit she should survive her Husband, the same being made, as the Lybel confesses, in the time of their Marriage standing, notwithstanding

whereof, the *Lords* Found, that she ought to give her Oath, and then the *Lords* would consider, what effect the same should produce. Actor. *Chaip.* Alter. *Russel.* Hay Clerk.

Meldrum contra L. *Clunie, Eodem die.*

IN a Suspension by *Andrew Meldrum* contra L. *Clunie*, he desiring to be relieved out of Ward, wherein he was committed by *Clunie*; The *Lords* Found the Reason of Suspension Relevant, upon a Compriſing of the Suspenders Lands deduced by *Clunie*, for that same Debt for the which he was incarcerat, which Compriſing standing unrenounced by the Charger, albeit no Possession apprehended thereby, The *Lords* Found sufficient to produce liberty to the Suspender, for the same behoved to be reput as payment, seing the Party neither would Renunce the same, nor shew any Just Cause, which might make the same appear to be unprofitable to him, nor qualified any Impediment, which of the Law might have debarred him from the Possession of the Lands Compriſed, seing he had never done diligence to recover the same, and so the *Lords* Found, that the Creditor ought not to retain the Compriſing, and also detain the Debitor in Ward. The like was done the ninth of *February*, betwixt *Hunter* and where the Compryſing was Found to take away Personal execution, so long as the Compriſing was not Renunced, albeit the Compriſing was not clad with Possession, seing the Compriſer alledged not, that he was debarred by any lawful Impediment, after Diligence done by him. Actor. *Mowat.* Alter. *Lawtie.* *Gibson* Clerk. *Vid. Jan.* 22. 1631. L. *Cloberhill. Decem.* 7. 1631. *Skarlet. July* 23. 1633. Mr. *John Lawson. March.* 15. 1628. *L. Blantyre* contra Parochioners of *Bothwel. Decem.* 20. 1621. *Smith* contra *Wood*, & *June* 23. 1627. *Bruce* contra *Sinclar* *

Donatar of L. *Cleghorns* Escheat, contra Tennents, *Ult. January*, 1628.

IN a special Declarator by the Donatar of L. *Cleghorns* Liferent, after a General Declarator, against the Tennents of certain of the Rebels Lands, for payment of certain Farms of the Lands possest by them, of all years since the Rebel was year and day at the Horn. The *Lords* found the payment made by the saids Tennents Defenders, to the Rebel himself, of all years preceeding the Citation of them in this special Declarator and Summons, to be sufficient to liberat them at the hands of the Donatar, seing they were in *bona fide* to pay their Farms and Duties to their Master, to whom they were in use to pay before his Rebellion; whose Rebellion they might excusably not know, before it was intimat by Citation to them particularly: And albeit the Pursuer Replyed, that this payment could not be admitted, for any Terms since the Decreet of general Declarator, seing that Sentence put all the Leidges *in mala fide* to deal with the Rebel, in prejudice of the King and his Donatar; seing all Parties having Interest were cited thereto: Yet the Reply was not sustained, but the payment made after the general Declarator was allowed, for all Terms preceeding the special Citation of thir Parties, even for the Terms interveening, after the general Declarator, and before the special Citation. Actor. *Mowat.* Alter. *Vid.* 22 *Feb.* 1628. *Anderson* contra *Gordon.* 13 *Decemb.* 1627. *Arbuthnet. Ult. Feb.* 1628. Betwixt the same Parties. 6 *Decemb.* 1631. L. *Conhaith*,

La. *Dumfermling* contra her Son, *Eodem die.*

IN an Action of the Lady *Dumfermlings* contra the Earl her Son, for payment of the Third of the Duties of the Lands, whereof she was served to a Terce; the whole Duties being uplifted by the Defender, it being controverted, if she as Lady Tercer before a Warning or Interruption used upon her Terce and Service, might seek any greater Duties for her Terce, but according to the Terce of that Duty, which was payed to her umquhile Husband, immediatly

atly before his Decease. The *Lords* Found she had good Right to seek her Terce of that quantity, which was uplifted by the Defender, for the Duties of the Lands, and that she ought not to be restricted to the quantity payed in her Husbands time, but might justly seek her Third of that which was actually received by the Defender, for the Duties of the whole Lands, seing the force of her Service, giving her Right from the death of her Husband, to all Terms, behoved to give Right for the Duty of that part of the Lands proportionally, which was uplifted by him, who had no Right but to the Two part, and none to her Terce; but if the Tennents had been conveened therefore, who had never payed any Duty, since the decease of her Husband, they had reason to have excluded the Pursuit for any greater quantity, than they were used to pay to the Husband before: So that the Reason of the Decision was, because the Defender had uplifted and received payment of this Duty, and therefore ought to pay back that which he really received, and had no just reason to retain it. Actor, *Aiton* & *Stuart*. Alter. *Hope* & *Nicolson*. *Hay* Clerk.

Hamilton contra *Brown*, *Eodem die*.

IN an Action for the Maills and Duties of an House, betwixt *Mark Hamilton* and *Brown*; The *Lords* preferred the Defender to the Pursuer, in the Right of the Maills acclaimed; the Defenders Right being a Disposition of the Land by the Heretor thereof, for satisfaction of a Sum adebted to him by the said Heretor, contained in a Contract of Marriage; upon the which Disposition, for the Cause foresaid, the Defender was Infeft in the Land upon the morn after the said Disposition: Albeit the Pursuer Replyed, that he had Compriſed the Lands from the said Heretor their common Author, for a Cause onerous; the Denounciation of which Comprising was made upon that same day, upon which the Party had acquired the said Disposition, and which Denounciation preceeded the said Seasin, and so his Denounciation being before his real Right of Seasin; and the same being a Deed necessar, and the other being a voluntar Deed, done by the Debitor, ought not to prejudge his lawful, and more allowable Diligence; but he Alledged, he ought to be preferred, which was Repelled, as said is, and the Defender preferred. *Hay* Clerk. *Vid.* 25 *March* 1628. *Blackburn*. 17 *Decemb.* 1627. *Lawder*. 22 *March* 1626. *Erskine*. 4 *Decemb.* 1628. *Logan* contra *Hunter*.

Nasmith contra *Hume*, *Eodem die*.

IN a Spuilzie by *James Nasmith* against *Hume* of *Carleside*, the Defender defending himself with a Tack of the Teinds alledged Spuilzied, whereupon he had served Inhibition, and conform thereto he had medled with the Teinds Libelled; He Alledged that he could not be repute a Spuilzier in so doing, conform to a lawful Right, specially to produce this Action against him at his instance, who had no Right to these Teinds, and who if he had intromett therewith, would have been subject in Spuilzie to this same Excipient therefore. This Exception was Repelled, for the *Lords* Found, that albeit the Pursuer had no Right to the Teinds Libelled, and the Defender had Right to the samine only, yet that the Defender could not *brevi manu*, without a Warrand of a Judge, or Sentence, enter himself to the Possession of these Corns, which were Sown and Win by the Pursuer, from off the Land pertaining to the Pursuer in Heretage, and that he could not enter to take the Teind at his own hand, without Concourse or Consent of the Pursuer, who was Heretor, and Labourer of the Land, as said is, he not concurring with the Defender to the Teinding of the same, and to his Intromission therewith. Actor, *Nicolson* & *Burnet*. Alter. *Lawtie*. *Scot* Clerk. *Vid.* 21 *Novemb.* 1628. *Bruce* contra *Bruce*. 7 *July* 1629. Lady *Renton*. 9 *Decemb.* 1628. *Mackie* contra *Dumbar*.

L. *Halkerton* contra *Kadie* and *Greives*, *Feb.* 1. 1628.

IN an Action of *Deforcement* L. *Halkertoun* contra *Kadie* and *Greives*, Tennents to the L. *Benholm*; The *Lords* sustained a Bond of 80 pounds of Principal Sum, and 40 merks of Penalty, albeit only Subscribed by one Nottar, and found it not to be a matter of Importance, which required to be Subscribed by two Nottars, albeit the Penalty Compted with the Principal Sum, made it to exceed 100 Pounds, seing they had respect only to the Principal Sum of the Bond, and the Penalty was but an accessor Obligation; and because the Poynding deduced against the *Debitor* of this Bond, for the Execution whereof this *Deforcement* was pursued, was begun to be Execute before the rising of the Sun, as the *Defender* Alledged, whereby he contended, that Act to be unlawful, and that therefore he might justly impede the same, albeit at the time when the impediment was made, The Pursuer *Answered*, that the Sun was up, and risen, at which time he Replyed, it was not lawful to make a *Deforcement*, although the Act of the Execution and Poynding was begun before the Sun rising, which Poynding was deduced in the Moneth of *June*; This Exception nevertheless was found Relevant, for they Found, that as no Judge could begin and enter to sit in Judgment before lawful time of day, and before the rising of the Sun, no more could Execution be made by Officers upon Sentences at such times. Also they Found, that Deforcements could not be Eleided by any Alledgance, proporting the Goods Poynded to pertain to another person, than to the Debitor from whom they were Poynded, except that either that persons self, to whom they were alledged to pertain, or some other in their name had compeared at the Poynding, either upon the Ground, or at some other time, before the Act was compleat and ended, and offered to make faith, that the Goods pertained to the other person; which being done, they might have stayed the Poynding, without danger of Deforcement, otherwise not; for the offering to prove against the Pursuit of Deforcement, that the Goods pertained to another, without the offer to make Faith at that time of the Poynding, was not sustained as Relevant to purge the Deforcement. Also the *Lords* Found that Alledgance not Relevant, to stay Deforcement, *viz.* That the Defenders, being Servants to L. *Benholm* their Master, who was Heretor of the Land, out of the which the Goods were Poynded, might lawfully stop the Poynding, for the security of their Masters Farm, adebted for that year to him, by the Debitor of that Sum, for the which Poynding was Execute, and which Debitor was Tennent to him also, and in which the Master would have preference for his Farm before other Creditors. This Alledgance was Repelled, because at the time of the Poynding, and staying thereof, neither the Master nor any other in his name, made mention of that cause of the stopping of the Poynding, which if it had been done, the Party might have offered Surety for the Masters satisfaction, and so proceeded to his Execution; and if that Security had not been granted, the Poynding might have been impeded, without danger of Deforcement; but no such Intimation being then made for the Masters Farm, the *Lords* Found, that the Deforcement could not be now Eleided, by proponing now in this place upon the Masters Right, which was then omitted to be mentioned at the time of the Execution, and was now only Alledged, and Offered to be tryed to be a just Debt. *Actor. Advocatus Hope. Alter. Stuart. Gibson* Clerk.

L. *Kirkonnel* contra L. *Barnbarroch*, *February* 21. 1628.

IN a Declarator of Escheat by the L. *Kirkonnel* against the L. *Barnbarroch*, the Summons being Execute upon six days against the Party Defender personally apprehended, where the Warrand and Command of the Letters did bear a desire, to Summon him upon sixty days, as being out of the Country, and no

no further anent the Citation of the Party, being contained in the *Will* and Desire of the Summons; and the Defender Alledging the Execution to be null, seing there was no Warrant in the Summons to cite and Summon the Party after that manner, and the same could not be done by any person at their own hand without a Warrant; This Alledgance was Repelled, and the Citation was Sustained. But this is disconform to the Decision betwixt the L. *Erskine* contra *Erskine*, mentioned *January* 24. 1627, except that that was found in the Execution of an Inhibition, which tending to make a posterior Hereable Alienation to be null and to fall, required a more strick Warrant and Process, after the nature of the Warrant, as it is craved by the Parties self, and is a greater Contempt of the Judge, than a Citation upon a Summons, which is but the beginning of a Process, and thereafter hath a Progress of a Judicial Procedor, whereas Inhibition is more odious and strick. Actor. *Belshes*. Alter. *Nicolson*. *Gibson* Clerk. *Vid.* 24 *January* 1627, L. *Erskine*, and the Cases there.

L. *Duffus* contra *Eodem die.*

IN an Action the Executors of the L. *Duffus* against for Payment to them of the Sum of 500 Merks, adebted by his Bond to the Defunct, for Exhibition of the which Bond the Defender was conveened, and for Registration thereof, but not by way of Action for Payment; the Defender Alledging, that the Defunct had written a missive Letter to him, subscribed with his Hand, shewing that he had given the Bond to one called *Swyland*, to whom he desired the Defender to make payment of that Sum, and to receive from him his own Bond, according whereto he had payed the same to him, and hath recovered his own Bond, which he hath cancelled. This Alledgance was Repelled, except the Defender would herewith Alledge, that the payment was made by him, according to the direction of the foresaid Letter, in the Defuncts Lifetime before his decease, or else after his decease the Defender not knowing thereof; for the *Lords* Found, that if the payment was made, after that the Defender knew the Director of the Letter to be deceas'd, that that payment so made could not liberate the Defender, seing the Person, to whom the Letter desired him to make the payment, was the Defuncts Servant, and so it was probable that he was appointed to receive the same only to his Masters use, who being dead, the Defender knowing the same, he could not be in *bona fide* to have done it, *quia mortuo mandatore expirat mandatum*. Actor. *Gibson*. Alter. *Gibson* Clerk. *Vid.* 12 *July* 1627, *Rowan* con. *Shaw*.

Scot contra *Banks*, *Eodem die.*

IN a Spuilzie by one *Scot* Relict of Mr. *Robert Stevin* against *Katharine Banks* and *James Weill* her Husband, which was restricted to wrongous Intromission, and no Spuilzie sought: The *Lords* Found, that the Deed of wrongous Intromission done by the Wife without Command of the Husband, was not effectual to produce Action against the Husband, he not being accessory thereto, albeit the Wife had medled with the Goods violently, and had disponed thereupon at her pleasure; and albeit the Husband thereafter getting knowledge of the Fact done by her, and of her disponing thereof, and after the Citation used also by the Pursuer against him, did never express any Act, by the which he made it manifest, that he disliked that Fact, and disallowed thereof; and so albeit the Pursuer Replyed, that the Fact of the Wifes Intromission being done in the express name of her Husband, and by her Husbands Right, *viz.* by a Poynding, deduced at his instance for Debt owing to him, which was found unlawful, yet he thereafter making no expression, neither to the Party, nor to the Magistrat of the Town where he dwelt, nor to the Officer Deducer of the Poynding, nor to no other person, to show that he was not accessory

ceſſory to that Fact, which he ought to have done, if he had intended to have been freed thereof, and which the Purſuer Alledged to be an expreſs Ratihabition, and ſo that he was ſubject to the hazard of the Fact, albeit it were true, that he was not within the Country at the very time of the Act done by his Wife, as he Alledged, for it were of dangerous conſequence, to give liberty to Women clad with Husbands to commit ſuch Wrongs, and that the Husband (ſpecially in Civil Matters, and purſued civilly before the Civil Judge) ſhould not be anſwerable therefore; whereas in Contraventions the Maſter is anſwerable for the Fact done by the Servant, albeit he was never acceſſory to the Fact, nor ever knew of the ſame, but after the committing thereof, which hath not ſuch grounds of Equity, as Purſuits for Reſtitution of Goods, unjuſtly taken away by the Wife, which muſt be repute to be allowed by the Husband, and by his Ratihabition, in reſpect of the Facts above-writtten; all which were not reſpected, but the Exception Suſtained, and no Action Found againſt the Huſband for any Fact done by the Wife, albeit civilly purſued, no more than he could be conveened for a Debt, contracted by her for Bonds or Obligations made by her without his Conſent. Actor. Alter. *Miller*. *Scot* Clerk. *Vid.* 4 *March* 1628, betwixt the ſame Parties.

L. *Balveny* contra L. *Innes*, *February* 7. 1628.

IN an Action betwixt *Balveny* and *Innes*, for payment of the Duty of certain Lands, Set in Tack by the Earl of *Murray* Heretor of the Lands to the Purſuer, and for the which the Defender as Poſſeſſor of the Lands was conveened, for the Cropt 1623, and ſenſine; The *Lords* Suſtained this Action againſt the Defender, albeit he Alledged that he could not be purſued therefore, ſeing he had acquired a Tack of the ſame Lands from the Purſuers Author, *viz.* the Earl of *Murray*, by vertue whereof he hath been in Poſſeſſion theſe eight or nine years by-paſt; and although the Purſuers Tack be anterior to his Tack, yet he cannot be found to be an unjuſt Poſſeſſor, nor in *mala fide* to bruik and continue his Poſſeſſion by vertue of his Tack, ſeing the Earl of *Murray* their common Author, being Heretor of the Land, was five years in Poſſeſſion of theſe ſame Lands immediatly preceeding the Setting of the Defenders Tack, and was never interrupted therein by the Purſuer, and ſo the Heretor being in Poſſeſſion, when he Set him the Tack, he ought to be maintained in his Poſſeſſion and Right, and the Purſuer cannot Repeat the Duties by vertue of his anterior Tack, never ſhewing any Deed *quomodo deſiit poſſidere* ſo long: This Alledgance was Repelled, in reſpect that the Purſuers Tack was anterior, and that he offered to prove, that it was clad with real Poſſeſſion for the ſpace of ten years together, and that he needed not condeſcend *quomodo deſiit poſſidere*, for neither the Earl of *Murray*, nor this Defenders Poſſeſſion could be found lawful within the years to run of the Purſuers Tack. Actor. *Hope* & *Gibſon*. Alter. *Hay*. *Gibſon* Clerk. *Vid.* 11 *July* 1628, La. *Colingtoun*. 23 *June* 1627, *M'millan* contra *Gordon*.

Hume contra L. *Rentoun*, *Eodem die*.

IN an Action betwixt *Hume* and L. *Rentoun*, wherein the Purſuer as Executor confirmed to his Father, Purſues for payment of the Sum of 1000 merks, for the price of ſome Land, ſold by the Purſuers Father to the Defenders Father, with the yearly Annualrent thereof ſince the Purſuers Fathers deceaſe; which Purſuit, both for Principal and Annualrent, the *Lords* Suſtained at the inſtance of the Executor; albeit it was Alledged, that if any Annualrent ſhould be payed, it was only competent to be ſought by the Heir of the Defunct, and not by the Executor, who could not have Right to ſeek Annualrent, but only the principal Sum; and alſo Alledged, that neither Heir nor Executor could

could seek *Annualrent* for that Sum, seing by the Contract, the Defunct was only obliged to pay the Principal, and was not obliged in any *Annualrent*, which Alledgances were Repelled, for the *Lords* Found, seing the Defender posseſt the Land, he ought also to pay the *Annualrent* for the Price thereof, so long as he retained it unpayed; *And* seing the Executor had *Right* to the Principal, The *Lords* found, that no other could have Right to the *Annualrent* thereof, but that it was due to him. Actor. *Alter. Belshes. Gibson* Clerk. *Vid. Feb.* 17. 1624. L. *Durie* and the Cases there.

Pringle contra *Ker*, *Eodem die.*

IN a Declarator of a Failzie betwixt *Pringle* and *Ker* of *Linton*, for not payment of the yearly *Annualrent*, to hear the Reversion of the Lands given in Wodset, be decerned to be *Extinct*. The *Lords* decerned, and would not admit the Purgation thereof, by offering real payment, after Dispute, and calling of the Process, but they thought that it was reasonable, that if the Defender payed the principal Sum, with the whole by-run *Annuals* at the Term of *Whitsunday* 1628. now ensuing, that he should be assoilzied, and so ordained some to deal with the Pursuer to consent hereto, and the Clerk of the Process to stay the Extracting of any Decreet to that Term. *Hay* Clerk.

Maxwell contra L. *Innerweek*, *Eodem die.*

IN an Action betwixt *James Maxwel* and L. *Innerweek*, for declaring of a Reversion of Lands to be expired, upon a Clause Irritant, conform to the Contract betwixt the Parties, seing conform thereto the Defender being Required to provide and pay the Moneys, as was appointed in the Contract, he had not done the same. The *Lords Assoilzied* from this Declarator, in respect the *Requisition* made to pay the Moneys, was made by a Procurator constitute by the Pursuer, who required payment to be made to *James Maxwell*, at a Term at which he was not within the Countrey, and the Defender was not obliged to pay the same out of the Countrey; and albeit the Procurator had power to receive the Money, yet seing he required not the payment to be made to himself, as having power, but to the Constituents self, who was absent as said is, & also in respect that the Procurator designed no place, where he desired the Defender to make payment, so that it was uncertain to him where to pay the Moneys, there being no place in the Contract designed for payment; and that the Instrument of *Requisition* bore not, that the Procurator shew'd and delivered his Procuratory to the Nottar, to the effect the Nottar might read the same to the Party; for albeit that the Instrument bore, *that the Nottar read the same Procuratory to the Party*, these words were eiked upon the Margin of the Instrument, since the same was produced by the Party, and was without any Clause making ment ion of the reading of the Procuratory; and whereby he Alledged, that it could not be sustained, and although the same might be received, as it is now mended, he Alledged it was not sufficient, not proporting that the Procuratory was deliverd to him as Nottar, to be read by him, as ought to have been done; *For* the reading thereof by the Nottar himself, without the Procurators own Direction, was not an Act of his Office, but was only proper to the Procurator to have desired it, and upon his desire the Nottar ought to have done it, and to give Instruments thereon, and it is not his Office to be Nottar to his own Deed, but in so far as he has the preceeding Warrand of the Requirer, as in Seasins, the Nottar reads the *Precept*, at the desire of the Party, and the Instrument makes mention thereof, and sicklike in other *Acts*, in respect of all which conjoyned, the Requisition was not sustained. Actor. *Hope* & *Nicolson*. Alter. *Hilton* & *Stuart*. *Scot* Clerk. *Vid. March.* 8. 1627. E. *Rothes* contra *Balfour. July* 3. 1622 L. *Thorndikes* and the other Cases there.

Dundas contra L. *Swinton*, *February* 8. 1628.

IN an Action of Reduction, betwixt Sir *James Dundas*, and L. *Swinton*, The *Lords* Sustained the Action at the Pursuers instance, upon the base Infestment of the Lands lybelled, granted to him, flowing from the L. of *Newbyres*, who was also Infeft therein, by an base Infestment, holden of the L. *Houburn* his Author, for Reduction of a publick Infestment of the same Lands, granted to the Defender by the said L. of *Houburn*, before the Right made to him by the L. *Newbyers*, because there was an Argument and Reason joyned with this base Infestment, whereby the said publick Infestment was desired to be Reduced, *viz.* a Back-Bond given by the Defender, that if he payed not a Sum contained in the Back-Bond, at the Terms therein contained, that *eo casu* his Infestment should fall; Like as the Pursuer subsumed upon the Failzie, so that the Disput was not, if the base, or the publick Infestment should be preferred, but if that publick Infestment was reduceable upon the Reason founded on the Back-Bond, and which was sustained; but *Houburn* himself, in whose favours the Back-Bond was made, was also Pursuer. In this Process also, the *Lords* Found, that a Charter granted by the L. *Houburn* to *Swinton*, which had no Relation to be done, for satisfying of a preceeding Bond of Alienation of Lands, made to him by the L. *Houburn*, nor had no dependence upon the same, but which was made after the Bond of Alienation, & also after the Back-Bond whereupon the Reason was lybelled, and which Charter had no cohesion with the same, but was made of a posterior date, and bearing to be done for Causes Onerous; and which the Defender Alledged therefore could not be affected with the Condition of the said Back-Bond, seing the Back-Bond provided, (that in case of failzie therein contained, the Alienation made to the Defender should be null,) and so the same might affect the Bond of Alienation, preceeding the Back-Bond, but could not affect, nor touch this Charter subsequent, done after the Back-Bond, which was a distinct and several perfect *Act*, not made conform, or referring to another preceeding Bargain, but which subsisted of it self, without respect to any other preceeding Writ. This Charter was found to be a part of the first Alienation made to *Swinton*, and to depend upon the preceeding Bond of *Alienation* of the Lands, made to him by *Houburn*, and that the Back-Bond should strick against it, albeit it was after the same, because the Defender could not show, nor Alledge any other Cause or Bargain, for Implement whereof he had acquired the same, by and attour the first Bond of Alienation, whereto the Back-Bond had Relation, so that the same was reput to depend upon that preceeding Bond of Alienation, it being also done in *August*, *viz.* the said Charter, and Bond of Alienation in *July*, few days before; and the said Charter being granted in *August*, was anterior to the Term of *Martinmas*, at the which Term the Sum was by the Back-Bond appointed to be payed, with the provision of Failzie forsaid, which all discovered the Charter to be a part of the preceeding Alienation, seing the Annalzier was obliged to give to the Defender two Infestments, one to be holden of himself, and another of the Superior; and seing the Defender could not show, that he had acquired another Charter, relative to the Bond, and depending thereupon; Therefore the Exception thereon was Repelled, and the Back-Bond found to affect the samen, neither was it Respected, what the Defender *Alledged*, that in the Bond of *Alienation*, the Disponers Liferent was Reserved, whereas in this Charter no such Reservation was contained, whereby he *Alledged* it was manifest, that it was not to be reput a part of the first Bargain, which was also Repelled. *Actor. Aiton* & *Nicolson*. *Alter. Cunninghame. Gibson* Clerk. *Vid.* 20 *Decem.* 1632. L. *Innerweek*.

Kirkhead

Kirkhead contra *Nairn*, *Feb.* 9. 1628.

IN an *Action* betwixt *Gerard Kirkhead* Procurator for one *Englishman* against Mr. *William Nairn* Minister at *Dysert*, for payment of a Sum contained in his Obligation. And the Defender desiring, that the Pursuer should be Compelled to find Caution to him *judicio sisti & judicatum solvi*, in the pursuit of Reconvention, which he had to Intent against this Pursuers Constituent, whose Procurator he was, *& cujus nomine agit*, seing he was a Stranger, and not subject to this *Scotish* Jurisdiction, and that both of the Law and Equity, he ought to be answerable to the Defender in his Reconvention. The *Lords* sustained the *Action* at this Procurators instance, and Found no necessity, that the Procurator should find Caution to answer in the Defenders Reconvention against the Procurator, as representing his Constituent; But here it is to be considered, that there was no *Action* intented against the Procurator, as representing the Constituent, which if it had been done, I think albeit the *Lords* Found, that the Procurator could not be holden to find Caution, yet they would not have refused, to have ordained himself to be answerable so, that whatsoever he should recover by this Process against the Defender, the same should remain lyable to the Defender, in his Reconvention, but there was found here no necessity of this, seing the Defender had not intented any Action, as he might have done. *Actor. Russel. Alter. Nairn. Gibson* Clerk. *Vid. Feb.* 14. 1627. *Pyrnon.*

Lo. *Colvil* contra *Andrew*, *Eodem die.*

IN a Suspension betwixt the Lord *Colvil* and *Andrew*, who Suspending Charges upon a Contract, for payment of Victual Annualrent anterior to the Act of Parliament 1597. Wherein the Suspender offered and consigned the Annualrent, according to ten for ilk hundred, and desired the Letters to be Suspended for the Victual acclaimed, in respect of the said *Act*, albeit the Contract preceeded that Act. The *Lords* sustained the Charges for the Victual Annualrent, in respect the Contract was before the said Act, and Found that the Act stract only upon Contracts, and Writs astricting Parties to pay more than ten for the said hundred since the date of that Act; But the *Lords* declared, that if the Suspender betwixt and *Whitsunday* Redeem the Annualrent, by payment of the Sum, and all the by-runs preceeding that Term, that in that Case, or by the Consignation thereof, in case of refusal to receive the same, he should be free of all greater Annualrent, which might be sought from him for that Term thereafter, and superceeded the Charges, while the said Term. *Actor. Alter. Bruce. Hay* Clerk.

Simpson contra *Boswel*, *Eodem die.*

IN a Suspension betwixt *Boswel* and *Simpson*, Suspending Charges given by *Boswel* to him for Renuncing and Resigning of Lands, wherein *Simpson* was Infeft by the L. *Balgony*, under Reversion; The Right whereof was Disponed to, or Comprised by *Boswel*, and who having, after Consignation of the Sum, Charged *Simpson*, not only to Renunce, but to Resign also the Lands in the Superiors hands, in favours of him who had Redeemed; and which *Sympson* Alledged he was not holden to do, and that he was not in Law obliged to Resign in his favours; But only obliged to Renunce, and to grant the Lands lawfully Redeemed. The *Lords* Found, that he ought also to Resign all his Right, in this Redeemers favours, to the effect that he might be Infeft upon his Right of Resignation made by him, in the Superiors hands, in his favours, besides the Renunciation. *Actor. Aiton. Alter. Gibson* Clerk.

L. *Wardis* contra Tennents, *Eodem die.*

IN an Action by *L. Wardis*, against the Tennents of the L. of *Duncintie*, for doing of Services to the Pursuers Miln, as Possessors of the Land astricted thereto, wherein the L. of *Duncintie* their Master, who was not called

led in the Process, Compearing and Admitted for his Interest, Alledged that no Process ought to be granted in this Case, tending to Constitut a Servitude upon his Ground, except he had been Summoned to this Pursuit. The *Lords* Found no Process therein, while the Master be called, and this was Found, albeit the Master himself compeared for his Interest, and proponed this Exception himself, and not with the Tennents. *Actor. Nicolson.* Alter. *Hope. Gibson* Clerk.

Ker contra *Scot, February* 12. 1628.

IN an Action of Reduction *Merk Ker* contra *Scot* of *Hertwoodmires*, for Reduction of a Service and Retour, with the Execution thereof, wherein the Judge, Clerk, and Assyssors were Summoned, it being Alledged, that the Summons could not be sustained, being a Summons written in *English*, and under the Signet, contrair to the Order of the Chancellary, and the ancient Custome and Practique, ever keeped in such Actions, and Summons of Error, which used to be written in *Latine*, and on Pearchment, and were under the Quarter-Seal. This Alledgance was Repelled, and the Summons sustained, because the Summons concluded, or was restricted by the Pursuer, only to the Reduction of the Retour, and concluded no punishment of the Assyssors, but was only pursued to have the Retour Reduced and taken away. In this same Process, The *Lords* Found also, that albeit the Retour was Registrat in the Chancellary, whereby the Defender Alledged, that the same being a publick Register, the Pursuer ought to Extract the same himself, and that the same could not be Reduced, for not Production; yet the *Lords* Found, that except the Defender should produce the Retour (it being his own proper Evident) that they would Reduce it for not production. Actor. *Aiton.* Alter. *Scot* & *Cunninghame. Gibson* Clerk. *Vid.* last *Feb.* 1628. E. *Nithsdale. July* 24. 1630. *Act* anent Order of the Chancellary.

La. *Dumfermlin* contra the Earl *her son, Feb.* 13. 1628.

IN a Pursuit by the Lady *Dumfermling*, against the E. *her son*, for payment of the Terce of the feu-Duties of the Lands disponed in Feu, to the Feuars thereof, and which Feu-Duties by the Feuars Infeftment, were due to her umquhile Husband, by his Right of the same Lands; he being Superior to them, and they being his Feuars, and Proprietars of the Lands; to the third of the which Feu-Dutie, she acclaimed Right by her Service, as Lady Tercer, Served to the third of all the Lands, wherein her Husband died Infeft; and he being Infeft in thir Lands, albeit the Propertie pertained to the Feuars, yet her Husbands Infeftment, although it extended not to the Property of the Lands, it was valid for the Feu-Mails; and consequently, albeit she had no Right to the Terce of the Lands, whereof her Husband was not Proprietar, yet she acclaimed Right to the Third, and Terce of the said Feu-Duties, to the which she restricted her Service and Pursuit. The *Lords* Found, that the Ladie-Tercer had no Right to claim any Right of Terce out of any Feu-Duties, whereof her Husband had Right the time of his decease; Seing he being denuded of the Propertie, and retaining only the Right of the Superiority, with the saids Feu-Duties, which was a Consequent of that sort of holding, belonging to him as Superior, the same could no more pertain to her, as Ladie Tercer than the Third of the Superiority, whereof she could have no Right in Law, by vertue of her Terce; and this was so Found, because she being provided to a sufficient Conjunct-fee, by and attour her Terce. The *Lords* Found therefore, no Terce could belong to her, but that which has been clearly by preceeding Practiques, given before to other Ladie-Tercers; And seing it could not be shown, that Services of Terces at at any time preceeding, were Deduced, or Alledged for the Third of Feu-Duties; Therefore

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in this instance they would not begin to introduce a new Consuetude, where the Lady was beside sufficiently provided of a Conjunct-fee, there being nothing shown where the like was granted at any time preceeding; but here it is to be marked, that the Lady was Served to the Third of the Lands, so that her Title differed from the desire of her Summons, wherein she craved the Third of the Feu-duties, and Retrinshed her Title thereto; whereas in her Title she was not Served nor Kenned to the Third of the Feu-duties, and so there was a disconformity. This Cause being thereafter reasoned again, the *Lords* abode by this Interloquutor, and Decerned according thereto, 25 *March* 1628. At the which time the *Lords* sustained the Pursuit, both against the Earl and his Tutors and Curators, who were conveened for payment of the Terce uplifted by them, & against the Tennents, who were conveened for payment of the same Duties, & the Summons was sustained *in solidum* against them both, but Declared, that once payment by either of them should liberat both the Parties. In this Process the *Lords* Found, that the Lady ought to have the Terce of the whole Teinds, wherein her Husband died Heretably Infeft; albeit it was found that she could not have Right to seek a Liferent thereof as a Conquish, conform to her Contract of Marriage, as is marked 12 *March* 1628. In that Action betwixt them there mentioned. Actor. *Aiton* & *Stuart*. Alter. *Hope* & *Nicolson*. *Hay* Clerk. *Vid.* 26 *June* 1629. *Advocatus* contra Excommunicats.

Kello contra *Mackison*, *Eodem die*.

IN a Pursuit by Mr. *John Kello* contra *Eleazar Mackison* and *Hunter*, for payment of 600 pounds, adebted to the Pursuer by *Innes* of *Crombie*, because they being Messengers, were imployed by the Pursuer to take the said Debitor, being Rebel, and to put him in Ward: Likeas they took him, and after taking, in place of putting him in Ward, they put him in *Gilbert Hunters* House, who was a privat Man, whereout they suffered him to escape, and pass to freedom, and therefore craving payment from them of his Debt; this Action against the Messengers was sustained, and found Relevant, [bearing the Tenor foresaid,] to produce this Action and Effect: Likeas the same was sustained to be proven, as accords of the Law, and it was not found necessar, that the Pursuer ought and should prove, either the imployment of the Defenders by him, to take the Rebel, or any other point of the Summons, by Writ, or Oath of Party, but sustained it as said is, to be proven otherways *prout de Jure*.

La. *Lamingtoun* contra L. *Lamingtoun*, *Feb.* 14. 1628.

IN an Action by the Lady *Lamingtoun* against the Laird, for payment of the Terce of the Coal of certain Lands, to the Terce of which Lands she was lawfully Served and Kenned, and thereby claimed the Third of the Profit of the said Coal, which was Win within the saids Lands. The *Lords* Found, that the Lady Tercer had no Right to the Profits of any Coals win within the Lands, by vertue of her Right of Terce, but only to so much as might serve for her own use, and not to any more of any part of the Commodity, made by the Heretor thereof, and therefore assoilzied from that Pursuit, except as said is *pro tanto*, so far as concerned her use, for her own Fire. Actor. *Nicolson* & *Belshes*. Alter. *Hope* & *Stuart*. *Gibson* Clerk. *Vid. supra* 13 *Feb.* 1628. Lady *Dumfermling*.

Mr. *Jedburgh* contra E. *Hume*, *Feb.* 15. 1628.

IN an Action Mr. *Jedburgh* contra E. *Hume*, for proving the Tenor of a Charter of divers Lands granted to umquhile *Andrew*, Abbot of *Jedburgh*, which umquhile *Andrew* had given Infeftment to the Pursuer of certain of these Lands, contained in that Charter, and by his Bond he had obliged himself to give Infeftment to the Pursuer, of some other Lands therein contained. This Action was sustained against the E. *Hume*, he being now Heretor of the Lands; albeit

albeit it was Alledged, that he was Minor, and was not holden in his Minority *placitare super Hereditate Paterna*; for if the Tenor of this Charter were proven, being anterior to his Right, it would make the same fall; which Alledgance was Repelled in this nature of Action, for proving of the Tenor of the Charter. In this Process also the *Lords* sustained the Pursuers Interest, *viz.* as being Infeft in some of the Lands contained in that Charter, to seek probation of the Tenor thereof, for the whole Lands therein contained, albeit he had only Right to a part, seing the Charter could not be divided anent the tryal of the Tenor thereof. L keas they Found, that the personal Bond concerning some other of the Lands therein contained, gave the Pursuer interest, to seek Probation of the Tenor of the said Charter, albeit the Defender Alledged, that a personal Bond could not produce Action for proving of the Tenor of a real Right, except some other Action had been first moved upon that personal Bond, which might in Law produce a Pursuit, concerning a real Right in the person of the Maker of the Bond, which was Repelled. Actor. *Liton* & *Stuart*. Alter. *Hope* & *Belshes*. *Gibson* Clerk.

Thomson contra *Merston*, *Feb.* 16. 1628.

IN a Removing betwixt *Thomson* and *Merston*, wherein a Liferenter of certain Acres of Lands in *New-haven*, after the decease of another Liferenter, whose Liferent was reserved in this Pursuers Right, pursues the Defender, without Order of Warning, as Fiars are in use to do after the Liferenters decease, for making the Ground void, that the Pursuer may enter to the Land. The *Lords* sustained the Defenders Exception to Eleid this Pursuit, proponed upon his occupation of the Land, as Tennent to the Liferenter deceast, albeit he was not Tacksman to her, neither could prove him to be Tennent to her by Writ: And albeit the Pursuer Replyed, that the Defenders Possession was the deceast Liferenters Possession, seing he remained in House and Family with her, and Laboured the Ground as her Servant, and never was able to prove, that he payed her any Farm or Duty for the Ground, notwithstanding whereof the Exception was sustained, seing the Defender Alledged, that his said Possession was as her Tennent, although he remained in the House with her, which he Alledged became his House during his Occupation, & that he payed Farm for the Land *hoc modo*, by converting of the Profit of the Land to her Intertainment and Maintenance; which the *Lords* Found sufficient to Eleid this Pursuit against the Defender, and to keep him from present Removing; but the *Lords* Found, that the Pursuer needed not to be put to a new Warning, only they Found that the Defender might Labour the Land this present Cropt, without danger of Violence, and that he should pay to the Pursuer for the Cropt possest by him, as much Farm as such-like Land is worth, and uses ordinarly to pay in Farm, but that he ought not now to remove being closed betwixt Terms, till after the Term. Actor. Alter. *Sandilands*. *Hay* Clerk. *Vid.* 12 *January* 1622. Lady *Kincaid*, 1 *Feb.* 1631. *Blaws* contra *Winraham*, 7 *March* 1627. *Paterson*.

Robertson contra Debitors, *Eodem die*.

IN an Action betwixt *Robertson* and her Debitors, the Pursuer being Relict of her Husband, and being made Assigney by him to certain Bonds and Sums, contained in the Assignation therein specified, adebted by the Debitors to the Husband, and done long before the Decease of her Husband, pursues the Debitors contained in the Assignation, for payment of the Moneys owing by them. The Pursuit upon this Assignation was sustained at the Relicts instance, both for the Bond of Heretable Sums, and also of Moveable Sums, whereto she was made Assigney by her Husband; Notwithstanding that the Debitors Alledged, that the same Assignation made by the Husband to the Wife, could not be sustained to produce this Action, being made to prejudge the Heir and Executor

cutors of the Defunct; and that this Assignation could not be respected in their prejudice, but for the Relicts own part, or as a Testament; which Alledgance was Repelled, seing it was not Alledged, that the Assignation was made on the Makers Death-bed; Neither was it ever Alledged to be Revocat by the Husband before his Decease, after the making thereof; neither was the Assignation quarrelled, either by the Heir or Executors of the Defunct, and it was not competent to the Debitors, to quarrel the same upon this Ground. *Scot* Clerk.

Marshal contra *Byres*, *Eodem die.*

IN a Pursuit by the Creditors of umquhile *Adam Marshal* Malt-man in *Edinburgh*, against *John Byres* Burgess there, who as Executor to the Defunct, their common Debitor, was conveened, for payment to them of their Debts; and the said *John Byres* being a Creditor of the Defuncts, and having Confirmed himself Executor to him only *ad hunc effectum*, to be payed of his own Debt. The *Lords* preferred him in his own Debt to the rest of the Creditors, and sustained his Intromission, and Defence founded thereon, concerning his preference in the Defuncts Goods, to all the rest of the Creditors; notwithstanding that the Pursuers Alledged, that he ought not to be preferred, but ought to come in with the rest of the Defuncts Creditors *pro rata*, and that the Gear ought to be divided amongst them all proportionally, seing *John Byres* had nothing to verifie the Defunct to be his Debitor, but only an Obligation made to him by the Defunct on his Death-bed, *viz.* upon the very day before his decease. Likeas immediatly after his decease, the said *John* had Confirmed himself Executor to him; which Diligence could not be the Cause of his preference, being so prepostrous, and the Pursuers having omitted no Diligence, but having Pursued as soon as they knew the Testament to be Confirmed, and that the Defender was Executor, before which time they could do no more timely Diligence: Likeas their Pursuits were Intented within two or three Moneths after the Defuncts decease, so that they were not *in negligentia*. This Reply was Repelled, and the Defender preferred *qui sibi vigilavit*; neither was it respected, that the Defenders Bond was granted by the Defunct on his Death-bed, because the Pursuer confest, that the Debt was truly owing by him to the Defender before, so that the taking of the Bond on Death-bed, was but a Confession of the Debt, which was truly and lawfully owing before, and could not prejudge the Defender; and seing he had done Diligence by obtaining himself Executor Confirmed, to the effect he might get payment of his just Debt, and that he had accordingly obtained payment therefore, he was preferred without division with the rest. Actor. Alter. *Burnet*. *Hay* Clerk. *Vid.* 13 *July* 1632. *Pollock* contra *Fairholm*. 7 *January* 1624. *Shaw* contra *Gray*, & 26 *January* 1628. *Adie*.

Kilgour contra *Thomson*, *Eodem die.*

IN an Action betwixt *Kilgour* and *Thomson*, mentioned 24 *January* 1628. *Thomson* Alledging, that he ought to be preferred to *Kilgour* who was Infeft; because he Alledged, that the Right made to *Kilgour*, was acquired from Mr. *Alexander Linton* Heretor of the Lands, who was Debitor to *Thomson* before the Disposition made by him to *Kilgour*; which Disposition he alledged was made without an onerous Cause, but *ex titulo lucrativo*, the Disponer being since become Bankrupt, and unable to satisfie his Debt. This Alledgance was found Relevant, albeit *Kilgour* Answered, that it was lawful to him to take a Disposition of the Land from *Linton*, Debitor to the Excipient, seing at that time he was not Bankrupt, and was not Inhibite by *Thomson*, nor no Diligence done by him against his Debitor, which might make it unlawful to *Kilgour*, to acquire and receive the Land from the said Debitor, either by Gift, or by buy-

ing. This Reply was not Respected, for the *Lords* Found that it was more reasonable and just, that the Land given to *Kilgour*, if it was disponed without a Cause onerous, or a preceeding Debt, or Sums of Money, should be rather forth-coming to the just and true Creditor, for satisfying of his lawful Debt, than that *Kilgour* should bruik the same *ex titulo lucrativo*, albeit the Creditor had done no Diligence against his Debitor, at the time of the acquiring of *Kilgour's* Right, seing immediatly thereafter the Debitor became Bankrupt, and so unable to pay this Party his just Debt, *partibus, ut illic notatur, comparentibus. Vid. 6 March* 1632, L. *Garthland*.

L. *Monimusk* contra L. *Pittaro*, *February* 21. 1628.

IN an Action of Exhibition by the Laird of *Monimusk* against the Laird of *Pittaro*, for Exhibition of certain Bonds, and Re-delivery of them to the Pursuer, which were made by the Pursuer in favours of his Bairns for their Provisions, and which were put by the Father in the Defenders Hands, who was Mother-Brother to the Bairns, to be keeped by him to their uses; in respect of the which, the Defender Alledged, that the Pursuer having so depositate them, they became the Bairns proper Evidents, als effectually as if they had been delivered to themselves, being made for their Provisions, which their Father did; and their Mother now being dead, the Pursuer could not seek them back again to be altered in their prejudice, or destroyed at the Fathers pleasure: Which Alledgance the *Lords* Repelled, and Found, that notwithstanding thereof, the Father might seek back again the saids Bonds, and alter or cancell them at his pleasure, but real Securities of Lands being exped, by the Father to his Bairns, are not retreatable by him. Actor. *Lermonth* & *Hay*. Alter. *Belshes*. *Gibson* Clerk. *Vid.* 11 *June* 1630, *Fairlie* contra *Fairlie*, 11 *Nov.* 1624, *Wallace* of *Ellerslie*.

Anderson contra *Gordon*, *February* 22. 1628.

IN an Action to make Arrested Goods forth-coming betwixt *Anderson* Pursuer against *Gordon* alledged Debitor to *Maxwell*, the Pursuers Debitor, for making forth-coming to the Pursuer a Sum adebted by *Gordon* to *Maxwell*, and Arrested by the Pursuer in *Gordons* hands for payment of his Debt owing by *Maxwell*: This *Maxwell* being at the Horn, and his Escheat disponed and gifted, and declared by a general Declarator at the Donatars instance, before the executing of the Arrestment at the Pursuers instance; and which Donatar compeared in this Process, and desired to be preferred to the Creditor Pursuer. The *Lords* Preferred the Donatar to the Creditor Pursuer, in respect of the said general Declarator obtained before the Arrestment, albeit no special Declarator was obtained by the Donatar. Actor. *Mowat*. Alter. *Cunninghame*. *Gibson* Clerk. *Vid. ult. January* 1628, L. *Cleghorn*.

Lo. *Lowdoun* contra Parochioners of *Killimuir*, *Eodem die*.

IN a Spuilzie of the Lord *Lowdoun* against the Parochioners of *Killimuir*; The *Lords* Found the payment of the Kings Taxation, imposed upon the Teinds libelled, made by the Defenders for the Cropt libelled, to the Pursuers Chamberlain, who was his Chamberlain and Receiver of his Rents that year libelled, and divers years before, and who continued yet his Chamberlain, and which Chamberlain had payed to the Kings Collector for the Pursuer, the same years Taxation for these Teinds, to be sufficient to liberate the Excipients, who had so payed to the Chamberlain the Duty imposed upon the saids Teinds, for the Taxation as said is, from all Spuilzie of that year, notwithstanding of the preceeding Inhibition, used against the Defenders before any payment, made by them to the Pursuers Chamberlain of the said Taxation; in respect whereof, and that the Pursuer Replyed, that no Deed of the Chamberlains could prejudge the

force

force of his Inhibition, except the Pursuer had given expres Warrant for the saids Receipts from the Defenders, or that the Chamberlain had given up his Compts to the Pursuer, and had compted and received Allowance from the Pursuer of these Receipts from the Defenders; which not being Alledged, but by the contrary, the Chamberlain having in his Hands much more of his Rents, the time of the paying of the Taxation to the Kings Collector, than these Receipts received from the Defenders, or the said Taxation would extend to, the Tennents could not ascribe the payment of the said Taxation, to be made out of the Receipts from them, and so being done without Consent or Warrant of the Pursuer, could not prejudge his Spuilzie and Inhibition, no more than a Warning to remove might be prejudged by the Chamberlains Receipt of the old Duty from the Tennents warned, except the Master had consented thereto; notwithstanding whereof, the Exception was Sustained to liberate from the Spuilzie, and also from wrongous Intromission, whereto the Spuilzie was restricted. Actor. *Hope, Nicolson, Aiton & Stuart.* Alter. *Cunninghame. Gibson* Clerk. *Vid.* 13 *Feb.* 1627, L. *Linlithgow* contra *Menzies.* 23 *March* 1622, L. *Gairlies.*

Colquhoun contra *Wardrop, Eodem die.*

IN an Action of Advocation of the Service of Brieves of Idiotry betwixt *Colquhoun* and *Wardrop*, wherein the *Lords* having heard the Reasons of both Parties, why the Service should proceed, or why no such Service should take effect, before they gave Answer to the Advocation or Remitt; and the Question being betwixt one, who was neareſt Agnat to the Idiot, and who thereby conform to the 18 Act Parliament 1585, claimed to be Served Curator to the Idiot, and betwixt another who had obtained a Gift of Tutory-Dative from the King, to be Tutor and Curator to the Idiot, by reason that the Agnat had not raised the Brieves, and desired that Service, but only since the obtaining of his Gift of Tutory-Dative, which was compleat and exped, and Caution found, and the Oath *de fideli administratione* given by him, before the raising of the Brieves by the Agnat, and who had not sought them *debito tempore*, but had ceased five years after his Majority, before he had raised these Brieves; which Cessation he Alledged made him to fall from that Office, as in Tutors lawful after the expiring of year and day. The *Lords* Found that the Agnat should be preferred in the Tutory to the Tutor-Dative, notwithstanding of the Gift exped to him, and notwithstanding of the Agnats Cessation, and therefore ordained the Agnats Brieves to proceed, and Remitted the Cause. Actor. *Hope & Nicolson.* Alter. *Stuart. Gibson* Clerk. *Vid.* 15 *July* 1631, *Grant* contra *Grant.* & 6 *July* 1627, *Campbel*, and the Cases there. 29 *June* 1632, *Irwine* contra L. *Elsick.*

Dumbar contra *Leslie, February* 23. 1628.

IN a Reduction betwixt *Dumbar* and *Leslie* of a Decreet, obtained by *James Leslie* against one *Dumbar*, as charged to enter Heir to his umquhile Father, who was Cautioner for a Sum of Money, owing to the said *James Lesly* by the Laird of *Auchtoun*, principal Party oblig'd; which Decreet was desired to be reduced, because it was given only against the Son of the Cautioner, as lawfully charged to enter Heir, he being then Minor, and as yet is; likeas he with Consent of his Curators, produced a Renunciation to be Heir, Subscribed by them and him, and so desired to be repotted. This Reduction was raised by the Minor, and also by one who was Cautioner for him in a Suspension raised by the Minor of that same Decreet, upon that same Reason, and wherein Protestation was admitted, and therefore the Reduction was also raised at the instance of the Cautioner in that same Suspension, against which the said Protestation was admitted, and because the Minor was dead since the intenting of the Reduction,

and the day of Compearance in the second Summons. The *Lords* Found that the said Cautioner could not use the said Renunciation, the Minor (Maker thereof) being dead, as he might have claim'd the benefite thereby, if the Minor had been living, and therefore Assoilzied from that Reason at the Cautioners instance; but thereafter the Parties were ordained to be further heard, this being thought to be an hard Decision.

This Action being again called in presence of the *Lords*, upon *June* 26. 1628. This Decision was Altered, and Found that the Cautioner might produce the Minors Renunciation, and use it for his own liberation, albeit the Minor was dead, and the reason of his Reduction was Sustained. Actor. *Gibson*. Alter. *Mowat*. *Scot* Clerk. *Vid.* 30 *July* 1626, *Harvie* contra *Barron*. & 13 *January* 1629, *Nisbet* contra *Nisbet*. 8 *July* 1628, betwixt these Parties.

L. *Gagie* contra *Guthrie*, *Eodem die*.

IN a Suspension betwixt L. *Gagie* and *Guthrie*, the Suspender Suspending upon a Poynding for a part of the Sums charged for, and Alledging further, that the Goods Poynded were worth greater Sums of Money than they were Appryſed for, and were set down in the Poynding; likeas before the Poynding, the Party from whom the same were poynded, offered to the Party, at whose instance they were poynded, greater Sums of Money for the same than the saids prices, whereto they were Appryſed, upon the which particular Sum offered he was special, and the Charger opponing his Poynding thereto, in the which the prices were estimate by the Appryſers, against which no contrary Probation could be received; the *Lords* not the less of the said Poynding, and Prices therein Appryſed, Found the offer of a greater price, really offered to the Party Poynder, and made upon the Ground, albeit before the Act of the Compryſing and Estimation of the prices by the Appryſers, to be Relevant, to be proven by the Oath of the Party Poynder, notwithstanding of the Poynding containing less prices. Actor. *Nicolson*. Alter. *Hay* Clerk.

Naſmith contra *Ruthvens*, *Eodem die*.

IN a Suspension of *Naſmith* against *Ruthvens* and *Hugh Roſs*, umquhile *Henry Naſmith* Heir to his Father *John Naſmith* Chyrurgian, obtains Decreet before the Commissars of *Dunkel*, against the Executors of the Laird of *Ruthven*, for payment of a Sum owing by the Laird of *Ruthven* to the said *John*, by an Hereitable-Bond; and upon this Sentence, by vertue of the Commissars Precept, he Arrests in the Lady *Ruthvens* hands some particular Movables, pertaining to the Defuncts Executors, and thereafter *Henry* User of the Arrestment dies, after which *James Naſmith* Heir to his Brother *Henry*, Pursues before the Commissar, and upon a Proceſs, by a Sentence, obtains this Decreet Recovered by *Henry*, and the Arrestment foresaid used by him, transferred in him as Heir to *Henry*; and in the same Sentence, the Relict, in whose Hands the Arrestment was made, is decerned to make the Arrested Goods forth-coming, for satisfaction of the Sums contained in that Sentence transferred. The *Lords* Found this Decreet of Transferring, and making Arrested Goods forth-coming null, because they were both obtained upon one Proceſs, and contained in one Sentence, which ought to have been done by two several Pursuits, and two Decreets, and not to have been joyned in one, and so could not be Sustained, being so confounded; for if confusion of Dyets be a Cause to annul Proceedings of interior Judges, far more the confusion of Sentences: And also the *Lords* Found, that albeit the Obligation was Hereitable, whereupon Decreet was obtained by *Henry* as Heir, yet being decerned at his instance, by his decease the Sums therein contained, (Sentence being recovered thereupon, and Arrestment Execute at his instance before his decease) were made and became

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to be Moveable, and so did pertain to *Harie's* Executors, and not to his Heirs, and therefore the Decreet obtained by his Heir was Found null. Actor. *Nicolson*. Alter. *Stuart*. *Gibson* Clerk. *Vid.* betwixt thir same Parties, *Jan.* 18. 1628. *March* 13. 1628. *Somervel* contra *Heriot*. & *Penult June* 1627. L. *Touch*. *Vid.* for this last Part. *Decem.* 11. 1627. *Falconer* contra *Beatie*.

Bairns of the B. Galloway contra *Couper*, *Feb.* 28. 1628.

IN an Action of Tutor Compts betwixt the Bairns of the Bishop of *Galloway* against *Andrew Couper* their Tutor, an Article of *Defalcation* of the Charge being given in by the Tutor, whereby he craved allowance of a Pension given to him by the Bishop, during his Lifetime, to be allowed to him particularly, of that year after the Bishops decease, the *Annat* whereof pertained to his Relict and Bairns, conform to the Ordinance of the *Kirk*, which provides the Fruits of the Benefice for the year, after the late Incumbents decease, to pertain to his Wife and Bairns, and therefore the Tutor craved the Pension of that year to be allowed to him; and the Minors Alledging, that the Pension lasting only for the Givers Lifetime, could not extend to that year. The *Lords* allowed of the Article of Defalcation, and Found, that the Tutor ought to have that years Pension allowed to him, in his Intromission with the Minors Goods. *Hay* Clerk.

Mauld contra L. *Mathers*, *Eodem die*.

IN a Pursuit of Letters conform, *Mauld* contra *Mathers*, *Mauld* being constitute Assigney to a Pension granted to *Andrew Mauld*, Father to the Assigney, which *Andrew* had the said Pension from the E. *Marishal*, *cum potestate transferendi etiam in articulo mortis*. The *Lords* sustained this Action at the Assigneys Instance, being now pursued after the Cedents decease the principal Pensioner, albeit it was Alledged, that the Cedent being now dead, that the Translation was null, seing the Cedent remained still in Possession, notwithstanding of the Translation, by uptaking thereof, and giving Acquittances thereon, in his own Name, so that the Translation took never effect in the Makers Lifetime, whereby it became in-effectual. This Alledgance was Repelled, and the Action and Translation sustained, for this Summons of Letters Conform was raised before the Cedents decease, and thereby the Assignation was intimat, whereas for want of Intimation the contrary was Found before in the Action *Douglas* contra the B. *Aberdeen*, *de quo Vid. Penult June* 1622. Actor. *Oliphant*. Alter. *Mowat*. *Decem.* 17. 1628. *Chalmer* contra *L. Craigivar*.

Glen of *Bar* contra *L. Knock*, *Eodem die*.

IN a Suspension betwixt *Glen* of *Bar*, and L. *Knock*, a Reason of Suspension being founded upon a Writ, made by the Charger, which was produced to verifie the Reason, the Letters was found Orderly proceeded notwithstanding thereof, because there was a former Suspension upon this same Reason discust, finding the Letters Orderly proceeded, for not verification thereof; so that albeit the Reason was both Relevant, and here instantly verified, yet seing it was not verified in the former Suspension, but Decreet given against him for not verifieing thereof, there being a Term affixed to the Suspender to have proven the same, and he failzieing to do it, therefore they Found, that the Verification could not be here received in this new Suspension, after a Term affixed in the first, as said is. Actor. *Hope*. Alter. *Stuart* & *Cunninghame*, *Scot* Clerk. *Vid. March* 19. 1628. *Lamb* contra *Blaikburn*, and the other Cases there.

Douglas contra *Idington*, *Eodem die*.

IN a Suspension *Douglas* contra *Idington*, of Charges upon a Decreet, Finding a Back-Tack contained in a Contract of Wodset, of the Lands of *Clettie* to be Expired, and that *Idington* had good Right to enter to the Possession of the Lands, whereupon *Douglas* being Charged to Remove, he Suspends upon O-

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bedience, that he has already Removed, and is content that the Charger enter without Danger of Ejection, or any other *Action*; and the Charger Alledging, that he ought to find Caution to diſiſt under a pain, as is uſual in ordinar Actions of Removing. The *Lords* Found no neceſſity to find Caution, and that the Suſpender could not be compelled thereto, ſeing this was not an ordinary *Action* of Removing, but proceeded upon a Contract, which the Party had Satisfied, by this offer of Obedience, without Danger to the Charger to enter, and that in the Contract, he had not taken the Party obliged to find *C*aution for his Removing. *Hay* Clerk.

L. *Lauchop*, Donatar contra Tennents. ult. *Feb.* 1628.

IN a ſpecial Declarator of L. *Clegborn's* Liferent, at the L. of *Lauchops* inſtance Donatar thereto, againſt the Tennents of the Rebels Lands, for payment of their Farms, the years 1626, and 1627. which Farms were *Arreſted* in their hands by the Donatar, long before the *T*erms of payment, *viz.* befor *Martinmas* the ſaid years; and the Defenders Alledging, that they had advanced to their Maſter the ſaids Farms, and ſatisfied him of the Prices, conveened betwixt him and them therefore before hand, before the Arreſtment, which they Alledged they might lawfully do, even before the *T*erms of payment, he being then, and of before their Maſter, to whom they have been in uſe to pay their Duties, and for whoſe Supply and Help in his neceſſities, they might do the ſame lawfully at any time, nothing being done to hinder them, when they tranſacted, & made the ſaid payment. This Alledgance was Repelled, and the payment advanced before the Terms of payment, was not ſuſtained, to liberat the *T*ennents, ſeing before the ſaids Terms of payment, the Donatar had Arreſted the ſame *debito tempore*, for if it ſhould be lawful to allow this payment made before hand, before the *T*erms, the *D*onatar and Creditors might ever be prejudged; and therefore theſe who payes before they can by Law be Compelled, muſt do the ſame *ſuo periculo*, and not to the hurt of others, and they ſhould provide for their own relief. Actor. *Mowat*. Alter. *Hay* Clerk. *Vid. Decem.* 13. 1628. *Hunily* contra *Hume* & *June* 12. 1629: *Gray* contra *Campbell*. ult. *Jan.* 1628. betwixt thir ſame Parties.

Philip contra L. *Roſſyth*, *Eodem die*.

IN an Action of Poynding of the Ground, *Philip* contra L. *Roſſyth*, for an Annualrent wherein *Philip* was Inſeft, as Heir to his Father, and for all the years which were owing Interveening, after his Fathers deceaſe, and before the *P*urſuers Service and *R*etour, as Heir to him, for the which years he *A*lledged, that his Retour behoved to be effectual to him, and was to be drawn back to the time of his deceaſe: *A*nd the *D*efender *A*lledging, that for the Interveening years, the *A*nnualrent was in Non-entry in the Heretors hands, and ſo could not pertain to the Heir, before he was Retoured and Seaſed. The *Lords* Found, that by this *A*ction of Poynding of the Ground, the Purſuer could not ſeek the Ground to be Poynded for theſe years, & aſſoilzied from this Purſuit, without prejudice to him to ſeek the ſame otherwiſe, by any other lawful Purſuit, and without prejudice of the Defenders Exceptions againſt the ſame, when it ſhall be Intented, as accords of the Law. *A*ctor. Alter. *Nairn*. *Hay* Clerk.

E. *Nithiſdale* contra L. *Weſtraw*, *Eodem die*.

IN an Improbation betwixt the E. *Nithiſdale* and *Weſtraw*, The *Lords* Found, that Purſuers of ſuch *A*ctions may purſue for Improbations of *R*etours, whereby the Defender in theſe Caſes, or any of their *P*redeceſſors, are Served Heirs to their Predeceſſors, in the Lands Controverted: for if the *R*etours fall, the Lands will be in Non-Entry, and ſo the Purſuer has ſufficient Intereſt to quarrel them, and crave Production thereof, *Item* it was Found, that albe-

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it Retours be Registrat in the Chancellary, yet that the Defenders, who are called therefore, are holden to produce the same, and if they do not, that Certification should be granted against them, and that the Pursuer is not holden to Produce and Extract them; It was also Found, that no Certification, neither for Retours nor Services should be granted, which are of any date, anterior to the year 1546. In respect of the burning of the Town, and most publick places in the Countrey, whereby it may be supponed, that publick Registers were then destroyed. *Item*, It was Found, that Comprisings whereupon Seasins and Infeftments were exped, could not be decerned to make no Faith for not production, seing they remained at the Signet, for the Warrand of the Seal, the time of the expeding of the Signatour, for Infeftment thereupon, and so the Party called in the Improbation, could not be holden to produce the same, but touching Comprisings, whereupon followed no Infeftment, the Party called was holden to produce the same, because it was to be presumed, that they were in his own hands. Actor. *Hope, Nicolson & Stuart.* Alter. *Aiton. Gibson* Clerk. *Vid.* 12. *Feb.* 1628. *Ker* contra *Scot. June* 28. 1628. *Henderson. Feb.* 4. 1630. E. *Kinghorn. July* 7. 1636. *Nicolson.*

Forrester contra *Clerk*, *March* 4. 1628.

IN an Action betwixt *Forrester* and *Clerk*, where an Executor to a Legatar, being pursued for payment of a Sum left in Legacy to the Legatar, with the Annualrent thereof for diverse years since the decease of the Legatar, *super hoc medio*, because the Defender, Debitor of the Sum left in Legacy, was in use to pay Annualrent yearly to the Legatars, during his Lifetime, which use being Alledged by the Defender not to be any Ground in Law, whereby he might be compelled to pay Annualrent for that, for the which he was not otherwise obliged to pay Annualrent, except by the foresaid use, seing the Pursuer ought to have done Diligence, to have sought the Legacy, & should have pursued therefore, and so being by his own Negligence, whatever he had done to the Legatar, could not be a Reason, forcing him to continue in that which was voluntar, and whereto he could not be compelled in Law. This Alledgance was Repelled, and the Reason of the use of payment of Annualrent by the Defender, and his not paying of the Sum, at the Term of payment, to the which it was continued, in respect of the Profit of the Annualrent, whereby he was *in mora*, was sustained by the *Lords*, as a sufficient Reason to make the Defender Debitor in Annualrent, for all Terms during which he retained the Principal Sum, and had the use thereof. Actor. *Nairn.* Alter. *Hay* Clerk. *Vid. Jan.* 10. 1627. L. *Thornton.*

Scot contra *Banks*, *Eodem die.*

IN the Cause of Spuilzie betwixt *Scot* and *Katharine Banks*, whereof mention is made 2 *February* 1628. The Messenger who Poynded being conveened as one of the Spuilziars; The *Lords* Found the Alledgance proponed for him Relevant, to liberat him both from Spuilzie and wrongous Intromission, bearing, that he Poynded by vertue of the *Lords* Letters, direct for Poynding of the Pursuers Goods, for the Debt therein-contained; albeit the Pursuer Replyed, that these Letters could not be a Warrand to the Messenger, seing the Decreet whereupon these Letters of Poynding were raised, was not given against the Pursuer, and so he had not a Warrand to Poynd, and therefore he was not excusable; yet the *Lords* Found the Messenger in *bona fide & in probabili ignorantia* to have Poynded, seing the *Lords* Letters bore Warrand to the Officer, to Poynd from this same Pursuer, and it was not his part to search the Decreet and Warrand thereof; for albeit the Letters were evil directed, yet that was not his fault: But the *Lords* Found, that he ought to Alledge,

that he had delivered the Gear Poynded to the Party at whose instance he had Poynded; which being done, it was a Liberation to him, otherways his Retention of the same would inforce Restitution against him, notwithstanding of the Poynding, *partibus ut illic comparentibus*.

Hammer-men in *Glasgow* contra *Crawfurd*, *March* 5. 1628.

IN an Action for proving of the Tenor of a Bond betwixt the Hammer-men in *Glasgow* and *Crawfurd*, who was conveened as Heir to his Father, for proving of the Tenor of the Bond, made by his Father to the Pursuers. The *Lords* Found, that no Process ought to be granted, for proving of such Tenors of Obligations, after the decease of the Debitor, except the Executors of the Defunct were specially called to these Pursuits, because the same tends to make up Obligations, whereupon the Executors may be distrest, either by the Principal Creditor, or by the Debitors Heir who is conveened; which Heir thereupon might seek relief against the Executors; and because this Defender was conveened, both as Heir and Executor to the Defunct, and the Defender condescended not that there was other Executors, therefore the Process was sustained: And because it was found by the *Lords*, that this *Action* to prove a Tenor, was of a dangerous consequence, to make up Obligations after the decease of the Debitor, the case of *Amission* not being clearly qualified, which was found necessar to be well known and qualified, and also proven in thir cases to make up Obligations; neither was the *Articles* Libelled found sufficient to produce this Action, which were only conceived upon Probation by Witnesses; therefore the *Lords* assoilzied from that Action, in so far as it was of the nature of a Cause to prove the Tenor of a Bond, but because the Obligation desired to be proven, was only of the Sum of 100 pounds, therefore they suffered the Pursuer to convert the Pursuit by this same Summons, in an Action to pay the Debt against the Defender; which Decreet and *Action* so converted, the *Lords* Found might be proven by Witnesses, who saw the Sum lent, and who knew that the Defunct payed Annualrent therefore; and Found, that albeit the Debt acclaimed extended to 100 pounds, yet seing it exceeded not 100 pounds, that it might be proven by Witnesses. Actor. *Lawtie*. Alter. *Mowat*. *Gibson* Clerk.

Scot contra Tennents of *Whitslaid*, *Eodem die*.

IN an Action for Maills and Duties betwixt *Andrew Scot* Chirurgeon and Tennents of *Whitslaid*, the *Lords* Found a Comprising of the Lands Libelled, whereof the Duties were acclaimed by the Pursuer, was not a sufficient Title to produce *Action* to him, except he had been either Seased in the Lands by vertue of his Comprising, or had done Diligence to obtain himself Seased, by Charging of the Superior, who had refused, or such other lawful Diligence. Actor. *Craig*. Alter. *Scot* Clerk. *Vid.* 25 *March* 1628. L. *Barr*, and the Cases there Cited. 1 *July* 1624. L. *Balveny*, and the Cases there.

Binnie contra *Ross*, *Eodem die*.

IN an Action to make Arrested Goods forth-coming, the *Lords* were of the mind (but not decided in this Process) that an Arrestment Execute upon a naked Bond, whereupon no Sentence was recovered, or any Action Intented the time of the Arrestment, was but a naked Intimation of the Parties Right to him, against whom the Arrestment was Execute, and nevertheless the same was a sufficient ground, when Sentence should be recovered against the Principal Debitor, for whose Debt the *Arrestment* was Execute, to produce *Action* against him, in whose hands the Goods were *Arrested*, after Sentence obtained against the Debitor, and that nothing could be done in prejudice of the *Arrestment*, albeit at the using thereof, there was neither Dependence nor Decreet obtained against the Principal *Debitor*, but that *Arrestments* in such cases were as ef-

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fectual for Moveables, as Inhibitions for Immoveables. *Actor. Lamb.* Alter. *Hay* Clerk. *Vid.* 14 *June* 1625. *Andrew Comper.* 7 *March* 1628 *Wilson.*

Megill contra *Edmonston, Bodkin alter.*

IN an Action for delivery of a Bond betwixt *Megill* and *Edmonston*, the Purſuer having a Bond made to him upon ſome Moneys, by a Principal Debtor, and ſome Cautioners therein mentioned, which being Subſcribed by the Principal Party, and by ſome of the Cautioners, and ſo delivered to the Purſuer in his hands; thereafter he delivers the ſame to the Defender, to be Subſcribed by him, his name being inſert therein as one of the Cautioners nominat in the Bond, and which was Subſcribed by the ſaid Defender, and retained ſtill in his hands; and therefore the Purſuer purſues for Exhibition and Delivery of the ſame to him, as his own Evident; and the Defender Alledging, that ſeing the Bond came never in the Purſuers hands ſince his Subſcription thereof, he might lawfully Cancell and take his own name therefrom. The *Lords* Found this Relevant, and that the Defender could not be compelled, to Exhibite the Bond Subſcribed by him, but that it was lawful to him at any time, before the Bond came in the Purſuers hands, ſince his Subſcribing thereof, to Repent, and ſo cancell his Subſcription; but Found, that he ought to Exhibite and Deliver the ſame to the Purſuer, in that ſame ſtate as it was when he received it, ſo far as concerned the other Parties Subſcribers thereof. *Scot* Clerk.

Nicol contra *Hume, March* 6. 1628.

Nicol Purſuing ſome of the Laird of *Aitons* Tennents, to make their Farms adebted by them to the Laird their Maſter forth-coming, as Arreſted in their hands by the Purſuer, for a Debt owing to him by the Laird. In this Proceſs Compears one *Hume* Creditor to the Laird, and who had Arreſted thir ſame Farms, and Alledged that the Purſuer had obtained a Decreet for Farms Arreſted in the Tennents hands, of another year preceeding, which would extend to a greater quantity than would ſatisfie his Debt, and ſo he ought not to misken that Sentence, whereby he might be payed, and *de novo* again Arreſt, thereby to prejudge other Creditors; The *Lords* Found, that the Purſuer having recovered a Decreet for his Debt, as ſaid is, ought either to renounce the ſamine, or to Aſſign it to the Party, or qualifie and inſtruct ſome competent reaſon, why the ſame cannot be available to him, or if he would not, but that he did adhere thereto, that he could not Arreſt *de novo*, for ſatisfying of that ſame Debt, whereof he behoved to be found ſatisfied by that Sentence, which he could not ſhow he could be fruſtrat in the Execution thereof; it being in his own default, that he wanted payment, The *Lords* Found, that he could not prejudge other Creditors, to Arreſt and ſeek payment of their Debts by his ſeveral Arreſtments, thereby to Eleid and defraud them. *Vid.* the Caſes wherein after Compriſing other Execution may be ſought.

Wilſon contra L. *Drumlanrig, March* 7. 1628.

James Wilſon Writer againſt L. *Drumlanrig*, purſues to make Arreſted Goods forth-coming, for ſatisfying of a Debt owing to the Purſuer by *Archibald Douglaſs*, Brother to the Lord *Torthorwald*, for payment whereof certain Sums owing by the ſaid *L. Drumlanrig* to the ſaid *Archibald*, were Arreſted by the ſaid Purſuer, the Bond being conceived in form of an Heretable Obligation, made by the ſaid *Archibald* to the ſaid *Wilſon* Purſuer, obliging him to pay Annualrent for the Sum while the re-payment; Upon this Bond the Purſuers Arreſtment being raiſed, and Execute, and it being controverted, and alledged by the Defender, that the Purſuers Debt being by an Heretable Bond,

and Arrestment thereupon could be sustained, seing Arrestments could not be Executed, but for Moveable Sums. This Allegeance was Repelled, and the Arrestment allowed, albeit raised upon an Heretable Bond; for as the Party might have Poynded therefore, so he might arrest; but if the Bond had contained that Requisition should have preceded before the Debtor should pay the Sum, *hoc casu* the *Lords* inclined that no Arrestment should be Execute therefore, untill the time that the Sum had been made Moveable by a preceding Requisition; but it is thought, that Heretable Sums owing by Heretable Bonds, may not be Arrested, although Arrestments may be raised upon Heretable Bonds by the Creditor, to whom these Heretable Sums are owing. *Scot* Clerk. *Vid. Peculi Feb.* 1613. Mr. G. *Habilitem* 21 *June* 1626. Sheriff of *Fornett*, 3 *March* 1628. *Simie* contra *Ker*.

Brown contra *Murray*, *March* 8. 1628.

IN a Spuilzie betwixt *Brown* and *Murray*, there being sundry particulars Libelled of divers natures, contained in the Summons Libelled to be Spuilzied, as Insight and Plenishing of an House and Goods, *viz.* Oxen and Horse of the Field, and Corns out of the Barns; and the Witnesses having proven Spulzieing of some Corns out of the Barns, and no further; The *Lords* Found that the Pursuers Oath should be taken, and that he might Swear upon all the particulars of the Summons, albeit they were of divers natures, and that no particular was proven, but only one, and the Pursuer having Sworn upon the Spuilzie of the Insight of the House, which was not proven; The *Lords* allowed of the Oath Deponed thereon, and Found he might so Depone upon all, where any one thing within the Summons was proven; but the *Lords* taxed the Prices Deponed on by the Pursuer in his Oath, no Party Compearing here for the Defender. *Scot* Clerk.

Muir and *Thomson* contra *Kincaid*, *Eodem die*.

MUir and *Thomson* her Tutor contra *Kincaid*, *Muir* the Pupil, and her said Tutor *dictum Thomson*, who was left Tutor Testamentar conjunctly by the Pupils Father, with *Robert Kincaid* and *Alexander Heriot*, whom the Defunct nominat Conjunct Tutors to the Pursuer his Daughter, the said Pupil and *dictum* one of the Tutors foresaids pursues the other two, either to accept of the Office, to the effect the Minors Goods may be Administred, and Pursuits moved against her Debitors by them, or then to renounce the Office, and *Alexander Heriot* one of the Tutors compearing, and renouncing the Office, the other, *viz.* *Robert Kincaid* Compearing and Contesting, that the Minor was not lawfully Authorized to pursue this Action, being only assisted with one of the three Tutors conjunctly given, who ought all to Concur; and this pursuit by the Minor against her own Tutors, ought not to be sustained *durante tutela*, at least she should be Authorized with other Curators *ad hanc litem*; and further he Alledged, that the Defunct died a Bastard, not Legittimat, and so had no power to make a Testament; Likeas *Robert Kincaid* has obtained from the King a Tutorie Dative, both this Alledgances was Repelled, and the Pursuit sustained, at the Pupils Instance Authorized with one Tutor, without necessity of Authorizing by any other Concourse, or new giving of Curators; and it was Found, albeit the Defunct was a Bastard, and not Legittimat, he might leave Tutors to his Bairns, gotten by him in lawful Marriage, and who were to succeed to his Means, and whom he might nominat Executors, notwithstanding that the Defender Alledged, that a Bastard not Legitimat, albeit having Bairns gotten by him in lawful Marriage, had not *Testamenti factionem*, and that if he nominat his Bairns Executors to him, yet their Succession, and coming to his Means would not be *ratione Testamenti*, but *ratione Sanguinis*, which

was

was Repelled; for if the Bastard had more Bairns gotten in Marriage than one, and if he should make one of them his Executor, that Bairn nominat Executor, would have Right only to that which behoved to come to him, *jure & ratione Testamenti, & non jure sanguinis*, for *jure sanguinis*, they would all succeed alike, and not be alone, who was nominat Executor.

But here it is to be also remembred, that there was no Declarator upon the Defunct's Bastardry. *Actor. Alter, Nisbet & Hay* Clerk. *Vid.* 9. *December* 1628. *Sowter.*

Douglas contra L. *Wedderburn, Eodem die.*

IN a Declarator of L. *Wedderburns* Liferent-Escheat of certain Lands holden by him of *John Stuart*, having Right to the Benefice of *Coldinghame*, and thereby fallen in his hands as Superior, and which was pursued against *Wedderburn*, by *William Douglas* Donatar to *John Stuarts* Liferent-Escheat, and who had obtained Declarator upon *John Stuarts* Liferent. It being controverted by the L. *Wedderburn* Compearing, and Alledging that his Liferent, which had fallen since *John Stuart* his Superiors Liferent fell, and since it was Gifted and Declared at *William Douglas* instance, and which was not then Extant, to be comprehended within that Gift of *John Stuarts* Liferent, then granted and Disponed, and so which he Alledged, could not pertain to the Pursuer, whose Gift of the Superiors Liferent could not extend to a Casuality, falling forth to the Superior thereafter, and which Casuality he Alledged, could not be disponed by any Gift of the Superiors Liferent-Escheat, but was proper only to be Disponed by a new Gift of the Superiors simple Escheat, as to pertinent Casuality, which could no otherwise be Gifted but by an simple Escheat, and could no wayes pertain to the Donatar of his Liferent. This Alledgance was Repelled, and this Casuality of the Sub-Vassals Liferent was found, might be comprehended under the Gift of the Superiors Liferent-Escheat, albeit the time of the Gift it was not then extant; for the King having disponed *John Stuarts* Liferent, and all which should befal to him, as that Gift did extend to any Few, or other Duties payed to him for these Lands, whereof *Wedderburns* Liferent sensine fell, so behoved it to extend to a greater Profit, which might befal to him thereafter, out of the same Lands, by his Vassals fault; for that Casuality of the Sub-Vassels Liferent was not a new purchase by the Superior, whose Liferent was acquired by the Donatar, without any Inherent Casuality of the Superiority, whereto the Gift did extend, als effectually as if the Superior had disponed to the Donatar before his Rebellion his Liferent, of all these Lands whereof he was Superior, *quo casu* as that Disposition would extend to the Casuality of the Sub-Vassals Liferent, even so the Gift of his Liferent did extend thereto; and it was acknowledged by the *Lords*, if it had been extant at the time of the Gifting of *John Stuarts* Liferent-Escheat, that the King might have gifted this Casuality of the Sub-Vassals Liferent, by the Gift of the Superiors simple Escheat; But not the less, that if the King had not Gifted it so, which he might effectually have done, if he pleased, but had Gifted it under the Gift of Liferent, of the Superiors Escheat, that the Gift of Liferent might have also effectually been extended to it, the same being a proper Casuality of the Lands, and the Liferent of the Lands, or what is due out of the Lands, being pertinent to be disponed by a Liferent Gift. Likeas here there was no other Donatar to the simple Escheat. *Actor. Alton, Stuart & Craig.* Alter. *Hope Nicolson & Belshes. Gibson* Clerk. *Vid. March* 26. 1628. betwixt the Parties, *Feb.* 26. 1623. L. *Cluny. July* 24. 1632. *Ja. Knell.*

Muir contra *Crawford, March* 11. 1628.

IN a Suspension by *Muir* contra *Crawford*, of a Decreet of Transferring of a Registrat Contract against his Father, and Transferred in him as

Heir to his Father, by the which Contract his Father was obliged to pay to *Crauford* two hundred merks, for Tocher-good, obliged to be payed by the said umquhile *Muir*, to the Charger, in Marriage with one *Cunninghame*, who was Sister to *Muir's* Wife, and which was Suspended by *Muir's* Heir, in whom as said is, it was transferred, because it being a Matter of Importance, *viz.* two hundred merks, it was only subscribed by a Nottar for him, before two Witnesses, and the Charger opponed his Decreet standing, and also that it was a Contract of Marriage, whereupon Marriage followed. The *Lords* Found the Letters Orderly proceeded, notwithstanding of that Reason, seing it was a Contract of Marriage, for payment of Tocher, whereupon Marriage followed, and had no respect to the Suspenders Reply, whereby he Replyed, that he was not obliged in Law to the Woman Contracted, to Tocher her, being a Stranger to her, she being only his Wifes Sister, whom no Law could compel him to Tocher; and therefore he Alledged, that the Form prescribed by the Act of Parliament, *Anno* 1579. Concerning two Nottars and four Witnesses, should be keeped; Which Alledgance was Repelled, but the Reason in this Case especially was, because the Contract was first Registrat against the Defunct in his own Lifetime, and thereafter was Transferred in this Suspender, as Heir to him, and so there was two Decreets thereon standing. *Hay* Clerk. *Vid. Decem.* 10. 1630. *Nisbet* contra *Newlands*, & *Ult. Jun.* 1625. where the Names are blank, and the Cases there.

Ferguson contra *Couper* and others, *Eodem die.*

IN a Suspension betwixt *Ferguson* of *Kilkerrand* and *Andrew Couper* Writer, and certain other Creditors to *John Crauford* of *Skeldon*, who had Comprised the said *John's* Lands holden of *Kilkerrand*, and had all Charged him as Superior to enter them, whose Charges being all Suspended by him, upon a Reason, *viz.* Because he had before their Charges, entered his own Son to the same Lands, who had Comprised the same, and had Charged him to receive him, and for obedience whereof he had received him. This Reason was not found Relevant, but the *Lords* Found, that the Superior should Receive, and Enter all the Comprisers, but prejudice always of the first Comprisers Right, who was entered by him before, *prout de jure*, to the which, his Entry of the others, should not prejudge, neither should the same be prejudicial to the Superior, his Entry of moe Vassals, being done for obedience of Charges; and Declared, that this Entry should not hinder the Parties, in their own time and place, to Dispute upon the Priority and Preference of their Rights to the Lands, which was not proper now to be handled in this place: But the *Lords* were of the mind, that where Parties were equal in Diligence, that the Superior might prefer his Son to the Rest, in all which he might lawfully advance him unto concerning his Entry. *Actor. Nicolson. Alter. Miller. Hay* Clerk, *Vid.* 22. *July* 1628. Lo. *Borthwick.*

Dalmahoy and her Spouse contra *Horsburgh*, *Eodem die.*

IN an Action, *Dalmahoy* and *Frank* her Spouse contra *Horsburgh*, for the Mails and Duties of a Tenement of Land, wherein the Pursuer was Infeft, as Heir to her Brother, and the Defender Alledging, that he was Retoured Heir to his Predecessor, who was Infeft in the same Lands, and that the Defender, by vertue of his Infestment past upon a Retour, had been five years in Possession of the same. The *Lords* Repelled the Alledgance, in respect that the Pursuer was Infeft as Heir to her Brother, and that he was Infeft in the same Land, before the Excipients Authors Right, and by vertue thereof, that he was in continual Possession ten years together of the same, to the time of his decease, who died in *Anno* 1623. and that all the years sensyne, whereof the

Defender

Defender had acquired only Poſſeſſion, were now controverted in this Proceſs, and could not make the Excipient to be compted a lawful Poſſeſſor, which Reply was Found Relevant in this Poſſeſſory Judgement.

L. *Lauriſton* contra Sheriff of the *Merns*, *March* 12. 1628.

IN an Action of Suſpenſion betwixt the L. *Lauriſton* and the Sheriff of *Mernes*, The *Lords* Found, that any Party, who had obtained Precepts out of the Chancellary, upon his Retour, for taking Seaſin of Lands whereto he was Retoured, as Heir to his Predeceſſor, was ſubject to pay the quanity of the Relief, upon a Perſonal Charge, at the King's Officers inſtance, *viz.* the Theſaurer againſt him to that effect, or that the Ground might be Poynded therefore, or the Sheriff might be compelled to pay the ſame, who for his Relief might either Poynd the Ground, or Charge the Party Obtainer of the Precept out of the Chancellary, Perſonally to pay the ſame, and which the *Lords* Found the Parties might be compelled ſo to pay, albeit he never took Seaſin by vertue of the ſaid Precept, conform to the 73 Act Parliament, 1587. And albeit the the Lands lay in Nonentry ay and while Seaſin were taken.

La. *Dumfermling* contra the Earl, *Eodem die.*

IN an *Action* by the Lady *Dumfermling* againſt her Son, as Heir to his Father, for fulfilling of that part of her Contract of Marriage, whereby her Husband was obliged to Inſeſt her with himſelf, in all Lands and Heretages, which he ſhould Conquiſh the time of their Marrlage; It being controverted betwixt the Parties, if that Clauſe of the Contract, of the Tenor foreſaid (for that was the Tenor of the ſame) did extend to Lands or Teinds, whereof the umquhile Earl her Huſband ſince their Marriage had acquired an Heretable *Right* to himſelf and his Heirs. The ſame Lands and Teinds before that Hereteble Right, being acquired by her ſaid Huſband, in Tack and *Aſſedation* alſo ſince the Marriage, and before the Heretable *Right* acquired by him two years at leaſt, in reſpect whereof he being Tackſman, and the Tack being Sert for longer ſpace, that would endure longer than the Ladies lifetime; the Defender Alledging, that the poſterior acquiring of an Heretable Right could not be found, ſuch a Conquiſh as might compell the Heir, to give the Relict Infeftment thereof, as of Lands whereof ſhe could be effectually Infeft, as Conquiſht Lands, the ſame being under ſo long Tacks procured before, which ought of reaſon to ſtay the effect of the Inſeftment, ſo far as might extend to the profit of the Lands, which would only pertain to the Heir, by reaſon of the preceeding Tacks; and the Purſuer Replying, that if this ſhould have place, all Contracts bearing ſuch Clauſes ſhould be Eluded, and the Wives defrauded of their Proviſion introduced in their favours; for to prejudge the Infeftment, which is provided to the Wife, it ſhould be then lawful to the Husband who minds to Conquiſh Lands, whereby the Wife would receive the benefit of Infeftment, to defraud her thereof, by taking a preceeding long Tack of the ſame, whereof he ſhortly thereafter takes an Heretable Right, tho the preceeding Tack is acquired alſo ſince the Mariage, yet he might Elud that Clauſe of Infeftment, if ſhortly after the Tack he had alſo acquired Infeftment, which is againſt the mind of the Contract, appointing her to be Infeft in all which he ſhould Conquiſh. This Exception was ſuſtained, notwithſtanding of the Reply; for the *Lords* Found, that the acquiring of an Heretable Right by the Husband, of that whereof he had acquired Tacks two years or before, of the endurance foreſaid; & albeit the Tacks were alſo acquired by the Husband ſince the Martiage, they could not be repute a Conquiſh, which might compell the Heir to give the Relict Inſeftment profitably, or of any greater benefit concerning the Lands ſo acquired by her, except ſo far as was further acquited by the Heretable

Right, in yearly Profit, than was contained in the Tack, *viz.* for the Tack-Duty Allanerly, if the Infeftment did free the Receiver of that Tack-Duty; For albeit the Heir ought to give her Infeftment thereof, as of a Purchase, yet it was Found it ought not to be so simply given, but with Exception & Reservation of the Tack foresaid, and the benefit thereof to the Heir; and as concerning the destituting of the Party of the mind of the Contract, which intends to give the Wife her Liferent of all which the Husband should acquire, This Contract was not of that Tenor, but did only bear, to Infeft her in all Lands and Heretage the Husband should Conquish; and if Parties agree, to provide the Wife to Liferent of Tacks, or Bonds, or other Securities and Benefits purchast by their Husbands, the same ought to be so expresst; but not being expresst by the Parties in Writ, could not be extended otherways than they agree in the words of their Contract. Actor. *Aiton* & *Stuart.* Alter. *Hope*, *Nicolson* & *Burnet.* *Hay* Clerk. *Vid.* 13 *Feb.* 1628, & 3 *July* 1627. betwixt thir same Parties. *Ult. Junii*, & 26 *Novemb.* 1629. betwixt them. 14 *March* 1628. *Grahame* contra *Finnie*, and the Cases there.

Ker contra L. *Coldingknows*, *March* 13, 1628.

A Declarator of Liferent of some Lands pertaining to *Coldingknows*, holden of the Abbacy of *Dryburgh*, being sought by the Earl of *Marr* Donatar, the Abbacy being Erected to the Earl of *Marr*, who thereby became *Coldingknows* Superior. In this Cause *John Boswell* of *Pittodrie* Compearing to exclude the Donatar, in respect he had Comprised the same Lands from *Coldingknows*, for Debt owing to him, whereupon he was Infeft by the King, who was *Coldingknows* Superior; for he found *Coldingknows* standing Infeft, holden of the King, by vertue of the Act of Annexation, whereby he Alledged he could not Enter by another Superior, than him of whom he found his Debitor, from whom he Comprised, standing Infeft. This Alledgance was Repelled, and the Liferent found to pertain to the Donatar Constitute by the Lord of Erection, notwithstanding of the Comprisers Infeftment and his Authors, holden of the King; for by the Erection which preceeded both the Comprising and the Infeftment taken thereon, the King ceased to be Superior, and the Right of Superiority belonged to the Lord of Erection, whereby the Comprisor not being Infeft by the right Superior, it could not prejudge the true Superior, *viz.* the Earl of *Marr* the Lord of Erection, nor his Donatar, in his Vassals Liferent. Actor. *Hart.* Alter. *Sandilands.* *Gibson* Clerk. *Vid.* 24 *July* 1632. *Ja. Reul.*

Somervel contra *Herriot*, *Eodem die.*

Somervel contra *Herriot*, Relict of *Robert Kincaid*, pursuing to make Arrested Goods forth-coming, *Robert Kincaid* being Debitor in some Moneys to the Pursuer, conform to a Contract Registrat against him, whereupon Arrestment being Execute in the Provost and Baillies of *Edinburgh* hands, of some Moneys adebted by them to the said umquhile *Robert*; after the making of the Arrestment the said *Robert* dies, and now the Pursuer in this Action pursues the Relict of the said umquhile *Robert*, and *Marion Kincaid* his only Bairn, and the said Town of *Edinburgh* to make the saids Goods forth-coming; and it being controverted and Alledged by the Relict, that this Action to make Arrested Goods forth-coming, could not be sustained, while the Registrat Contract, which was the Sentence against the Defunct, were first transferred in some person to represent him, and then this Action was competent, being the Execution of a Sentence; and the Pursuer contending, that he needed no Sentence of transferring; because *Mr. Alexander Lockhart*, who was Executor Confirmed to the Defunct, was that only person in whom of Law he ought only to transfer, and he needed not to transfer in him, seing he compeared, and declared (as he did indeed)

indeed) that he would not propone that Exception, but that he was content that this Process should be sustained against the Defenders, sicklike as if Transferring had been Obtained and Decerned against him. The *Lords* notwithstanding of this Compearance of the Executor, and his consent foresaid, Found, that no Process could be granted in this Cause, to make Arrested Goods forthcoming, while first the Sentence was transferred in some person of Law, to represent the Defunct, who was Debitor, and after that Sentence, Action to make Arrested Goods forth-coming might be pursued. *Scot* Clerk *Vid.* 23 *Feb.* 1628. *Nasmith* contra La. *Ruthven*, & 15 *June* 1626. *James Stirling*, and the other Cases there, & 17 *March* 1637. Captain *Stuart*.

M'math contra Baron of *Burghtoun*, *March* 14. 1628.

IN a Suspension *M'math* contra Baron of *Burghtoun*, an Heretable Contract made by the Baron of *Burghtouns* Father, for Infefting of his Creditor in an yearly Annualrent, for the Principal Sum adebted by him to his Creditor, being Comprised by *Janet M'math* Assigney to the Creditor, for satisfying of a certain Sum owing to her, and conform to the Clause of Requisition contained in that Contract, she having Charged and Required this Baron, as Heir to his Father, in whom that Contract was Transferred, as Heir to his Father Contracter, which being Suspended upon this reason, that his Father Contracter was Minor the time of the Contract, and died before the expiring of the *Quadriennium utile*, after his compleat age of 21 years, and this Suspender succeeding to him, being yet Minor, at the least the *Anni utiles* after his Majority not being expired, he had Revocat and Intented Reduction thereof upon Minority and Lesion, The *Lords* Found, as agrees with the Civil Law *de temporib. in integr. Restitut. Cl.* 2. *Tit.* 53. That a Minor succeeding to a Major, who had past and lived while he past the age of 21 years, but died before the expiring of *Anni utiles*, had the benefit of Restitution competent to him, during the whole years of his Minority, after the compleating whereof, the Benefit foresaid lasted for no more years to him, than was lasting unexpired, at the decease of that Major; to whom he succeeded; and that the whole years after his Majority of the *Quadriennium continuum* endured not to him, but only so many as was unexpired when his Predecessor died; also it was Found, that albeit the Sum Charged for, and Comprised was more than the Sum adebted to the Compriser, yet that the Comprising and Charge for the whole was sustained, ay and while the Compriser was compleatly payed of the Sum, for the which the Comprising was deduced; which being satisfied, the *Lords* Found, the Compriser could seek no more, and that her Interest ceased, albeit the Suspender remained obliged in much more, which would pertain to the first Creditor, or others having the Right thereof. Actor. *Hope* & *Stuart*. Alter. *Nicolson* & *Primerose*. *Gibson* Clerk. *Vid.* 23 *Decemb.* 1630. *Ogilvie* contra Lo. *Ogilvie*.

Graham contra *Finnie's* Heirs, *Eodem die*.

IN an Action by *Graham* Relict of *Finnie* against the Heir and Executors of her Husband, and also against her Husbands Debitors, particularly called in the Summons, to hear and see the Debitors decerned, to pay to her the Profits of certain Moneys lent to them, and adebted by their Bonds to her Husband, seing by her Contract of Marriage, her Husband was obliged to provide her to her Liferent of all Lands, and all Sums of Money, which he should lend out on Bond, at any time after their Marriage; and therefore she craved the Debitors to pay to her the yearly Annualrent, so long as they retained the Moneys, and that the Heir and Executors of the Defunct should imploy the same again *de novo* to her use, for her Lifetime, conform to the Contract. This Action was sustained against the Debitors, albeit they were not bound

to her in their Bonds, but to the Husband, seing the Heir and Executors were called as said is, in this Pursuit, and because some of the Bonds were conceived to be payed to certain of the Defuncts Bairns, who had thereby only Right thereto; so that the Debitors could not in Law be Compelled to pay any Annualrent to the Relict, for these Sums which they were by their Bonds subject to pay to the Bairns, and not to the Defuncts self, therefore the Action for the Sums of these Bonds was sustained against the Heir and Executors, for causing of them provide the Relict, to the Liferent thereof, and Found that this Action, for Imployment of a Sum upon Annualrent to the Relict, during her Lifetime, was competent alswel against the Executors, as against the Heir, and that it was a Fact prestable by Executors; but Declared, that the Executors should have *beneficium Inventarij*, and the Heir would be lyable for the rest. Actor. *Oliphant* & *Primerose*. Alter. *Nicolson* & *Mowat*. *Gibson* Clerk. *Vid. Feb.* 10. 1629. *Oliphant* contra *Finnie*, * *Jan.* 24. 1629. Lady *Renton* contra Laird *Renton* *March* 12. 1628. Lady *Dumfermling* contra her Son. *July* 3. 2627. betwixt them. *July* 16. 1625. *Knox* contra *Broun Decem.* 7. 1627. *Porteous* contra *Welsh*.

Lo. *Blantire* contra Parochioners of *Bothwell*, *March* 15. 1628.

IN an Action of Spulzie by the Lo. *Blantyre* contra Parochioners of *Bothwell*, Founded upon a Tack of Teinds of the Defenders Lands, set to the L. of *Cleland*, whereto the Lo. *Blantyre* was constitute Assigney by him, for satisfaction of some Debts owing to the Pursuer, and which he had payed, as Cautioner for him, and the Defender Alledging, that the Assignation being made to him, for the foresaid Cause, it could not produce this Action, in respect that the Pursuer had Compriſed the saids Debitors Lands for the same Debt, owing by the Cedent to him, upon the which Compryſing, he had both Charged the Superior to Enter him, and also had pursued the Possessors of the Lands, for payment to him of their Duties, whereupon he might both recover Sentence, and payment, and so this Compriſing standing un-renounced by the Pursuer, and nothing being Alledged or shown by him, which might make the Compriſing unprofitable, or un-effectual, the same behoved to be imputed, for payment, specially seing thir Defenders stand bound for the L. *Cleland*, in far greater Sums, whereof they have, nor can get no other Relief, but only Retention of their own Teinds, the Right whereof must be found to remain with *Cleland*, in respect of his Compriſing, which might make the Assignation to cease, and consequently the Defenders must have Retention thereof as said is. This Alledgance was Repelled, and the Compriſing was not found, to be any Impediment to the Pursuer, to claim the Benefit of the Assignation, ay and while he was relieved of the saids Debts, which were not found satisfied by the Compriſing, albeit the Pursuer should neither Renounce the same, nor Alledge any thing, wherefore it was unprofitable to him, neither whereof the *Lords* Found necessar to be done. Actor. *Lermonth*. Alter. *Nicolson*, *Scot* Clerk. *Vid. Penult January.* 1628. *Meldrum* and the Cases there, where the contrair seems done, except that the difference is, that the Compryſing there stayed Personal Execution against the Debitor, whereas here no Personal Execution is sought, such as Caption, and Warding, but the Debitors Goods Challenged. But in a Suspension, the same day, *Michael Hill* contra his Creditors, who desired to be put to Liberty, he being put in Ward by his said Creditors, who had Compriſed his Lands. The *Lords* Found, that he could not be put to liberty, notwithstanding of the Compryſing, untill the time he caused these, to whom he had made prior Rights of the Lands Compriſed, Renunce their Rights which

which were Redeemable, and the Reversion whereof pertained to the Compryser, who was Found could not be Compelled to Renunce, albeit he refused to put the Debitor to Liberty. *Vid. Jun.* 23. 1627. *Bruce.*

L. *Haltoun* Supplicant, *Eodem die.*

A Bill was given in by the Laird of *Haltoun* craving Letters and Charges of Horning against the Possessors of his House of *Haltoun*, for delivery of the same to him, seing the Lady, Liferentrix thereof, was deceased. These Charges desired by the Bill was granted summarly by Charges of six days, and in case of failzie to denunce, without Citation or Cognition of the Parties Rights.

Lo. *Blantyre* contra Parochioners of *Bothwell*, *March* 18. 1628.

IN the above-written Spuilzie of the Lord *Blantyres*, mentioned in the preceeding Page; The *Lords* Found, that an Inhibition used against the Defenders for their Teind-Sheaves of one year, was a sufficient ground, to exclude the persons Inhibited that year from any Defence, which they might propone, that they could not be pursued for any greater Duty than the Rental-Bolls, or the Duty accustomed to be payed for these Teinds in the preceeding years, for any year subsequent to that year, for which Inhibition was Served; which old use of payment, the *Lords* Found was interrupted for all the years subsequent, after that year of the Inhibition, whereof the Pursuer had not received payment, nor prejudged the said Inhibition by receiving the old Duty thereafter, albeit there was no Inhibition Served each year thereafter upon the saids Teind-Sheaves, notwithstanding whereof the Pursuer might pursue for such quantities, as he should prove the Teinds to have extended unto the years libelled, wherein no Inhibition was Served, the old use of payment being interrupted as said is, by the Inhibition Served for one preceeding year.

Lo. *Cathcart* contra L. *Carse*, *Eodem die.*

IN a Redemption Lord *Cathcart* against Laird *Carse*; The *Lords* Found no Process, until the Heirs of the Granter of the Reversion were Summoned to the Declarator of Redemption, whom the *Lords* Found necessary Parties to be Summoned, albeit the Heirs of Tailzie to the Granter, and which Heirs of Tailzie bruiked the Lands, whereof the Reversion was granted, and were standing Heretably Infeft in the saids Lands, and were Heretable Proprietors thereof, and the Tennents Possessors thereof, were Summoned in this Cause, which the *Lords* Found not enough. Actor. *Sharp.* Alter. *Gibson* Clerk. *Vid.* 11 *January* 1628, E. *Marr*.

Nasmith contra *Nasmith*, *Eodem die.*

IN an Action of Tutor-Compts betwixt *Nasmith* and *Nasmith*; The *Lords* Found that the Tutor should pay Annualrents to the Minors, of all Sums pertaining to them uplifted by him, as well Sums which were Heretable as Movable, not only to the time of the expiring of his Tutory, but also of all years continually, to the time that he should make real payment to them of their said principal Sums, or else should consign them; notwithstanding that the Tutor Alledged, that he could not in Law be subject to pay Annualrent for the same since the time that he intented his Action *contraria tutelæ*, for taking off his Compts off his Hands, and exonering of him, at which time he was content to make payment of what he should be found owing, and since that time he could not be found *in mora*; but thereby the course of running of Annualrents was Sisted, and he cannot be subject therein, seing he durst not put their Money out for profite, but behoved ever to have it ready, as it ever sensine was, to be delivered at the ending of his Compts for his Exoneration; which Exception was Repelled, and the Tutor Found Debitor in Annualrent, ever untill Payment were made, or Consignation. Actor. *Hope* & *Stuart*. Alter. *Nicolson* & *Burnet*, *Scot* Clerk.

Raith Donatar contra L. *Buckie*, *March* 19. 1628.

A Special Declarator after a General of *Andrew Meldrums* Liferent by Mr. *James Raith* Donatar thereto, against L. *Buckie*, the Defender clothing himself with an Heretable Right and Disposition made of the Lands, whereof the Liferent was acclaimed in this special Declarator, and which was acquired by him from the Rebel, before year and day ran after he was denunced Rebel, albeit it was granted after he was denunced, yet being granted before the expiring of the year after his Denunciation, and being granted for a true Cause of preceeding Debt, owing to him by the Rebel before his Rebellion, and he being in real Possession of the Lands by vertue of his Right continually sensine, the same ought to defend him against this Declarator. This Alledgance was Repelled, and the Donatar was Found to have Right to the Lands, during the Lifetime of the Rebel, notwithstanding of the Heretable Right, made to the Excipient for the preceeding Cause, and notwithstanding of his Possession preceeding the expiring of year and day. Actor. *Lawtie*. Alter. *Hope*. *Gibson* Clerk. *Vid.* 17 *July* 1630, L. *Ley* contra *Porteous*. 16 *February* 1631, Lo. *Cranstoun*. 24 *July* 1632, *Fo. Rule*. 23 *January* 1627, *Wallace* contra *Porteous*.

Lamb contra *Blackburn*, *Eodem die*.

IN a Reduction *James Lamb* against *Blackburn*, for Reducing of an Inhibition, by reason that the Command and Charge of the Letters bore, *to Prohibite the Party at the Mercat-Cross of* Edinburgh, *Pear and Shore of* Leith, *and other places needful*, because the Party was out of the Country, for these are the very words of the Letters, and this Party was only prohibited at his Dwelling place, for the which there was no Warrant; and the Defender Alledging, that seing the Inhibition was Execute against the Party at his Dwelling-place, and that the Letters bore as said is, to prohibite him at all other places needful, he doing the same at the Parties Dwelling-place, it behoved to be found sufficient; likeas the same was Execute at the Mercat-cross and Peer of *Leith* against all the Leidges *in genere*, and the Party being one of the Kings Leidges, behoved to be found comprehended within that Execution, and so the Warrant of the Letters was obeyed. This Alledgance was Repelled, and the Reason Sustained, for the Letters gave no Warrant to Prohibite the Party at his Dwelling-place, for that was not craved therein, and the Execution against the Leidges at the Mercat-cross and Peer of *Leith*, could not extend to the Party, because thereby the Leidges were prohibited, to receive alienations from the Party to be prohibited to Annailzie, who was not thereby prohibited to make Alienation to the Leidges, which ought specially to have been done against him. And the Defender thereafter Alledging, that in another Action pursued betwixt Mr. *John Archibald* and this same Pursuer, an Exception being proponed upon the same Inhibition, and the Inhibition as it now is, being used for proving thereof against this Pursuer, the same was found to prove the Exception against him then compearing, so that this Objection being then competent to have been proponed, which now is used for a Reason of Reduction, and being then omitted, and not proponed, which might have been as well received there, by way of Objection, as here in a Reduction, the same consisting *in jure*, and being proven *instanter* by Inspection of the Writ, therefore he Alledged, that the Pursuer cannot be heard to Reduce upon this Reason. This Alledgance was found Relevant, and because this was not proponed in that Process by way of Objection, being *in jure*, and then competent to have been received and discuss'd there; the *Lords* therefore Found, that the Pursuer could not be heard to Reduce thereupon, albeit the Pursuer Replyed, that he omitted to propone the same in that Process, by way of Objection, because he thought that it could not be received against the Inhibition standing, and therefore of purpose reserved it

to

to pursue Reduction thereon, which was not respected, seing he omitted to propone it, and protested not that he might be heard to Reduce thereupon. Actor, *Aiton & Lawtie.* Alter. *Hope.* *Sæt* Clerk. *Vid.* 24 *Jan.* 1627. Lo. *Erskine* contra *Erskine* for the first part of this Decision; and for the last part *vid.* 18 *March* 1630, *Horsburgh* contra *Frank*, and the Cases there, & 28 *Feb.* 1628, *Glen* of *Bar.*

Websters Freemen in *Stirling* contra Un-freemen, *March* 21. 1628.

IN an Action at the instance of the Websters Freemen in *Stirling*, with concourse of the Agent for the Burrows, against certain Un-freemen, for exercising of the Craft within that Burgh, and discharging them thereof; The *Lords* Sustained the Pursuit, for the same was founded upon Acts of Parliament *Ja.* 6. even against such as dwelt within the Priviledge and Liberty of the Castle of *Stirling*, which was the Kings House; albeit they Alledged, that the Acts of Parliament struck only against such as dwelt within the Suburbs of Towns, and so could not extend to them who were Tennents to the King, and dwelt within the Territories and Jurisdiction of the Kings House, which could not be called a Suburb, which was Repelled; but the *Lords* Declared, that this Discharge extended only to prohibite them to work within the Town, and not to stay them to work within their own Dwelling-houses. Actor, Alter. *Hope.* *Hay* Clerk.

Relict of *Lindsay* contra *Elleis*, *Eodem die.*

IN a double Poynding by the Relict of *Bernard Lindsay* against *Patrick Elleis* and Sir *John Dalmahoy*, and certain other Creditors of her umquhile Husband, *Patrick Elleis* having pursued the Relict for payment of his Debt, as Intromissatrix with her Husbands Gear; after the Intenting of the which Cause, she having confirmed her self Executrix to him, albeit it was two years after her Husbands decease, yet the Action was only Sustained against her as Executrix, that she might have *beneficium Inventarii*; and sicklike, during this Dependance, after *Patrick Elleis* Citation, the Laird of *Dalmahoy* her Son in Law, being also a Creditor, Intented Action, and obtained Decreet against her, conform whereto she made payment to him, and which exhausted the Goods contained in the Testiment; in respect whereof she Alledged, she should be Assoilzied from *Patrick Elleis* Pursuit. This was found Relevant, and the payment made by her Allowed, and the Laird of *Dalmahoy* Preferred; albeit *Patrick Elleis* Replyed, that he ought to be Preferred, or at least should come in with other Creditors to be equally answered, seing he was anterior in Diligence, and during his Dependance by favour of the Relict, she had given way to her Good-sons Process, who had Intented this Action since he had Cited her, and had keeped his Process in her Procurators hands, while the other had passed through his Decreet by Colluſion betwixt them; which Fraud ought not to be Sustained. This Reply was Repelled, and the Creditor, posterior in Diligence as said is, was Preferred. Actor, *Lermonth.* Alter. *Belshes.* *Vid.* 14 *June* 1625, *Andrew Cowper*, 2 *Dec.* 1628, *Lyle* contra *Hepburn.*

Maxwell contra L. *Porteak*, *Eodem die.*

IN a Removing *Maxwell* of *Cowhill* contra *Porteak* from a Fishing, The *Lords* Sustained the Pursuers Seasin produced for his Title in this Removing from a Salmond Fishing, albeit the Seasin bore not expressly, that Seasin was taken of that Fishing *per traditionem Cymba & Retis*, but only bore that the Bailie came to the Ground of the Lands and Fishing, and others therein contained, and thereupon gave State and Seasin of the same; and in the words *alia erant hæc*, it says only *alia erant hæc super fundis dictarum terrarum aliarumque particulariter supra specificatarum*; which the *Lords* Found sufficient, where the De-

fender Alledged no Right to the Fishing in his person; and albeit thereafter he Alledged he was Infeft in *piscationibus cum traditione Cymbæ & Retis*, yet that was also Repelled, being proponed only *ad hunc effectum*, to make the Pursuers Seasin null, for want of the like Clause *traditione cymbæ & retis*, but it was reserved to be discuss'd, being proponed *peremptorie causa*, as a Right to Eleid the Pursuers Right. Actor. *Cunninghame*. Alter. *Vid.* 26 *March* 1628, betwixt these Parties.

Balmanno contra *Yule*, *Eodem die*.

IN a Reduction *Alexander Balmanno* contra *Yule*, for Reducing of an Alienation of a House in prejudice of the Pursuers Tack, Set to him by the Annailzier, and whereon he had Served Inhibition before the Alienation made to the Defenders Father in Fee, and to his Mother in Liferent; and albeit the Defender, Son to the Receiver of the Alienation, was Minor, and so *qui non tenebatur placitare super hæreditate paterna*, as was so found here; yet the Action was sustained against the Wife, who was Liferentrix, and the delaying of Process against the Minor was not admitted, to stay Process against her, albeit her Security was in the same Body of the Writ, which was the Minors Right, seing the Action concluded not properly Reduction, but that the Pursuer should be declared to have good Right to bruik during the years of this Tack, notwithstanding of that Right made to the Defenders, which the *Lords* Found might be tryed against the Relict who was Liferentrix, notwithstanding of the Minority of the Fiar; And because the Duties of the Lands Set in Tack for the by-past years, since the Inhibition was uplifted by the Liferenter, The *Lords* put it in her option, either to restore the saids by-gones of the years since the Tack began, to the Pursuer, or otherways to let him bruik as many years after the Tack expired, as he hath wanted since the Inhibition, uplifted by her as said is. Actor. *Mowat*. Alter. *Gibson* Clerk. *Vid.* 26 *March* 1628, betwixt these same Parties.

Scot contra Creditors of *Dishingtoun*, *Eodem die*.

IN a double Poynding Sir *William Scot* against the Creditors of Sir *Thomas Dishingtoun*; The *Lords* found, that a Bond produced by *William Dishingtoun*, brother to Sir *Thomas*, one of the Creditors, not to be a good Writ, whereupon he could desire to be answered as a Creditor, seing it was never delivered to him by the Maker, but by the contrary, the same remained ever in the custody and keeping of the said Sir *Thomas* and his Wife, after whose decease (Sir *Thomas* self being then out of the Country) the said *William* at his own hand, he being then in Service with Sir *Thomas* Wife, took the Bond out of a Coffer pertaining to the said Sir *Thomas*, and told his Wife where the same was among these other Writs within her Dwelling-house, where she died; which Alledgance was found Relevant, albeit the Bond was sensine Registrat by the said *William*, and that Comprysing had also followed at his instance thereupon; And because the Proponer offered to prove the Exception foresaid by Witnesses, The *Lords* before they would give an Answer to that, if it was probable by Witnesses, (which they found hard to be done, tending to destroy the Bond) ordained the Party to be Examined *ex officio*, who being Examined, confess'd the same, and so the Bond was not Sustained. Actor. *Cunningham*. Alter. *Stuart*, *Oliphant* & *Burnet*. *Hay* Clerk.

Murray contra Intromettors with Teinds, *Eodem die*.

IN an Action by Mr. *Patrick Murray*, as Abbot of *Inch-jaffray*, against the Intromettors with the Teind-sheaves of the Lands within that Abbacy, for payment of the old accustomed Duty used to be payed for their Teinds: The *Lords* Found an Exception Relevant, bearing payment to be made by them to their Master, who Sett the Land with the Teind to them, for a certain Duty, for Stock and Teind undistinguished, according as they were in use to pay to him divers other years before the years Libelled; which payment, albeit the same

same was made by them after they were Cited in this Cause, and whereby the Pursuer *Alledged*, that they were *in mala fide* to do any Deed in his prejudice thereafter, The *Lords* nevertheless sustained it, seing they could not know what part of their *Duty* they should keep unpayed from their Master for the Teind, different from the Stock, for both which they were astricted in a *Duty* undistinguished: Also the *Lords* Found, that a Prelat having Right to Teind-sheaves, if he live while the whole Corns be shorn, albeit he die both before the Leading of them off the Ground, and also before the Term of *Martinmass* thereafter, yet that the whole Teind-sheaves will pertain to him and his Executors, and that the same will not divide, as in Farms and other *Duties*, where the person having Right to the same, dying before *Martinmass*, will only leave Right to his Executors to the half of that years *Duties*, which the *Lords* Finds not to hold alike in Teind-sheaves, where the Party having Right, may in Law intromet with, and Lead the Teind-sheaves immediatly after the Corns are Shorn, even that same day whereon they are Shorn, for his Right thereof will carry him to the same; so not the Terms of *Whitsunday* or *Martinmass*, nor the time of Leading off the Ground, but the time when the person having Right, hath in Law Right to Lead, is here considered. Actor. *Hope* & *Nicolson*. Alter. *Aiton* & *Stuart*. *Hay* Clerk. *Vid.* 13 *Decemb.* 1627. *Arbuthnet* contra Tennents of *Fairnislat*, & 24 *June* 1630. *Scrimzeour*.

Raith Donatar to *Meldrums* Liferent, contra L. *Buckie*, *March* 22. 1628.

IN the Declarator of *Andrew Meldrums* Liferent, mentioned 19 *March*, 1628. There being an Exception proponed for the Defender, upon an anterior Gift of the Rebels Liferent, whereupon Declarator was recovered by the Donatar, before the Pursuers Gift and Declarator, to the which the Defender, who was a Creditor to the Rebel was made Assigney, and who according thereto was in Possession of the Lands Libelled, desired to be declared to the Pursuer in this special Declarator now sought by him; and the Pursuer Replying, that this General Declarator cannot exclude this Pursuer, who seeks a special Declarator of the Lands specially Libelled, seing that anterior Gift and General Declarator thereon, cannot prejudge the Pursuer, neither can be any Warrand to the Excipient, to have apprehended Possession thereon at his own hand, without order of Law, except he had obtained special Declarator also after the general, for thir Lands controverted; Likeas he offered to prove, that the Rebel notwithstanding of that anterior Gift, and general Declarator, retained the continual Possession of thir Lands to his own use, utility, and profit. This Alledgance was found Relevant, notwithstanding of the Reply, and the Rebels retention of the Possession was not respected, seing the prior Donatar might pursue him therefore, and might evict it from him by Law. *Vid.* 23 *Decemb.* 1623. *Bannatyne* contra *Murray*.

Farquhar contra *Campbell*, *Eodem die*.

IN an Action by *Robert Farquhar*, as Assigney to the L. of *Carnehill*, against *George Campbel*, as lawfully Charged to enter Heir to *Campbel* of *Cuinzie-clengh* his Father, who was obliged in some Moneys to the Pursuers Cedent, for payment of the said Sum, the Defender offering to Renounce to be Heir; and the Pursuer contending, that he could not Renounce, seing *se immiscuit* by Intrometting with the Duties of certain Lands divers years after his Fathers decease, whereof his Father was Heretor, or Tack-man at least, which were bruiked by his Father *per tacitam Relocationem*, the time of his decease: And the Defender Duplying, that there was a Decreet of Improbation against him, Decerning all Right whatsomever made to his Father, to make no Faith, whereby he could not be repute Heir for any Intromission he had of the saids Lands, seing

he ſtood obliged, and would be compelled by Law to reſtore the Duties of the ſaids Lands to the Heretor thereof; and ſo reaped no benefit by his Father; This Exception and Duply was ſuſtained by the *Lords*, that the Defender ſhould not be holden as Heir, albeit the Purſuer anſwered, that once the Defender had entered to theſe Lands, which were bruiked by his Father the time of his deceaſe *per tacitam Relocationem*, he being Tackſ-man thereof before; by the which Entry the Defender having no Right otherways, behoved to Enter as Succeſſor to his Father; and there was no Decreet of Improbation, but which was only obtained ſince the Defenders Fathers deceaſe, againſt the Defenders ſelf, and was never Intented againſt his Father, & ſo cannot purge the Defenders Entry after his Fathers deceaſe, and before that Decreet of Improbation, and which cannot make him ceaſe to have ſucceeded therein to his Father. Likeas, notwithſtanding of that Decreet, he hath thereafter ſtill Intrometted with the Profits and Duties of the ſame Lands; which Anſwer was not reſpected, but the Exception and Duply ſuſtained, as ſaid is, ſeing the Decreet foreſaid would make the Defender Comptable for his Intromiſſion with the ſaids Lands, and ſo he could not therethrough be repute Heir. *Vid.* 8 *July* 1628. *Dumbar* contra *Leſlie*, 20 *July* 1626. *Harvie* contra *Baron.* 13 *January* 1629. *Niſbet* contra *Niſbet.* 18 *Decemb.* 1623. *Mowat* contra *Mowat.* 16 *July* 1629. *Murray* contra *Roſs.* 20 *Novemb.* 1629. contra 11 *June* 1631. *Taylor* contra *Drummond.* 3 *July* 1631. L. *Gadgirth.*

Adamſon contra Tennents. *Eodem die.*

IN an Action for Abſtracting of Thirl Multars, *Adamſon* of *Braco* contra the Tennents of *Stralay*, The *Lords* ſuſtained the Action for the Knaveſhip, Bonock, and Lock, alſwel as for payment of Abſtracted Multars of the bygone years lybelled, albeit the Defenders Alledged, that they could not be compelled to pay the Duties of the Knaveſhip, Bonock and Lock, ſeing they Alledged, that the Purſuer was not ſpecially Infeft therein, and thir being but Duties to be payed for Service to be done at the Miln, to them who ſhould grind their Corns at the ſame, Reaſon would crave, that they ſhould not pay the Dutie which is only due for Service, where they neither got, nor could get Service; for albeit the Purſuers Infeftment of Thirlage, might carrie him to the Multar of any Corns Thirled, which ſhould be Abſtracted, yet the like Reaſon was not for the foreſaids Duties, which were only payable for Service, which Service not being done, they Alledged theſe ſhould not be Exacted. This was Repelled, ſeing the Purſuers Right was of the Thirle-Multars *cum eorum ſequelis uſitatis & conſuetis*; And that the Purſuer offered to prove, that they were in uſe to pay theſe Duties before, and ſeing he had Right to the Multars Abſtracted, he had als good Right to theſe Duties uſed to be payed, ſeing he behoved to keep Servants at the Miln, for labouring of the Corns, when they came there, and theſe were the Fees due to them. In this Proceſs the *Lords* ſuſtained the Summons, bearing, That the Defenders Abſtracted their Multars, which were ſpecificè lybelled to extend to a ſpecial Quantity Lybelled, and Found it not neceſſar, that the Summons ſhould bear, that the grouth of the Corns growing upon the Ground, extended to any particular Quantity, and that the Summons needed not bear the Quantity of the Corns which grew yearly, but that it was ſufficient, that the Summons bear the ſpecial Quantity of the Multars Abſtracted. *Actor. Mowat & Pitcairn.* Alter. *Nicolſon & Hay. Hay* Clerk.

contra *Cheſholm*, *Eodem die.*

IN an *Action* betwixt contra *Cheſholm* for payment of the bygone Mails and *Duties* of a Land, to the Alienation whereof, made to the Purſuer, by the Defenders Huſband, the Defender conveened being then his Spouſe, and

and who was then Infeft in the Lands, gave her consent, and now after her Husbands decease, she being conveened for re-payment to the Pursuer of the saids Mails of certain years, Intrometted and uplifted by her since her Husbands decease, and which preceeded the Intenting of this Cause. The *Lords* sustained this Action pursued against the Relict *Personaliter*, for payment making, notwithstanding of her Defence proponed against the Personal pursuit, founded upon her Liferent-Right, which she Alledged, could not be prejudged by her Consent adhibited to the said *A*lienation, at Command and Reverence of her Husband; and she remaining now Possessor *A*lledged, that in this Judgment, she could not so summarly be decerned to Re-found bygones uplifted by her, conform to her Infestment, standing *bona fide*, no Deed being done by the Pursuer before the Defenders Intromission, which might make her subject to Refound these bygons uplifted *bona fide*, and consumed, which Alledgance was Repelled.

Hume contra Tennents, *Eodem die.*

IN an *A*ction by *Mark Hnme*, as Assigney to the Duties owing by the Possessors of the Lands, pertaining to the Prebandry of *Kelso*, of certain bygone years, whereto the said *Mark Hume* was made Assigney, by Mr. *Peter Euart* Prebend of the said Prebendry, against the Tennents; The *Lords* sustained the Gift and Provision of the said Prebendary granted to the said Prebendar by the Earl of *Hume*, as Patron of the Provostry of *Dunglas*, whereof this Prebandry Lybelled was a Part: albeit it was *A*lledged, that the said Provision was null, being subscribed only by one, who was affirmed to be Patron, and not instructed; and which also, albeit it were shown that he was Patron, yet could not be sustained, seing it was not subscribed by the Provost, whose Subscription the Defender *A*lledged, to be necessar to the Gifts and Provisions of all the Prebendaries of this Benefice; which *A*lledgance was Repelled, except it had been *A*lledged, that by the Foundation, the Provosts consent is ordained to be given, and necessarly required to the Gift of the saids Prebendaries; but here it is to be considered, that this Alledgance was proponed, by the Tennents adebted to pay their Duties, who had no Right of Retention.

Lo. *Blantyre* contra Parochioners of *Bothwell*, *March* 25. 1628.

IN a Spulzie pursued by Lord *Blantyre*, mentioned 15. and 18. *March* 1628. The *Lords* Found the Receipt of the old accustomed Duty, used to be payed for Teind-Sheaves received for one year subsequent to a perceeding year, for the which Inhibition was Served at the Instance of the Pursuer, prejudged the Pursuer, that he could not seek any greater Duty for the saids Teinds, neither that year whereof he received the old Dutie after the Inhibition, nor for any other year, thereafter, for the which he had not Served Inhibition; for the said Inhibition was found to be prejudged, and in effect was past from by the Pursuer, by his foresaid Receipt of the said old Duty thereafter, whereby it could not be compted an Interruption, and therefore that the Defenders should pay no more for the Teind-Sheaves, but the said old Duty for any years, for the which they were not Interrupted, after the Receipt, since the Inhibition, as said is. *Item*, The *Lords* Found, that the payment made to the Pursuer, who had a Pension of certain Bolls to be payed, out of the Teind-Sheaves lybelled, did not import Liberation to the Defenders, who made the said payment, of the *A*ction for the rest of the avail of the said Teind-Sheaves, and their wrongous Intromission was not totally purged thereby, but allowed only the said payment *pro tanto* in the first end of the quantity of the saids Teind-Sheaves, seing the Pensioner had not the Teind-Sheaves *A*ssigned to him, for payment of his Pension, but the Pension was only of certain Bolls to be payed out of the Teind-Sheaves. *Vid. March* 27. 1628. betwixt thir same Parties.

Lockhart of *Bar* contra Tennents, *Eodem die.*

IN a Removing L. *Bar* contra his Tennents, for Removing from the Lands Compriſed by him; The *Lords* Found the Compriſing, whereupon no Seaſin was taken, could not be a Title to produce Removing, albeit the Compriſer Alledged, that he had Charged the Superior to Inſeft him, and who had Suſpended, and which Suſpenſion was diſcuſt, and the Letters found Orderly proceeded: which Superior being now out of the Countrey, whereby he could not receive Precepts for taking Seaſin, he Alledged this ſhould be ſufficient to him to ſupply Seaſin, and produce this Action of Removing ſpecially againſt Tennents, who Alledged no Right to exclude the Purſuer, notwithſtanding whereof this Purſuit without Seaſin was not ſuſtained, albeit it might produce Action, for the Mails and Duties of the Lands, as ſome thought, but others doubted thereof. Actor. *Cunninghame.* Alter. *Nicolſon.* *Scot* Clerk. *Vid.* *March* 5. 1628. *Scot* contra Tennents of *Whitſlaid.* *Feb.* 20. 1629. Mr. *John Galloway*, and the Caſes there cited, *July* 10. 1628. *Herris.* *December* 18. 1632. *Dalrymple.*

Blackburn contra *Gibſon*, *Eodem die.*

IN a Removing by *Peter Blackburn* contra *William Gibſon*, The *Lords* Found a Tack Set to the Defender, by the common Debitor to both the Parties, ſix days before the Denunciation of the Land Set in Tack, and upon which Denunciation Compriſing was deduced, which Compriſing was the Purſuers Title in this Purſuit, to be a ſufficient Right to Eleid this Purſuit, albeit the Tackſman had not apprehended Poſſeſſion, before the Denunciation, and Compriſing, ſeing it was Set to the Defender, for a juſt and true Debt owing before, in ſatisfaction whereof the Tack was Set, and that no Diligence was done by the Purſuer, againſt the ſaid common Debitor, before the Setting of the ſaid Tack, which might hinder the Excipient to take the ſaid Aſſedation, or the other to Set the ſame; and in reſpect the ſaid Tack was Clad with Poſſeſſion, diverſe years before the Intenting of this Removing, upon *Feb.* 4. 1626. after the Tack here mentioned was expired, this ſame Compriſer upon a warning then made, ſeeking Removing; The *Lords* Found, that the Defenders Alledgance upon a Compriſing, after the Purſuers Compriſing, three Moneths deduced, within the time of his Tack, could not Defend againſt the prior Compriſing, notwithſtanding of the Poſſeſſion had by the Defender, which they Found could not be aſcribed to the Compriſing, as the Defender would, ſeing it was apprehended by the Tack, after the expyring whereof he could not *mutare cauſam ſuæ poſſeſſionis*, in prejudice of the Purſuers prior Compriſing, *& ſic in prejudicium alterius*, the prior Compriſer having done Diligence; for the firſt Warning made by him was an Argument thereof, albeit it took no effect, by reaſon of the Tack, and which the *Lords* ſuſtained, ſeing it was made before the Defenders Compriſing; neither was it reſpected, that the Defender Alledged the Denunciation to have preceeded the Warning, and ſo would have aſcribed the continuing of his Poſſeſſion, to the Compriſing, which was Repelled, as ſaid is. Actor. *Mowat.* Alter. *Cunningham.* *Gibſon* Clerk. *Vid.* *Jan. ult.* 1628. *Hamilton* contra *Broun.*

Nisbet contra *Hume*, *Eodem die.*

IN a Suſpenſion betwixt *Nisbet* contra *Hume*, a Good-dame being obliged to pay to her Oye, and to her Husband, in her Contract of Marriage, the Sum of 2000 Merks, to be imployed upon Land, or Annualrent, or otherwiſe at the ſight of the Father to the Husband, and of the Good-dame Contracter for the Tocher, and by their adviſe (thir were the very words of the Contract) for ſhe was obliged to pay the ſaid Sum in Tocher to the Husband, and to his Wife, to be imployed, as ſaid is, by the advice of the Father to the Husband,

and

and of the Good-dame to the Wife. The *Lords* Interpreted the Contract to this Sense, that the Wife should have the Liferent of this Sum, albeit by the Contract she was provided to a sufficient Conjunct-fee by the Husband, and his Father, and albeit the Good-dame being now deceased, that the Father to the Husband being yet living dissassented, and the Wife should have a Liferent of that Sum, without whose *Advise* and Consent it was *Alledged* by the Husbands Heir, (the Husbands self being also now deceased) that it was Provided in the Contract, that the Sum should not be Imployed, and he refusing to give advise thereto, the Heir Alledged, that the Relict ought not to have it, specially seing he also *Alledged*, that the *Relict* had the whole Means pertaining to her Husband, and that his Heir had nothing. Actor. Mr. *Robert Mcgill.* Alter. *Craig. Hay* Clerk.

Hume contra *Hume*, *Eodem die.*

IN a Suspension, betwixt Mr. *James Hume*, Minister at *Dumbar* contra *Hume* and *Justice*, the said Mr. *James* being Charged to relieve the Heir of him, whom he was bound to *Relieve* by his Bond, anent the payment of a Sum of Money. The *Lords* Found, that albeit the said Mr. *James* was obliged only to Relieve the Party therein expreset, and made no mention to *Relieve* his Heirs, Executors or Assigneys, yet that Bond should be effectual to his Heirs, or any made *Assigney* by the Heirs, for producing of *Action*, or Execution against him, for their Relief, seing the Bond of Relief *per expressum* excluded not the Heirs, Executors or Assigneys. *Actor.* Alter. *Belshes. Gibson* Clerk. *Vid. July* 14. 1629. L. *Wardes. Feb.* 6. 1630. *Muir.*

Maxwell contra *Portrack*, *March* 26. 1628.

IN an Action betwixt *Maxwell* of *Cowhill* and *Portrack*, whereof mention is made 21 *March* 1628. The *Lords* Found the Defenders Infeftment of his Lands from the Kings Majesty, of whom the same were holden *cum piscationibus in aqua de Nith*, with continual Possession of Fishing of Salmond within the said Water, by the Defender and his Predecessors, conform to their said Infeftment, and use of debarring of all others from Fishing of Salmond therein, was sufficient, and sustained the same to defend the Excipient in this Removing, it being a Possessor Judgment against this Pursuer, and his Pursuit founded upon special Right of the Salmond-fishing, Disponed to him and his *Predecessors per expressum*, and had no respect to the *Reply* made by the Pursuer, whereby he Alledged, that Salmond-fishings were *inter Regalia*, and could not be comprehended under the general Clause *cum Piscationibus*, and that they were not *Disponed*, except they were *specificè* and *per expressum* Disponed; which Reply was Repelled, and the said Exception sustained.

Balmanno contra *Tuill*, *Eodem die.*

IN the Reduction *Balmanno* contra *Tuill*, mentioned 21 *March* 1628. the Pursuers Tack, whereupon he had served Inhibition, being Set to him by the Husband of the Wife, the Wife being Heretrix of the Land her self, and she not consenting to the Tack, and the Heretable Alienation being made by the Wife and her Husband together, after the said Inhibition; which Wife and Husband were both living, the time of the reasoning of this Cause. The *Lords* Found no necessity to Summon the Wife, who was Heretrix, to this Reduction, seing her Husband who was Setter of the Tack was Summoned; albeit it was Alledged, that she was a necessar Party to have been Cited, seing she is subject to Warrand the Alienation controverted, made to the Defender.

Lo. *Lovit* contra Sheriff of *Nairn*, *Eodem die.*

IN a Reduction the Lord *Lovit* contra Sheriff of *Nairn*, for Reducing of two Acts, whereby two Highlandsmen, and the Lord *Lovit* as Cautioner

for them, was obliged to compear before the Juſtice, and to underly the Law for poyſoning of ſome perſons, and who were Unlawed in the Sums, for which they found Caution, in reſpect of their Non-compearance. The Reaſon of Reduction was, becauſe the Sheriff had no power to cauſe the ſaids perſons ſo to Act themſelves, except there had been a preceeding Charge, directed againſt the ſaids alledged Malefactors, or elſe that they had been taken *in flagrante crimine*; whereas in this Caſe, neither was there any Charge againſt the Malefactors, nor had the Sheriffs Warrand to take them; and it was not *in flagrante crimine*, ſeing the Fact, for the which the Sheriff cauſed them be Acted to Compear to underly the Law, was committed 15 or 16 years before that. Likeas, the ſaid *Act* being for the Sum of 300 merks, and ſo in a matter of importance, and in an Inferior Court, it was not Subſcribed by the Parties alledged *Acted* thereby; this Reaſon of Reduction was found Relevant. Actor, *Lawtie*. *Alter*. *Mowat*. *Hay* Clerk.

Vaus contra *Law*, *Eodem die*.

IN an Action of Relief *Vaus* contra *Law*, for relieving of the ſaid *Vaus*, who was Cautioner for *Law*, to pay a Sum of Money to the Creditor; The *Lords* ſuſtained the Action and Charge of Relief at the Cautioners inſtance, againſt his Principal, for whom he was obliged, and who was bound to relieve him; where the Principal Bond was Regiſtrat againſt the Cautioner, and the Term of payment was bypaſt before the ſeeking of the ſaid relief, albeit the Principal Alledged, that the Cautioner could not ſeek relief but where he was diſtreſt, either by Charge of Horning, or by making payment to the Creditor, neither whereof he could alledge. Likeas he inſtructed, that the Creditor had Superceeded the payment of the Sum while a Term yet to come, whereby he could not be diſtreſt: Which Alledgance was Repelled, and the Charge for relieving of the Cautioner ſuſtained, ſeing the Bond was Regiſtrat, and the Term by-paſt, as ſaid is; and alſo the condition of the Principal was feared and ſuſpected, as likely to become *non ſolvendo*, *viz.* Mr. *James Law*'s Father. *Actor*. *Gibſon*. Alter. *Nairn*. *Gibſon* Clerk. *Vid. March* 25. 1623. *Baillie*.

Dowglaſs contra L. *Wedderburn*, *Eodem die*.

IN the Declarator of *Wedderburns* Liferent-Eſcheat, mentioned 8 *March*, 1628. The Laird *Wedderburn* being preſent Alledged, that he diſclaimed *John Stuart* to be his Superior of the Lands Libelled, and was content the Superior ſhould make what advantage he pleaſed of that Diſclamation, and therefore Alledged, that his Liferent could not fall to *John Stuart*, as to his Superior of theſe Lands. This *Alledgance* was Repelled, and the Action for the Liferent ſuſtained, notwithſtanding of the Diſclamation, becauſe the Defender being once Vaſſal to the ſaid *John Stuart*, at leaſt being Vaſſal to the Kings *Majeſty* by the Act of Annexation, and conſequently to the ſaid *John Stuart* ſince, by his Erection. The *Lords* found, that after the Caſuality was fallen, and acquired to the Superior, by the fault of the Vaſſal, the ſaid Diſclamation made thereafter, could not take away the preceeding Caſuality which fell of before; and it being in the Superiors option, either to admit the Diſclamation, or to claim the Caſualities falling to him before, he could not be compelled to receive the ſamine, except he pleaſed ſo to do, ſeing that was introduced as a benefit in favours of the Superiors, which they needed not to admit but if they pleaſed ſo to do, after Caſualities were fallen.

Lo. *Blantyre* contra Parochioners of *Bothwell*, *March* 27. 1628.

IN the Spuilzie purſued by the Lo. *Blantyre*, mentioned 25 *March* 1628. The *Lords* Found a Diſpoſition made by him, who was Author to the Lord *Blantyre* in his Right of the Teinds Libelled, and granted for onerous Cauſes to his

his Creditor, before the Right made to the Pursuer, which Disposition bears, *That the said Author Disponed the said Right of the Teind-sheaves to the Excipient, to be bruiked by him, ay and while he was compleatly payed of the Debt owing to him*; which Debt was condescended on in the said Bond of Disposition, and conform whereto he was in Possession of the saids Teinds, by receiving payment of the same from the Tennents, Occupyers of the Lands, whereout of the Teinds were craved, and by giving of Subaltern Rights of the same to the saids Tennents Possessors, for a certain Duty to be payed therefore to him. Likeas the Tennents Defenders Compeared, and proponed this same Alledgance, and Alledged, that they had payed to him the saids Teinds the year controverted, which behoved to be found sufficient to liberat the Tennents, who had payed *bona fide* to him, to whom they were in use to pay divers years before the Inhibition Libelled, Served by the Pursuer. This Disposition and Exception foresaid was not sustained, neither to liberat the Excipients the Tennents, nor him to whom the Disposition was made; But the Exception foresaid founded thereupon was Repelled, because the Tennents were not found to have payed *bona fide* for any year after Inhibition, and the Disposition of the Teinds, ay and while the Creditor, to whom it was made, were payed of the Sums owing to him, was not found *habilis modus* to the Receiver, to bruik the Teinds valiably against the Pursuer, who was a singular Successor: and the Right of it self not being Sett by way of Tack, nor otherways, to make the same reals but being a personal Security and *Bond*, which would only work against the Maker, was not fouud sufficient to give him *Right* to the Teinds, against the Pursuer a singular Successor as said is, specially it not being Sett for a certain and definite time, and so was not allowed. *Vid.* 20 *March* 1629. *Finmonth*.

Fletcher contra *Irvine*, *March* 28. 1628.

IN a Declarator of Escheat Pursued by *Fletcher* against Mr. *James Irvine*, the Bishop of *St. Andrews* Compearing and Alledged, that the said Rebels Escheat pertained to him, and not to the Kings Donatar, seing the said Rebel dwelt in the Lands of which are within his Regality. The *Lords* Repelled this Alledgance, for albeit the Rebel (he being a Minister) had his Dwelling in his Manse beside his Paroch Kirk, the Lands whereof, and whereupon his Manse was builded lay within the Regality of *St. Andrews*; yet they Found that the said Manse could not be repute to be holden of the Bishoprick, but that Manses pertaining to Ministers, being given to them by the King and Estates, by Laws and Acts of Parliament, the same ceased to be of any privat Holding, and could have acknowledgment of no Superior but the King; and consequently the *Lords* Found, that the Stipend due to the Minister that year of his Rebellion, albeit the same was payed out of the Teinds of that Lands holden of the Bishop, pertained to the Kings Donatar, because the Debts owing to the Rebel follow his Dwelling-place as *nomina debitorum* doth; likeas the Sum owing to him for Reparation of the Manse, was also found to be in the like case. Actor. *Hope*. Alter. *Aiton*. *Hay* Clerk. *Vid. 9 Decemb.* 1623, Annats of Benefices.

Cairns contra *Hunter*, *Eodem die*.

IN the Spuilzie of a Horse *Cairns* against *Hunter*, an Exception being admitted upon the redelivery of the Horse to the Pursuer's Probation, and therein at the advising of the Cause, a Witnes proving, that the Pursuers Wife directed her Son to receive the Horse, and that according thereto she caused her Son put the Horse in her Husbands Stable, and another proving that he heard the Husband say at another time, that he had received the Horse, albeit none ever proved

that he saw the Horse in his Possession, nor no more was proven in the Cause. The *Lords* Found, that although this Probation was not enough to prove the Exception, yet it was a presumptive Probation to induce the Judge as *probatio semiplena*, to take the Excipients Oath of Verity upon the said Exception, and therefore ordained his Oath to be taken thereon. *Hay* Clerk.

Rule contra L. *Aiton*, *June* 13. 1628.

IN an Action of Compt and Reckoning at the instance of *James Rule* against the Laird of *Aiton*, the Defender being debarred by the Pursuer by Horning, and the Defender Alledging, that the Pursuer could not debar him by Horning, seing he offered instantly to compt and reckon with him, which being the desire of his Summons, it was the only thing which could be decerned in this Process, in favours of the Pursuer; and the Defender being ready to do and fulfil that, for the which Sentence allenarly might be given, *viz.* to Compt and Reckon, therefore he could not be debarred from doing of that which the Decreet could decern him only to do. The *Lords*, notwithstanding of the Alledgance, and offer to Compt, Found that he was debarred, and so in respect that he was at the Horn, that he had not a person to stand in Judgment, and Decerned; which Decreet extended only, to ordain the Defender to Compt, which was offered as said is, without any Sentence, but in respect of the Horning refused, yet the *Lords* declared that they would give Suspension without Caution, seing the Decreet being only general for Compt and Reckoning, not containing a special Sum, it was hard to find Cautioners in such generals, not being certain nor special in the quantity of the Sum, nor liquidate what the same was. Actor. Alter. *Belshes*. *Hay* Clerk.

Purves contra *Smith*, *Eodem die*.

IN an Action to make Arrested Goods forth-coming *Purves* against *Smith*, one Compearing and Alledging, that the Goods Arrested desired to be made forth-coming, could not be decerned to be delivered to the Pursuer, because the Wife of the Husband, for which Husbands Debt the saids Goods were Arrested, Disponed the saids Goods to the Excipient, long before any Arrestment Execute thereon by the Pursuer, and that for satisfaction of a Debt owing to the Excipient by her said Husband, which Wife Disponer had a Factory and Power given to her by her said Husband, to pursue for all Debts owing to him, and to Intromet with the same, and bearing a general Clause, *to do all and whatsomever he might do himself if he were present*; in respect of the which Factory and Power, and Clause foresaid, *to do as if he himself were present*; the Defender Alledged, that as the Husband, might have given the saids Goods, either *gratis*, or sold the same to whom he pleased at that time, when his Wife disponed and assigned the samine to this Excipient, seing the Husband at that time neither was put to the Horn by this Pursuer, neither were the Goods then arrested, but long after the said Disposition by the space of three Months; and therefore he contended, that he had no necessity to qualifie or show now, that the Husband was his Debitor, seing the narrative in the Disposition proported the same, and he had no necessity to keep the Bonds any longer after the said Disposition, which was given to him for payment, and which might lawfully have been received by him, albeit there had been no preceeding Debt, the Husband not then being Bankrupt. This Alledgance was Repelled, except that the Excipient qualified a Debt owing by the Husband to him, answerable in Sum and Quantity, to the Avail of the Goods disponed by the Wife; which being so proven, the *Lords* Sustained the Disposition made by the Wife, and Found it good, it being proven that by the Factory she had Power so to do: but if there was no preceeding Debt owing by the Husband.

Husband. The *Lords* Found, that the Factory (notwithstanding of the said general Clause) gave her no Power to Dispone of any of her Husbands Gear, in prejudice of his lawful Creditors, except there were a just and lawful Cause Alledged and Instructed, showing the same converted to the use and necessary Affairs of her Husband. Actor. *Sandilands*, Alter. *Belshes*, *Hay* Clerk. *Vid.* 18 *June* 1628, betwixt these same Parties. 12 *Feb.* 1622, *Dennistoun*.

Hamilton contra *Eodem die.*

IN a Suspension of Charges of Removing from a Ministers Gleib, *Hamilton* Minister at *Lintoun* against The *Lords* Found a Designation null, upon this eiked Reason proponed after Inspection, *viz.*, because the Designation was not made by a Commissioner, having Power from the Presbytery, to pass and make the said Designation, albeit the same was made by the Moderator of the Presbytery, being directed to visite that Kirk, as the said Designation bore; but not bearing, that upon complaint or desire made to the Presbytery, concerning the Gleib, he had Warrant or Direction from them to design only, bearing that the Moderator in his said Visitation, upon complaint made to himself, and to the Gentlemen of the Paroch of *Lintoun* then present, of the insufficiency and in-lake of his Gleib, the said Moderator with consent of the Parochioners present designed, *&c.* which the *Lords* Found not enough, wanting a specifick Warrant as said is, and also because it bore not, *that it was done with consent of two or three honest men in the Paroch*, whose Names ought to have been set down in the Designation specially, for it was not sufficient that it bore, *to be done with advice of the Parochioners generally*, condescending upon no special person, albeit also two or three of the Witnesses in the Designation were of the honest men of the Paroch, conform to the Act of Parliament 1572, also this Designation was of a whole new Gleib, whereas there was an old Gleib, which the Minister possest, and was not four Acres compleat, so that the Designation should only have been made of so much as might make out the old Gleib compleat, and not of a whole new Gleib. Actor. *Cunninghame*. Alter. *Stuart*. *Gibson* Clerk.

Purves contra *Purves*, *June* 18. 1628.

IN an Action to make Arrested Goods forth-coming *Purves* against *Purves*, The *Lords* Found the Summons needed not to abide second Summons of Continuation, albeit there was nothing produced instantly to verifie, that the Defender was owing the particular Goods arrested in his Hands to the Pursuers Debitor, the time of the making of the Arrestment, but that the Pursuer behoved to take a Term to prove the same, and referred it to his Oath, that he was owing the particulars arrested to this said Debitor; whereby the Defender Alledged, that the Summons should be continued, seing the same was to be proven by his Oath, and where any thing is referred to the Oath of a Party, he ought to be twice Summoned, notwithstanding whereof, there was found no necessity of Continuation, the Cause being of this nature, for making Arrested Goods forth-coming, and accessory to a Sentence. Actor. *Sandilands*. Alter. *Belshes*. *Hay* Clerk.

E. *Marr* contra his Vassals, *June* 19. 1628.

IN an Action of Improbation by the Earl of *Mar* against the Vassals of *Mar*, an Incident being used by one of the Defenders, who were Minors, for having of the Writs libelled, and the Pursuer referring the having of these Writs to the Parties Oaths; it being controverted, if Minors could be holden to give their Oaths, or if Certification should be granted against them, and they holden as confest for not compearance, being for that effect cited. The *Lords* Found, that Minors albeit within 21 years, yet if they were past the Age of 14 years, and so past Tutory, ought to give their Oaths in this and the like Cases,

and that if they were present they should give their Oaths, and if they compeared not after Citation, they should be holden as confest. Actor. the K. Advocat, *Aiton*, *Nicolson* & *Stuart*. Alter. *Belshes*, *Cunninghame*, *Mowat* & *Lawtie*. *Gibson* Clerk. *Vid.* 1 *July* 1628, L. *Pitsligo*. & 9 *Jan.* 1628, *Aitkin* contra *Hewart*.

Mc culloch contra *Marshel*, *Eodem die*.

IN a Transferring *David Mc culloch* against *Marshel* and *Robert Reid*, the Defender being conveened as lawfully charged to enter Heir to his Father, and *Robert Reid* who was a Creditor to the said Defenders Father, Compearing for his Interest, and Alledging that the Pursuers Summons should not be Sustained, because it was execute before the expiring of 40 days after the out-running of year and day after the decease of the Defunct the common Debitor, whereas not only year and day, but also 40 days after expiring of the year should pass before any Party can intent Action against any person as charged to enter Heir. This Alledgance was Repelled, for the Summons were not execute till year and day after the Defuncts decease, which they found sufficient, and there needed not that 40 days more should pass before the Summons, and the 106 Act *James* 5, *anno* 15 0,7 Parliament, is mean'd of Compryfings & Executions of Sentences, and not of Charges to enter Heir, whereupon Pursuits are raised, and the 76 Act 6 Parliament *James* 4 hath nothing to do with these Citations; and by Act of the Sederunt Books, it is Statute, that in such Cases Summons may be execute after expiring of year and day, after the Defuncts decease, and no sooner, and that no more time needs to run, and that the Charge to enter Heir may be execute before the expiring of the year, but no Summons execute within that time, and this Act of Session touches summoning of Parties, and Charging of Parties to enter Heir for that end; whereas the Acts of Parliament, concerns only Executions upon Compryfings, and nothing of Pursuits and Actions or Summons. Actor. *Foulis*. Alter. *Gibson* Clerk. *Vid. Quod sequitur*. & 8 *February* 1622, L. *Muckall* contra *Innes*, and the Cases there cited.

By the Practique of old, an Heir to a Defunct, albeit entered Heir to him, could not have been pursued for the Defuncts Debts by his Creditor, before year and day was expired after the Defuncts decease; for the Executor was answerable to the Creditor within that space, and after the year the Heir might be pursued, conform to the 76 Act, Parliament 6. *James* 4, but now it is doubted by some, who are of opinion, that albeit any who is charged to enter Heir, cannot be pursued before the expiring of year and day, as is Noted in the last Practique, yet they think where the person is entered Heir actually, *to casu* that he may be pursued within the year, if he be Retoured or Seased as Heir within the year, seing they think that by his own Deed in his entering Heir, he hath prejudged himself of that delay of Pursuit which the Law gives, and which benefite they think only given to them, who are charged to enter Heirs, and not to them who hath entered. Others are of opinion, that if an Heir enter Heir within year and day, he may be conveened after he is entered, before the expiring of the year, where the Debt is Heretable; but where the Debt is Movable, he cannot be conveened within the year, albeit he be entered Heir. The Act of Parliament foresaid would appear to free the Heir, albeit entered Heir, from all Pursuit from any Debt, Heretable or Movable before the year expire, and after the year gives the Heir Relief against the Executor, even in Immovable Debts, which doth affect properly the Heretage and the Heir, and not the Executors, for so will the words of the Act import: but I am of the mind that the *Lords* have now these many years by-past been in use, to find Process against the Heir, within the year, where he was entered before, and it hath been so decided divers times, as is Noted, *Penult June* 1624, *Haliday* contra *Edgar*. L. *Ednem*

L. *Ednem* contra the Heir thereof, *June* 26. 1628.

IN a Poynding of the Ground, the Lady *Ednem* being Infeft by her Husband, in an Annualrent of 3000 Merks out of *Ednem*, pursues the Appear and Heir of her Husband, Granter of her Right, and the Tennents of the Ground, for payment of the *Whitsunday's* Term, 1628. and in time coming: and the Tennents Compearing, and Alledging, that their Goods could not be Poynded for this Term of *Whitsunday* Lybelled, because the Summons being raised in *March* 28. and the Husband having deceased only some few days before, in that same Moneth, the Relict could not intent any Summons against the Tennents, which might distress them, or their Goods, before the Terms of payment of their Duties and Farms, while their occupation, were by-past; and therefore this Summons being raised before *Whitsunday*, which was the first Term craved, and they not being Debitors, neither of that Term, nor of the *Martinmas* thereafter, while *Zuil* and *Candilmas* were past, therefore they contended, that this Pursuit moved for the said Term, and Execute before that Term was past, and before the Terms of payment were come, at which, and whereby they would be only Debitors of their Duties, could not be sustained. The *Lords* Repelled the Alledgance, and sustained the Process, for that Term of *Whitsunday*, which was not come as said is; And albeit the Summons was Execute before the Tetm, seing thereby payment was craved to be made after the Term was past only, The *Lords* Found, that this Action was *Declaratoria Juris*, and not principally for present Execution. Actor. *Nicolson*. Alter. *Kinross*. Hay Clerk. *Vid. Feb.* 5. 1624. *Wood* contra *Weddall*, and the Cases there. *July* 11. 1628. betwixt thir Parties. *Jan.* 24. 1628. *Edington*.

L. *New-wark* contra his Son. *Eodem die.*

IN a Redemption L. *New-wark* contra his Son, The *Lords* sustained the Order of Redemption, albeit it was quarrelled by the Defender, as not orderly deduced, seing he Alledged, that the time of Premonition, the Reversion was not shown, nor read to the Party premonished, which was Repelled, and found not necessary, specially in this Case, where the Charter given to the Defenders Brother, of the Lands desired to be Redeemed from this Defender, as Appear and Heir to him, was given under Reversion, & so the Reversion was *in Corpore Juris Rei*, and needed not be shown and read to him; And also the Order was sustained, albeit it was Alledged, that the same being done upon a *Sunday*, upon which it was not lawful to execute any such Civil Acts, it ought therefore to be found null, which Alledgance was Repelled also, for they would not find the Order null therefore, specially where the Sum of the Reversion was only a Rose-Noble, and so needed not to distract the Parties over long a space in the numeration, and nevertheless thought it Expedient, that such Acts should not be done on *Sunday* again; Likeas the Consignation was made on *Sunday*, because the Premonition was made to that day, the Reversion providing that Redemption might be made at any time, upon six days warning, and not restricting the Order to be made before any Term. Actor. *Belshes*. Alter. *Gibson* Clerk. *Vid. July* 3. 1622. L. *Thornidykes*, and the Cases there. *July* 4. 1628. *Rachelet*, and the Cases there.

Gordon contra L. *Meldrum*, *June* 27. 1628.

GOrdon contra L. *Meldrum*, the Executors of a Wife conveening the Executors to the Husband of that Wife, for payment of the Wifes Part contained in the Testament, which was given up, and Confirmed to pertain to her, and her Husband, the time of her decease, she deceasing before her Husband, the Defenders Alledging, that Defalcation ought to be made of the Debts owing by her Husband, at the time of her decease, which the Executors had

payed sensyne. The *Lords* Found this Defalcation reasonable, and allowed the said payment, and Found, that the Executors needed not to abide any Sentence for the said *D*ebts, to have been obtained by the Defuncts Creditors against them, but that they might have payed the same without Sentence, they proving the Debts to have been truly owing; and albeit there had been no payment, nor yet Sentence, yet they Found the Defalcation Relevant, bearing, That the Defunct was owing such particular Debts, which being proven, the same ought be taken of the Gear, before the Relict, or her Executors could claim any of the Gear, for the Relicts Portion thereof. Actor. *Baird.* Alter. *Burnet* Major. *Gibson* Clerk.

Henderson contra La. *Knock-hill*, *June* 28. 1628.

IN an Improbation by Mr. *James Henderson* contra Lady *Knock-hill*, of certain Compriſings, and Inſeftments following thereupon, given by the Superior of the Lands of *Knock-hill*, which were alſo Compriſed by the Purſuer, likeas alſo he was Inſeſt thereupon by the Superior, the Defender Alledging, that no Proceſs could be granted, becauſe the Warrands of the *D*efenders Compryſing were called to be Produced and Improven; And the Clerk to the Compriſings, who keeped the ſaids Warrands, not being called in this *P*roceſs, no Proceſs ought to be granted therefore: Likeas ſhe Alledged, that ſeing the Inſeftments, made to her by the Superior were quarrelled, that the Superior ought to be called: Both thir Exceptions were Repelled, for the Clerk to the Compriſings was not found needful to be Summoned, ſeing he was not a publick Perſon, But in this Caſe of Compriſings, was but a privat Perſon choſen by the *E*lection, and at the pleaſure of the Party Compriſer, who upon his own hazard, chooſes his Clerk, and ſo who muſt be anſwerable to produce the Warrands of his own Evidents, and to be lyable in Law for the ſame, and not the Clerk. And the *Lords* Found no neceſſity to Summon the Superior, ſeing the *P*urſuer quarrelled not the Superiors Right, but the Right Perſonally made to the Defender by the *S*uperior, of the Property, which *S*uperior was alſo Granter of the Purſuers Right. Actor. *Advocatus.* Alter. *Kinroſs. Hay* Clerk. *Vid. ult. Feb.* 1628. E. *Nithiſdale.* and the Caſes there.

Broun Burges in *Innerkeithing* contra the Town thereof, *Eodem die.*

IN a Double Poynding by *James Broun* Burges in *Innerkeithing*, againſt the Town of *Innerkeithing*, and L. *Spenſerfield*, on the one and other Parts, for the Multars of certain Corns growing upon ſome Aikers, pertaining to *Spenſerfield* Heretably, aud which were Poſſeſſed by *Broun* the Suſpender, and for which Multars he was diſtreſſed by the ſaids Heretor as being due to him, being the Corns growing on his own Heretage, and which were Thirled to his own Miln, the ſaids Lands and Miln being holden of the King, and whereunto the Town of *Innerkeithing* could claim no Intereſt: And on the other part, the Town acclaimed the Multars of the ſaids Corns, becauſe all their Burgeſſes were Thirled to their Miln of *Innerkeithing*, and by an Act of their Court made by the Provoſt, and Baillies, and Council, with Conſent of the whole Inhabitants of their Burgh, not only were the Corns growing upon the Lands pertaining to the Town Thirled, but alſo all their Burgeſſes were obliged thereby, to Grind and pay Multar, for all their Corns in-brought within the Liberties of their Burgh, whereſoever they grew; and ſo the ſaid Suſpender, being Burges of the Town, & ſo by Conſequence tyed by the foreſaid *A*ct, being ſworn to obſerve the Acts, and Statutes of Burgh, is holden to pay Multars, and Grind the Corns queſtioned, at their Miln, ſeing they claim the ſame, as being brought by the Suſpender within their Liberties, the ſame being Stacked within the Suſpenders Corn-yards, which is within the Town, and threſhin out, & dreſt within his Barn

and

and Houſes, within the Town, and ſo falling under their Act; For if *Spenſerfield* claim any Right thereto, as of Corns Growing on Lands Thirled to his own Miln, the Town has no Intereſt therewith, but their own Burgeſſes nevertheleſs muſt be Perſonally Aſtricted to pay them, at leaſt dry Multar therefore; And ſo they Contended, that the Suſpender would be obliged to pay twiſe Multar for the ſaids Corns. The *Lords* Found, that the Suſpender was obliged to pay his Multars to *Spenſerfield*, and Found that the in-bringing, and Setting of the Corns within the Suſpenders Yard, and threſhing of the ſame within his Barn, albeit he was then Burges, and that the Barn and yard was within the ſaid Burgh, [Seing the Aikers whereupon the Corns grew, lay hard beſide the Town, and were neareſt to the Suſpenders Yard and Houſe] was not ſuch a Cauſe as might Subject him in Law, to pay Multar for the ſaids Corns to the Town, or to grind the ſame at their Miln, and that the In-bringing of the ſaids Corns, as ſaid is, would not make them to come under the ſaid *Act*, which Act they Found did not extend to Corns ſo In-brought. Actor. *Baird.* Alter. *Gibſon* Clerk.

Henderſon contra La. *Knockhill*, *July* 1. 1628.

IN the Improbation of Mr. *James Henderſon*, whereof mention is made, *June* 28. 1628. the Defender, who was a Pupil, being Conveened, and his Father as Adminiſtrator, Conveened with him, and the Father dieing ſince the Intenting of the Cauſe, whereby the Pupil was deſtitute of one to Defend him, and he Compearing by his Procurators, and deſiring that the Proceſs might be delayed to a fit and competent Day, as the *Lords* ſhould Aſſign, betwixt and which he might chooſe Tutors and Curators, *ad hanc litem*, to conſider of his Rights, and to Defend him in this Purſuit: which deſire the *Lords* Found Reaſonable, and therefore ſuperceeded all Proceeding in this Proceſs, while the firſt of *November*, that betwixt and that day, the Pupil might provide himſelf of Tutors and Curators, to Maintain and Aſſiſt him, in the Defence of this Proceſs; And that at that day, they would proceed and do Juſtice in the Proceſs againſt him without delay, whether he were Authorized with Tutors or Curators or not.

Forbes of *Gask* contra L. *Pitſligo*, *Eodem die.*

Pitſligo and his Curators having Charged *Forbes* of *Gask*, for payment of a Sum Contained in his Bond given to the Minor, and Suſpenſion being raiſed upon this Reaſon, that the Minor and his Curators knowing, that a Part of the Sum was not a juſt Debt, they at the ſubſcribing of the Bond, promiſed not to ſeek the ſame, but to Diſcharge him thereof; and referred this to the Minors Oath, and Curators, and the Curators being all abſent, and the Minor preſent, and offering to give his Oath; and the Suſpender Contending, that his Oath could not be given while his Curators were preſent, who might call him to remembrance of the Promiſe, and of the Reaſons thereof. The *Lords* Ordained the Minor's Oath to be preſently taken, without delaying of the ſame, while the Curators were preſent, for if they were preſent, and ſhould confeſs the Promiſe, yet the Minor could not thereby be hurt, if he would not acknowledge the ſame. Actor. *Mowat.* Alter. *Hay.* *Gibſon* Clerk. *Vid.* *June* 19. 1628. *E. Mar*, and the Caſes there.

Hamilton contra *Hamilton*, *July* 2. 1628.

IN an Action of Tutor Compts, betwixt *James Hamilton*, and *John Mean* his Curator, againſt *Robert Hamilton* in *Preſton*, who was his Tutor; The *Lords* Found, that the Tutor was not Comptable in Law to the Minor, for the Sum of 1000. pounds, contained in the Laird of *Wedderburns* Bond, adebted to the Minor and his Father before, notwithſtanding, that it was Contended,

that he ſhould be anſwerable therefore, in regard that the Curator Alledged, that the Tutor had done no *Diligence* againſt the Debitor, neither Perſonally by Horning, or Caption, nor Really, by Compriſing, without which doing of Diligence, by the ſpace of three years, within his Tutory, he Alledged that he cannot be freed of that Sum: for albeit the Tutor anſwered, that he ſpared to Depurſe any of his Pupils Money againſt the Debitor, who was then irreſponſal, and from whom he would not have gotten any better payment, for all the Execution that might have been uſed, and ſo he might have done the Pupil prejudice, by Deburſing and Spending of his Moneys needleſly; and which poſſibly, in reſpect of the event, would not have been allowed to him: yet the Curators Replyed, that he ought to have done Diligence, becauſe he can never be freed, except he had uſed Horning and Caption, at leaſt againſt the Debitor, whereby to have Diſcharged that Dutie, which was incumbent to him in his Office, and he cannot excuſe himſelf, by the Inſufficiency of the Debitor, and the waſting of the Pupils Goods thereon, ſeing the *Debitor* was not then Bankrupt. The *Lords* Found, that the Tutor was not *Aſtricted* to be anſwerable for this Debt, for his ſaid Negligence, and that he needed not, neither to have uſed Horning or Caption, or Compriſing againſt the ſaid Debitor, except that the Curators might ſhow, and make it Known and Alledged, that by the doing of the forſaid Diligence, he would have recovered payment of the Debitor; and that ſo the Debitor is in worſe Caſe now, than he was in the foreſaid time of the Tutory. Actor. *Nicolſon*, Alter. *Belſhes*. *Gibſon* Clerk.

Naſmith contra *Meinzies*, *Eodem die.*

IN a Suſpenſion *Naſmith* contra *Meinzies* the Relict, upon her Contract of Marriage, having Charged the Cautioner for imployment of 1000 Merks upon *Annualrent* to her uſe for her lifetime, and the Party *Exhibiting* the Money at the Barr, to be delivered to her for her Imployment foreſaid, ſhe finding Caution to make the Principal *Sum* forth-coming after her deceaſe to the Heir; And the Relict Alledging, that ſhe was not holden to receive the Money, which ſhe could not get imployed, and that ſhe was not obliged to receive the ſame, nor find Caution, which ſhe alledged was not in her power to find; and that ſhe ſought payment only yearly of that Annualrent for her lifetime. The *Lords Found*, that this offer of delivery of the Money to the Relict, as ſaid is, (which *Sum* alſo was Exhibit in preſence of the *Lords*) fred not the Cautioners, and that the Relict was not holden to accept the ſame, but if ſhe pleaſed: And that the Cautioner remained ſubject to imploy the Money for the uſe of the Relict, that ſhe might get the *Annualrent* thereof ſo long as ſhe lived. Actor. *Aiton*. Alter. *Hay* Clerk. *Vid.* 13 *Feb.* 1629. *Robert Dawlings* Bairns.

Wilſon contra *Hay*, *Eodem die.*

IN a Reduction of a Decreet *Wilſon* contra *Hay*, the Decreet being recovered againſt the Reducer, at the inſtance of the *Executors* of umquhile *Patrick Ramſay*, for payment to them of a Sum adebted to the ſaid umquhile *Patrick* by an Heretable Bond, by a Debitor of the ſaid *Patricks*; and which Sum the ſaid *Wilſon* Reducer was Decerned to pay, albeit he was not Debitor in the Bond, but as he who promiſed to pay the ſame; the promiſe being referred to his Oath, and in his abſence he holden *pro confeſſo*; the reaſon of the Reduction was, becauſe the Bond was Heretable, for promiſe of payment whereof he was conveened in the *Proceſs*, and ſo the Executors had no Right to purſue therefore, but only the Heir, and ſo the Heir not having recovered the Sentence, the Executors could not purſue him, and he ought to be Reponed

ed againſt the Sentence: This Reaſon was found Relevant, albeit the Executors Alledged, that this Reaſon ought not to be prejudicial to their Sentence given upon the Parties Contumacy, who if he had Compeared, and Proponed this, they would have ſuſtained the Purſuit, by Replying then, which they now Alledge, that the ſame perſons who are Executors, are alſo Heirs Served and Retoured to the Defunct; notwithſtanding whereof the Reaſon was ſuſtained, and the Party Reponed to give his Oath, ſeing the Decreet, againſt which he deſired to be Reponed, was only obtained by the Executors, without mentioning the Heir, ſo that the Party needed not to Compear in that Proceſs ſo Purſued by thoſe who had no *Right*; and whereas it is fortified by the foreſaid Concourſe of the Heir, ſeing he was the perſon who had the only Right to Claim the Sums, if he would Claim the Parties Oath, he ought to have it, and ſo Reponed the *Reducer* to Depone thereon, notwithſtanding the prior Sentence. Actor. *Nicolſon*, M^c^*gill* & *Miller*. Alter. *Lermonth* & *Aiton*. *Gibſon* Clerk.

Scot contra L. *Drumlanrig*, *July* 3. 1628.

IN a double Poynding *Scot* contra L. *Drumlanrig*, wherein the two Parties contending for the preference of a Sum, acclaimed by both the Parties, from a Debitor of their common *Debitors*; The L. *Drumlanrig* ſeeking the ſame as *Arreſted* for ſatisfaction of ſome Debt owing to him by their common *Debitor*, and the other ſeeking the ſame as Aſſigney made thereto; which Aſſignation was both made and intimat before the L. *Drumlanrigs* Arreſtment. Likeas both the Parties had obtained Sectences upon both their Rights foreſaid, againſt the Complainer. The *Lords* preferred *Drumlanrig*, notwithſtanding of the other Parties prior Aſſignation and Intimation, becauſe the Intimation was found null, ſeing it was made by a Procurator for the Aſſigney; which Procurator was Nottar to the ſame Intimation, made by himſelf as Procurator; and the *Lords* Found, he could not be both Procurator and Nottar, but that it ought to have been perfected by two diſtinct perſons, and that one and the ſame perſon could not be both Procurator to Intimat in the Aſſigneys name, and alſo Nottar to take Inſtruments on the doing thereof; and the Aſſignation unintimat, albeit prior to the Arreſtment, was not a cauſe of Preference to the ſaid ſubſequent Arreſtment, where the Queſtion was with a third Party, and not betwixt the Cedent and the *Debitor* to the Cedent only, but that a third perſon claimed the ſame, who contended, that the Aſſignation unintimat could not derogat to his ſubſequent Arreſtment and lawful Diligence, done before any lawful Deed made by the Aſſigney, to affect the Sum Libelled; And ſo it was alſo found, and the *Lords* ſuſtained the *Decreet* obtained by *Drumlanrig* againſt the ſaid perſon who was Decerned to make the Arreſted Money, owing to the ſaid common *Debitor* forth-coming, albeit it was quarrelled as null, being given before the Term of payment of that Money which was Arreſted, which was not come the time of the ſaid Sentence; which *Alledgance* was Repelled, and the Decreet ſuſtained, which was only *Declaratoria Juris*, for therein all *Execution* was Suſpended while the Terms of payment were paſt and come. Actor. *Nicolſon*. Alter. *Scot* Clerk. *Vid*, 12 *January* 1628 *Dowglaſs*, &c. 5 *Feb.* 1624. *Wood*.

Maxwell contra *Livingſton*, *Eodem die*.

IN an Action betwixt *Maxwell* and *Livingſton*, for payment to the *Purſuer* of an Heretable *Sum*, adebted by the *Defender* to the *Purſuers* Father, and which he acclaimed, as Heir to his Father, and referred to the Defenders Oath that he was Heir, and that it was ſo known to the Defender. The *Lords* Found, that the Defender could not of Law be compelled to give his Oath, upon the

Pursuers Title, but that the same ought to be produced, before the Process could be sustained at his instance, as Heir; for the Defender could not be *in tuto* to give his Oath; for if the Pursuer should die, and another were Retoured Heir to the Pursuers Father, thereafter the Defender might be compelled, to pay the Sum Acclaimed over again; and also if the Service or Retour were produced, he might Impugn the same upon any Alledgance, competent in Law against the same; therefore it being his Title, it was found that the same ought to be produced before Process could be granted. Actor. *Belshes.* Alter. *Scot* Clerk. *Vid.* 10 *Feb.* 1636. *Murray.*

Rachelet contra *Lawder*, *July* 4 1628.

IN an Action *Rachelet* a *French man* against Sir *Lewis Lawder* Sheriff of *Lothian*, who was pursued for payment of a Sum adebted to the *French man* by his Debitor, because he was Charged by Letters of Caption, to take the said Debitor, he being then in his company, and did not the same, The *Lords* Found the said Charge given to the Sheriff null, because it was given to him upon a *Sunday*, on the which the *Lords* Found it was not lawful to Execute any such Charges, at no time of the Day, neither before Noon, nor the time of Sermon, nor thereafter; and therefore found the Sheriff, for disobedience of that Charge, not lyable in the Sum, and Assoilzied him therefrom. *Actor. Burnet major.* Alter. *Lermonth. Hay* Clerk. *Vid.* 26 *June* 1628. L. *New-wark* contra his Son. 9 *Feb.* 1622. *Mortimer* contra *Scrimzeour. Ult. July* 1628. Betwixt thir same Parties. 24 *Feb.* 1627. E. *Cassils.*

Hamilton contra Bishop of *Galloway*'s Relict, *Eodem die.*

IN a Suspension *Hamilton* of *Kinblathmonth* against the Relict of *Gawin* Bishop of *Galloway*, who had charged the Suspender, as he who was Cautioner for her Husband in the Contract of Marriage with him, for Infefting her in Liferent of a Tenement pertaining to her said umquhile Husband, and also in some Annualrents, which he had out of certain Lands redeemable conform to the said Contract: wherein it was Provided, that how oft the Lands should be redeemed, as oft the Moneys should be imployed again to her use for her Lifetime. The *Lords* Found, that there being an Infeftment once given to her of the said Tenement by her Husband, albeit she Alledged that the Land was thereafter sold by her Husband, and so thereby she Alledged the same was not profitable to her, yet that the Cautioner was freed thereby of that part of the said Contract; for if she had consented to the Alienation, it was her own fault, for the which the Cautioner was not bound, and if she had not consented thereto, then she might claim and use the Right of her Infeftment; And sicklike they Found the Cautioner obliged to give her, her Liferent of the Annualrents contained in the Contract, notwithstanding that he Alledged that she was once Infeft therein by her Husband, whereby he Alledged, that he was not further obliged, seing albeit the Annualrents were redeemed, and the Moneys payed to her Husband, yet seing she consented to the Renunciation made by her Husband, that being her own Deed, she could not come to seek the Cautioner, who was not obliged for that which was done by her self, nor for any thing wherein she had voluntarly prejudged her self: for he Alledged, that howsoever he was obbliged as Cautioner, that how oft the Annualrents should be lawfully redeemed, in that case to imploy them again to her use, yet he was not oblig'd to imploy, where they voluntarly received the Money, and gave voluntar Renunciations, no Redemption being orderly used; in which case of order of Redemption, and not of voluntar Renunciation, he alledged he had only become Cautioner, and the words of his Obligation could not be extended. This Alledgance was Repelled; and the Cautioner was found obliged to imploy again to the Relict in Liferent

rent the Sums uplifted, notwithstanding of her Renunciation, and albeit there was no order of Redemption used; for the Annualrents contained in the Contract being redeemable, the voluntar Renunciation was found of that same force, to astrict the Cautioner to re-imployment, seing there was a preceeding Reversion which was as necessar a Cause, as an Order and Decreet of Redemption; and because it was thereafter Alledged by the Cautioner, that the Relict had given up and confirmed her Husbands Testament, wherein she confirmed the Money beside him to a special Quantity, and the Utensils of the House to a special Sum, which was given up by her self, she then being in his House, and retaining the Possession of the House; likeas she became obliged in the Testament, to relieve the Cautioner therein, who was obliged to make the Goods forth-coming; therefore the *Lords* Allowed the Sums to the Relict, to meet the Sums *pro tanto*, which she desired to be imployed to her use by the said Suspender, and found that she ought to fulfil that to her self, she being full-handed therewith; and found that the Testament given up by her self as said is, and her own Obligation therein, to relieve the Cautioner for the Goods confirmed, was a sufficient Probation of her Intromission, and that there was no necessity to prove any otherways her Intromission, but that the same was sufficiently proven by the said Testament as said is: and consequently the *Lords* Found the said Suspender could not be charged by her *pro tanto*, seing she might by her own Intromission imploy the same to her own use; and albeit she Alledged, that divers of these Sums was evicted from her by her Husbands Creditors, by Sentences recovered by them upon lawful grounds of just Debt; yet that was Repelled, seing they Found that she might have Alledged, that she was a prior Creditor by her Contract of Marriage, and so more favourable, and therein she would have been preferred to them, and this being omitted by her, and so suffering other Creditors to be preferred in that which would have been first subject to her self, and whereby the Suspender was also frustrate of the means of his relief; This Alledgance was therefore Repelled also. Actor, *Aiton*. Alter. *Stuart* & *Cunninghame*. *Gibson* Clerk. *Vid.* 28 *Nov.* 1635, Relict of *Mowat*, for a voluntary Renunciation. 8 *March* 1622, La. *Corsinday*. 11 *Dec.* 1632, *Geiles Shaw*, where the Relict Executrix had Action notwithstanding; *vid.* the Cases there. 7 *Dec.* 1627, *Porteous*, and the Cases there.

Dumbar contra *Leslie*, *July* 8. 1628.

IN the Reduction *Dumbar* against *Leslie*, mentioned 23 *Feb.* 1628, the Defender Alledging that the Minor could not Renunce to be Heir, because *res non fuit integra*, seing he was Successor to his Fathers Lands *post contractum debitum*, and also had behaved himself as Heir to his Father, by Intromission with his Fathers Heir-ship Goods, and uplifting of the Mails and Duties of the Lands wherein his Father was Infeft, and that his Father was a Burges of the Kings Burgh-Royal, and that he thereby was a person who in Law had an Heir; the Defender condescended upon sundry Alternatives, whereby he Alledged, that *res non erat integra* to the Minor to Renunce; which Alternatives being considered by the *Lords*, they Found that a Charter, granted to the Minor of the Lands, whereof his Father was Heretor before the said Charter, flowing from no Deed done by the Father to the Son, but proceeding from the Disposition of the Superior, upon another Parties Resignation made in favours of the Son, having no dependance nor relation to the Fathers Right, made not the Son to be Successor to the Father in these Lands, albeit the Seasin given to the Son upon the foresaid Charter was after the contracting of the Debt controverted; for he could not be Successor in his Fathers Right of these Lands, the Right whereof he had acquired *aliunde* as said is; for seing the Fathers

Right ſtood in his perſon, and the Son claimed no Right to theſe Lands, whereby the Creditor might claim the ſame Right by Adjudication or otherways, and therefore the Purſuers Anſwer, to Eleid that Member of the condeſcendance, *viz.* whereby the Defender had Alledged, that the Minor ſucceeded to his Fathers Lands foreſaid, was Found Relevant to Eleid that Alternative, and alſo where the Defender condeſcended that he had ſucceeded to his Father in ſome other Lands, whereon he was ſpecial; that Alternative was Found Eleided alſo in that part by this Reply, *viz.* that the Superior had obtained Decreet againſt his Father, decerning all his Evidents of theſe Lands to make no Faith, after which Decreet he had for Sums of Money obtained to himſelf a new Right of the ſame Lands; which the *Lords* Found Relevant, ſeing there was nothing qualified to detect, that that Infeftment after the ſaid Decreet, was obtained by the procurement and Travels of the Father; and where the Defender condeſcended, that the Minor had medled and intromitted with the Evidents of the ſaids Lands wherein his Father was Infeft, and ſo Alledged that by that Deed he had behaved himſelf as Heir; that was Repelled, and the Intromiſſion with the Evidents (no other Deed being done thereon) was not Suſtained *ad hunc effectum:* neither was it Suſtained that it was Alledged, that the Minor had ſince the deceaſe of his Father in ſome Writ and Evident ſubſcribed as Heir, and ſo profeſſing himſelf: for the *Lords* Found that the ſubſcribing of the Writ, bearing that Deſignation of the Party, was not enough to make him Heir, not being done in *re hæreditaria*, ſpecially the Purſuer Subſcriber being then & yet Minor; and where the Defender condeſcended, that the Minor had intromitted with the Mails and Duties of the Lands, wherein his Father was Infeft; that was Eleided, becauſe the Fathers Relict had a Tack thereof for her Lifetime, by whoſe Tollerance he had Intromitted: which the *Lords* Found Relevant, and Declared, that the Tack being proven by Writ, the Tollerance might be proven by Witneſſes againſt this Party; alſo the *Lords* Found, that the Defunct being denuded of the Heretable Right of his Lands by a Decreet, decerning the Evidents thereof to make no Faith, if he had no other Lands wherein he ſtood Infeft the time of his deceaſe, he was not ſuch a perſon who might have an Heir, ſo as if becauſe he was once *Baro*, he ſo continued, *quia ſemel Baro, ſemper Baro*, which Rule holds but *preſumptivè*, viz. that where one is *Baro* ſhown, it is preſumed he ſo continues; and which Preſumption holds, except it be contrary-ways ſhowen, that he was really denuded, and then the Preſumption ceaſeth *quia præſumptio cedit veritati*; and where the Defender condeſcended, that the Father was a Burges of ſome Royal Burgh, the *Lords* Found not that Relevant, becauſe it was not Alledged, that he was an actual Reſident Burges, Indweller within Burgh, and uſing the exerciſe of a Burges by Trade; which not being Alledged, but only that he was *civis honorarius*, the *Lords* Found, that made him not to be of ſuch a Quality, as that thereby he had an Heir, who might be conveened as Heir, for Intromitting with the beſt Movable Goods pertaining to the Defunct. Actor. *Stuart & Gibſon.* Alter. *Nicolſon & Mowat. Scot* Clerk. *Vid.* 22 *March* 1628, *Farquhar* contra *Campbel*, and the Caſes there cited. 13 *July* 1631, L. *Gadgirth.* 24 *January* 1627, L. *Glenkindie.* 10 *July* 1628, La. *Maxwell* for proving of Tollerance.

Aliſon contra *Trail, Eodem die.*

IN an Action of Spuilzie *Aliſon* contra *Trail*, the Defender being conveened for Spuilzie of certain of the Purſuers Goods, which were libelled, to be in the Defenders own Houſe: The *Lords* Found no Action of Spuilzie could be Suſtained for the Goods which were libelled, to have been in the Defenders own Houſe; albeit the ſame pertained to the Purſuer, but that the Purſuer might purſue for reſtoring and delivery of the Goods to her. Actor.

Alter. *Belſhes.*

Semple

Sempill contra *Cunninghame*, *Eodem die.*

IN a Controvention, *John Sempill* against *Cunninghame*, The *Lords* sustained the Pursuit, only founded upon a Charge, given by the Pursuer to the Defender, to find Caution of Law-borrows, albeit no Horning followed thereupon: but it was sustained, because the Pursuer Replyed, that before the Deed Lybelled, whereupon Controvention was craved, the Defender had found Caution conform to the Charge, and he Pursued not the Cautioner, but the Principal Party, who was Charged; which Reply was sustained with the Summons, albeit the Lybel was not founded upon the said Act, but only upon the Charge. Actor. *Nicolson.* Alter. *Cunninghame.* *Gibson* Clerk.

Lauder contra *Mowat*, *July* 9. 1628.

IN a Suspension *Lauder* against *James Mowat*, the said *James* being Sheriff-Clerk of *Berwick*, was Charged by the said *Lauder*, to Extract a Decreet, obtained in the Court of the Sheriffdom, and the Clerk Suspending upon this Reason, that there was never such a Decreet; and producing the Process to verifie the same, no Minut of any Sentence was to be found, in any Part of the Process, and the Charger producing the Laird of *Eistnisbet*, who was Sheriff for the time, his Letter to verifie, that he had pronounced that Decreet, and which Letter bore the same. The *Lords*, notwithstanding of the Sheriffs Writ, Proporting, that there was a Decreet Pronunced, and given by him, Suspended the Letters *simpliciter*, In respect of the said Process, which had no such Warrand; and that the Clerk in his Office, ought to have greater Faith with the Process than the Assertion of the Judge, *cui non creditur, nisi quantum constat ex Actis.* Actor, *Dunlop.* Alter, *Mowat.* *Hay* Clerk,

La. *Maxwell* contra Tennents, *July* 10. 1628.

IN a Removing, Lady *Maxwell* against her Tennents, the Defender Alledging, that he bruiked the Lands Lybelled by Tollerance, Allowance, or Over-sight of the Rentaller, who was Rentalled in the Lands Lybelled by the Pursuer, during his Lifetime, and who was on Life the time of the Warning: this Exception was Found Relevant, albeit the Pursuer Replyed, that bruiking, without any Title, could not defend the Excipients; Tollerance, Allowance, or Over-sight, not being *nomina juris*, which could maintain the Excipients, the same being no valid Right; which Reply was not respected, and the said Tollerance, Allowance, or Over-sight was Found by the *Lords* ought to be proven either by Writ, or Oath of the Rentaller, by whose Over-sight and Permission, he Alledged that he bruiked, and found it probable after that manner. Actor. *Douglas.* Alter. *Hay* Clerk. *Vid. July* 15. 1628. betwixt thir same Parties. *July* 8. 1628. *Dumbar* contra *Lesly.*

Herries and *Cuminghame* contra *Lindsay*, *Eodem die:*

IN a Removing, *Herreis* and *Cunninghame* against *Lindsay*, the *Lords* sustained the Pursuit upon a Seasin, albeit the same was after the Warning, seing the Seasin proceeded upon a Charge, given by the Pursuer, to the Superior, who was Charged upon a Decreet, recovered by the same Pursuer, whereby the Author of her Right, *viz.* the Heir of her Husband, who by her Contract of Marriage, was obliged to give her a Liferent-Infeftment, in the Lands Lybelled, for not fulfilling whereof he was put to the Horn, and his Superior upon that Horning, was decerned to give her a Precept of Seasin; and for obedience of the Decreet, the Superior had given the said Precept, and she was Infeft by this Seasin produced, which was sustained, albeit done after the Warning, seing the same was before *Whitsunday*, subsequent to the Warning, and the saids Contract, Horning, and Decreet, and Charge given to the Superior, all preceeded the Warning, and was reput to be sufficient Diligence, to

make the ſubſequent Seaſin, to be drawn back to the time of the ſaid Diligence, which was done in due time, before the Warning, as ſaid is. Actor. *Oliphant.* Alter. *Scot* Clerk. *Vid. March.* 25. 1628. L. *Bar.* *July* 17. 1628. L. *Drumquhaſſill.*

Cant contra *Edgar*, *Eodem die.*

ONe *Cant* purſues *Edgar*, for payment to the Relict of umquhile *Edward Edgar*, of the third of her umquhile Husbands Moveable Goods, the ſaid umquhile *Edward* being Cautioner for umquhile Mr. *William Maxwell* of *Carvens*, to his Creditor, in an Heretable Bond, in the which Bond the ſaid Mr. *William* was obliged for his *Relief*, and the ſaid umquhile *Edward* being compelled, and having payed the Sum, and dieing before he was Relieved: It was Controverted, if that Relief contained in the Heretable Bond ſhould be eſtimat an Heretable Sum, and ſo pertain to the Heir of the Cautioner; or if it was Moveable, ſo that the Relict would have in Law her Third thereof, which the Defender *Alledged*, could not be found Moveable, ſeing he Alledged, that the Relief was of the nature of the Bond given to the Creditor, which was Heretable; Likeas the Defunct, had in his own Lifetime, obtained Decreet againſt the Principal, for whom he was Cautioner and had payed, for Repayment of the Principal Sum, with the by-gone Annualents, and decerning him to make payment alſo in time-coming of the yearly Annualrent, ay and while he were repayed, whereby the ſame pertained to the Defuncts Heir, and not to his Executors, who could not have Right to Sums, for which Annualrent was running to be payed in time-coming, and ſo the Relict could not claim a third thereof; Likeas the Defunct, before his deceaſe, had made *David Johnſton* Aſſigney thereto, and to his ſaid *Relief*, to the effect he might Compriſe the *Prinicipal* Parties Lands, to the uſe of his Bairns, whereby he had expreſt his own Intention, that he Willed, that the ſaids Sums ſhould be Heretable; All which was Repelled, and the ſaid Sums found to be Moveable, and not to pertain to the Heir, and conſequently, that the Relict had Right to her third, wherein the *Lords* Found, that ſhe was not prejudged by the Aſſignation made by her Husband, and by the Compriſing deduced thereupon by the Aſſigney, and Infeftment following on the Compriſing; ſeing the ſaid Aſſignation was made by the Husband on his Death-bed; at which time, The *Lords* Found, he could do no Deed, neither to his Bairns, or any other, to prejudge her in her Third of the Moveables; Likeas they Found the ſaid Relief to be of the Nature of Moveable Sums, notwithſtanding that the principal Bond was Heretable, *quoad Creditorem*, in ſo far that the ſame would pertain to his Heir, and not to his Executors, and this notwithſtanding of all the Arguments above-written: In this Proceſs it was alſo Queſtioned, if a Bond bearing this Clauſe, was Heretable or not, *viz.* whereby the Debitor was obliged to pay to his Creditor a Sum at a certain Term, as deſtinat to be laid upon Land for Annualrent: And in caſe of failzie, to pay at that Term an hundred pounds of Penalty, but he was no ways obliged to pay the Annualrent, by any Clauſe of the Bond. This Point was not Decided, albeit moſt of the *Lords* eſteemed the Bond of this Tenor to be Moveable, becauſe the Deſtination to employ a Sum for *Annualrent*, was not thought ſufficient, except according thereunto, the Sum had either been employed, or elſe that the Debitor had been expreſly obliged in the Bond to pay Annualrent, while the Re-payment thereof. For this Point Controverted, *Vid. November* 21. 1623. L. *Kinblathmouth* *March* 23. 1624. *Hamilton* *June* 21 1626. *Murray*, where it is found Arreſtable. *July* 10. 1629. *Wardlaw.* Actor, *Stuart* & *Nairn.* Alter. *Hope* & *Peirſon.* *Scot* Clerk.

Arbuthnet contra *Lighton*, *July* 11. 1628.

IN a Spulzie *Arbuthnet* of *Findour*, againſt *Lighton*, The *Lords* ſuſtained the Action (the ſame being reſtricted by the Purſuer to wrongous Intromiſſion)

mission against the Defender, who was Conveened therefore) in respect he had uplifted from the Tennents, Possessors of the Lands, a certain *Duty*, both for Stock, and Teind of the Corns of that Cropt, for which the Action was Pursued, which Receipt of that Year they Found sufficient, to make him answerable for the true Avail of the Tiends of that year, albeit it was not Lybelled, that he had Set the Lands so for Stock and Teind, any other year, before the year Lybelled, but one year alennarly; And albeit it was Replyed, that the Defenders Author, who was Heretor of the Lands, the years preceeding this year Lybelled, had been in use to Set the same to Tennents, for a Duty promiscuously payed for Stock and Teind, which was probable by Witnesses, albeit the Defender Contended, that it ought only to be proven by Writ, or by his Oath, and that the Pursuer ought to prove, that the Land was in use so to be Set the years preceeding the year Controverted, which was Repelled. *Actor. Gibson. Alter. Mowat. Gibson* Clerk. *Vid. March* 16. 1627. *Gibert Kirkwood.*

La. *Collington* contra *Ja. Haswell, Eodem die.*

IN a Removing, the Lady *Collington* contra *Ja. Haswell*, the Pursuer being Infeft by Sir *John Ker* in the Lands Lybelled, and having Set back to him, a Tack for a Dutie, containing Clauses Irritant, the said Sir *John* remaining in Possession, and having payed diverse years, the Duty of the Back-Tack to the Pursuer, thereafter he Dispones a part of the Lands to the Defender, who acquires, and continues 7 years in real Possession of the Lands; here both Pursuer and Defenders Infeftments were base, and the Defender in respect of his Right albeit Posterior, yet being many years clad with Real Possession, which he Alledged, gave him Preference to the Pursuers Right, which was also Base, and never Clad with *Real* Possession, as the Excipients was, conform to the 105. Act 7. *Par. Ja.* 5. who Alledged that he could not be Removed so Summarly, which Alledgance was Repelled, in respect of the Pursuers prior Right, which they found Clad with Real Possession, by Setting of the Back-Tack, and receiving the Dutie thereof from his Tacksmen; neither was it respected, what the Defender Alledged, that the Heretor, who was both their Author, keeping and retaining still the Real Possession of the Land, he was *in optima fide*, to take a Right from him, whom he knew to be Heretor, and was actual Possessor of the Ground, and the Back-Tack Set again by the Pursuer to this Author, could not be respected, and allowed, as Possession to the Pursuer, as if he had Set a Tack thereof to a third Person, which was Repelled. Actor. Alter. *Belshes. Gibson* Clerk. *Vid.* Feb. 7. 1628. L. *Balveny* contra *Innes.* July 8. 1626. *Turnbul.* June 23. 1627. *M'millan.*

La. *Ednem* contra the Laird, *Eodem die.*

IN a Poynding of the Ground, Lady *Ednem* contra the L. *Ednem*, the Lady being Infeft conform to her Contract of Marriage by her Husband, in an Annualrent of 3000 merks, to be uplifted out thereof, The *Lords* Found, that she had competent *Action* against the Tennents, for Poynding of any of the Tennents Goods which they had on the Ground, which was affected with that *Annualrent*, and that the saids Goods were in Law subject and lyable to the payment of the Annualrent, of all Years and Terms preceeding before the Poynding, notwithstanding that at that time they should be owing no Farm nor Duty to their Master, Heretor of the Land; and albeit the Terms of payment of the Duties, *viz. Yuill* and *Candlemass* were not come, nor yet the Legal Terms, *viz. Whitsunday* and *Martinmass*; For the *Lords* Found, that if the Terms were come contained in the Infeftment of the Annualrent, appointed for payment thereof, albeit the Term of paying of this Duty to his Master were not at that time come, yet the Annualrenter might Poynd *omnia*

invecta & illata within the Ground, as well any Strangers Goods and Gear, as the Goods of the Tennents, Labourers of the Ground; to the which payment the ſaids Tennents Goods were ſubject, albeit the Duties payed to their Maſter yearly, ſhould not extend to the half of that, for which their Goods ſhould be Poynded; and this was found, notwithſtanding of the 36 *Act*, 5 *Parl. Ja.* 3. which Provides, *That the Goods of the Labourers of the Ground ſhall not be Poyndable for their Maſters Debt, for a greater quantity than the years Duty payable to their Maſter*: Which Act the *Lords* Found did extend only, where Poynding was deduced againſt the Tennents Goods, for a Moveable Debt, as Sums of Money owing by the Maſter to the Creditor, and did not extend to Annualrents claimed by Infeftment, which they found affected the Ground, and all the Goods being thereon, to whomſoever they pertained, and for all bygones owing to the Poynder, albeit the Tennent were not Debitor to the Maſter, and before his Terms were come, if the Terms of paying the Annualrent were paſt. Actor. *Hope* & *Nicolſon*. Alter. *Alton* & *Mowat*. *Hay* Clerk. *Vid.* 26 *June*, & 23 *July* 1628. Betwixt the ſame Parties. 24 *March* 1626. *Gray* contra *Fairniſlat*. 21 *Novemb.* 1628. *Watſon* contra *Reid* of *Aikenhead*.

Dumbar contra *Mudie*, *Eodem die*.

IN a Declarator *Dumbar* contra *Mudie*, the *Lords* Found, that the Donatar who ſought the *D*eclarator upon a Horning againſt the Defender, for not taking of a Rebel, whom he was Charged to apprehend, by vertue of other Letters direct againſt him for that effect, as uſe is in ſuch caſes, where the Magiſtrat or other Officers are charged to take Rebels, were not holden to produce the ſaids preceeding Letters and Charges, which were the Warrands of the Horning, but that it was enough to the Donatar to produce the Horning, and found the ſaid Horning ſufficient; albeit the Defender Alledged, that there was no preceeding Letters, to be the Warrand of the ſaid Horning, and ſo that the Horning was null, which was Repelled in this place, without prejudice to the Party to Reduce thereupon *prout de Jure*. This is not Diſcrepant from the Deciſion 16 *January* 1622. L. *Drumlanrig* contra L. *Caſhogill*; except that here a Stranger is Donatar, who is not preſumed to have the Writ, which is proper to be kept in the hands of the Party Executor of the Charge, and not in a third perſons hands; and there the Donatar was that ſame perſon, at whoſe Inſtance the Charge was Execute, and ſo preſumed to have his own Letters. Actor. *Advocatus* & *M'gill*. Alter. *Nicolſon*. *Scot* Clerk. *Vid.* 16 *January* 1622. L. *Drumlanrig* contra L. *Carſhogill*. 28 *Novemb.* 1628. *Baillie*.

Bennet contra *Turnbull*, *July* 12. 1628.

IN a Removing *Rachel Bennet* contra *Turnbull*, the Defender being Minor, the *Lords* Found no neceſſity to Warn the Tutors and Curators by the Precept of Warning, they being Summoned by the *P*rincipal Summons of Removing, for the *P*recept is not a Judicial Act; and alſo the *D*efender defending upon a perſonal Contract made by the *P*urſuers *A*uthor, anent the borrowing of Money from the Defenders Father, to whom he was Heir, for the which he was bound, to give the Defenders Father and his Heirs Security of the Lands Libelled, and Diſponed the ſame by the ſaid Contract, (no other real Right following) to be bruiked without any *D*uty to be payed therefore, in place of the Annualrent of his Money, ay and while the Lands were Redeemed, by payment of the *P*rincipal Sum, according whereto he and his Father hath been in continual *P*oſſeſſion of the Lands thir many years bypaſt; which Security being of the nature of a Tack, ought to defend him. This Exception was Repelled againſt this Purſuer, who was a ſingular Succeſſor in the *R*ight of the Lands. Actor. *Taylor*. Alter. *Belſhes*. *Hay* Clerk. *Vid.* 17 *July* 1628. *Gechin* contra *Walkinſhaw*.

L. *Moriſtoun*

L. *Moristoun* contra L. *Frendraught*, *Eodem die.*

IN an Action *Moristoun* contra *Frendraught*, as Heir to his Father; which Father was Intromettor with the Defenders Good-sir his whole Moveable Goods and Gear, and which Good-sir was bound to pay 500 merks, and *Moristouns* Father to whom he was Heir, was Cautioner for the said Good-sir, and the said Good-sir obliged for his relief, the Bond being Heretable, and consequently the Defender being conveened, as representing his Good-sir in manner foresaid, *viz.* by being Heir to his own Father, and his Father being universal Intromettor with his Good-sirs Gear immediatly after his decease, for repayment to *Moristoun*, who was Heir to the Cautioner, of the said Sum, with the Annualrent thereof continually since his Father payed the samine, and ay and while he were re-payed of the Principal Sum. The *Lords* Found, that the Party being conveened *super hoc medio*, as universal Intromettor by the foresaid progress to the Good-sir, who was Debitor, was subject to pay the Annualrents ay and while the Principal Sum were re-payed, and sustained this Action against the universal Intromettor; albeit the Defender Alledged, that neither an Executor to a Defunct, nor an Intromettor could be conveened, for any more than that which was adebted by the Defunct at the time of his decease; and no Action can be granted against them for any Annualrent, which should run for Terms after the Debitors death; which Annualrent running thereafter, was only due to be sought from the Heir of a Defunct, and not from his Executor, or Intromettor with his Goods; for it is the Creditors own fault, who after the decease of his Debitor seeks not his Debt, which being timously sought immediatly after the Defuncts decease, either will force the Executor or Intromettor to pay the just Sum, owing by the Debitor at his decease; or if they do not, then for their own Cessation, they may be conveened for the Annualrents thereafter running; but if the Creditor ly off, and seek not the Executor or Intromettor many years thereafter, he cannot claim the Annualrents for Terms after the Debitors decease from them, but should seek the same from the Heir: This Alledgance was Repelled, and the Action sustained for all the Annualrents since the Defuncts decease, from the time of the payment made by the Cautioner, unto the Term of payment, to be made to him against the universal Intromettor, who Intrometting *sine titulo*, behoved to be esteemed a vicious Intromettor, and so could not have the benefite of an Inventar, which is competent to an Executor: And in this Process, as in all the like Cases pursued against Parties, as universal Intromettors, The *Lords* are ay in use to Find, that one conveened as universal Intromettor, if he be proven to have any Intromission with the Defuncts Goods, albeit he be not proven to have Intrometted with all, is lyable to pay the Debt for which he is conveened, if he cannot purge his Intromission, before there be an Executor Confirmed to the Defunct, who may have *beneficium Inventarii*, for his vicious Intromission produces that effect; And this is ordinarly observed, albeit before the Commissars it be not so, where more being proven to be Intromettors, every one is subject *pro parte* for the Debt, and not one for all. Likeas the *Lords* thought that an Executor (albeit that was not the Case now controverted) would be subject in the like, if the Defuncts Goods would extend to so much, and were not otherways exhausted; For the *Lords* thought that a Creditor could not be prejudged of that Annualrent, whereof he had lawfully provided himself by his Heretable Security, if his Debitor should want an Heir, and have Executors or Intromettors with his Goods; as was in the same case, where none was Heir to the Good-sir, and that the same person, who in Law should be his Heir, was Intromettor; neither was there any Testament of his given up, or Executors Confirmed to him, so that the Pursuit was sustained, as said is, and the *Lords* Found, that the De-

Defender might yet give up a Testament, and the Debt Libelled being satisfied, he may obtain Exoneration thereby against any other Creditor of the Defuncts, if there be no more Gear than which would satisfie his Debt, or if there were, by making of the same forth-coming to the other Creditors; and where the Defender Alledged, that any Intromission which his Father had with his Good-firs Goods, the same was only by buying of the same from the Defenders Fathers own younger Brother, who in Law would have been the Good-firs *Executor*; and which younger Brother after the Fathers decease, medled with the whole Goods, and the Defenders Father bought the same from him in an open Rouping, in the House where the Good-fir died, and payed the price therefore to him, which Deed cannot make him Intromettor. And further he also Alledged, that the Good-firs Escheat was gifted to the L. *Lesmoir*, not only of all Goods, which he then had (the same being gifted in *Anno* 1599.) but also of all Goods which he should acquire, during his remaining Rebel: Likeas he died Rebel, and which Gift of that Tenor was also declared against the Rebel *in foro contentiosissimo*, conform to the which Gift and Declarator, the Defenders Father being then Administrator to the *Defender*, he being then an Infant, Intrometted with the saids Goods as Escheat-goods, in name of the Defender who was made *Assigney* thereto by the L. *Lesmoir Donatar* thereto, as said is; so that his said Intromission being by vertue of the said Title, and in name, and to the behove of the Defender Assigney thereto, and to his Sons use, the same cannot be burdenable to him. Thir *Alledgances* were *Repelled*, and the Action sustained against the *Defender*, as Heir to his Father, who was Intromettor, in respect of this Reply, *viz.* That the Pursuer offered to prove, that the Good-fir remained in Possession of his whole Goods, notwithstanding of the Escheat and Declarator, which was in *Anno* 1599. to the time of his decease, which was in *Anno* 1612. at the which time immediatly after the Good-firs decease, the *Defenders* Father, who was his eldest Son, Intrometted therewith, and used the same at his pleasure; and the said Gift and Declarator which was 13 years before the Rebels decease, cannot extend to the Goods which were in his Possession at the time of his said decease. This Reply was sustained, for Eleiding both the foresaids Exceptions, which were Repelled in respect thereof. Actor. *Nicolson* & *Craig*. Alter. *Advocatus* & *Oliphant*. *Gibson* Clerk. *Vid.* 28 *June* 1632. *Dalrymple* contra L. *Closeburn*, & *Penult January* 1630. *Calderwood*.

La. *Maxwell* contra her Tennents, *July* 15. 1628.

IN the Removing Lady *Maxwell*, whereof mention is made *July* 10. 1628, the Pursuer Replying, that he could not clothe himself with that Rental, because it bore that Provision, *that if the Rentaller should put any other in Possession of the Land, except only himself, that then it should be null*; so that if the Rentallers self were pursued to Remove, the Rental would not defend him, far less can it defend this Excipient; and the Excipient answering, that he could not be compelled to dispute upon that Right, which was not Set to himself, but the Rentaller should be Summoned, who is not called in this Process, before the Rental could be drawn in Dispute upon any nullity, whereto he would answer: The *Lords*, notwithstanding that the Rentaller was not warned, nor summoned, Sustained the foresaid Reply against the Excipient, whom the *Lords* Found ought to Dispute for maintaining of that Rental, which was the Ground of his Possession, and whereupon he founded his Exception. *Vid. Penult January* 1628, *John Stuart*. & 5 *March* 1629, L. *Ley*.

Bannatine Donatar contra *July* 17. 1628.

IN a Transferring of a Declarator of the L. *Drumelziers* Liferent, at the instance of one *Bannatine* Donatar thereto, wherein Litiscontestation being made by

by the Compearance of a contrary Donatar, who was admitted for his Interest; and a Reply proponed and admitted, for Eleiding of an Exception proponed by him, which Donatar dying since Litiscontestation, this Process was desired to be transferred in one representing the said Donatar; to the which Transferring the *Lords* Found no necessity, to Summon the principal Party Defender in that Declarator, seing he was living, and so needed not to be summoned; albeit it was Alledged, that the Process wherein he was principal Party, could not be moved nor medled in by any judicial Deed, except he were cited thereto: This Action being for Procedor, in a Process wherein he was Party principal, wherein nothing could be done, except he had been legally cited, this being a Diet in the same Process: Which Alledgance was Repelled, and the Transferring Sustained without necessity to cite him, seing he would be summoned after the Transferring by a Wakening. Actor. *Stuart*. Alter. *Scot*. *Hay* Clerk.

L. *Drumquhashill* contra *Cleeland*, *Eodem die*.

IN a Removing the L. *Drumquhashill* against Sir *James Cleeland*; The *Lords* Sustained the Warning and Summons, and Process of Removing, albeit that at the time of the Warning the Pursuer was not Infeft nor Seased, seing he was Seased 40 days before the Term, to the which the Warning was made, which Seasin proceeded not upon a Retour, but upon a Precept of *Clare Constat*, given by the Duke of *Lenox* Superior, and which albeit it was not of a date anterior to the Warning, yet being 40 days before the Term as said is, was Sustained. Actor. *Cunninghame*. Alter. *Gibson* Clerk. *Vid.* 23 *July*, and 4 *Dec.* 1628, betwixt these same Parties. 10 *July* 1628, *Herris*.

Geichen contra *Walkenshaw*, *Eodem die*.

IN a Suspension *Geichen* against *Walkershaw* of a Decreet of Removing; The *Lords* Found a Reason Relevant founded upon a Contract made betwixt the Suspender, to whom the Charger was Heir, or behaved himself as Heir, by Intromission with his Heir ship Goods and Gear after his decease, and thi Suspender, obliging him not to remove the Defender from the House libelled, until the time he payed 50 Pounds then borrowed from the Suspender, conform whereunto the Defunct entered the Defender in Possession, and by vertue thereof she yet continues in Possession, and ought not to Remove until her Money be payed. This was Found Relevant against the Charger, who was offered to be proven Heir, or behaving himself as Heir to the Contracter as said is, but it is not admitted against a singular Successor. *Hay* Clerk. *Vid.* 12 *July* 1628, *Bennet* contra *Turnbul*.

Peacock contra *Peacocks*, *July* 18. 1628.

IN an Action *Peacock* against *Peacocks*, the Defenders being two of three Executors confirmed to their Father, were pursued for payment of a Sum owing to the Pursuer by their Father, wherein the *Lords Found* no Process against the two Executors, because the third Executor confirmed with them was dead, and who before her decease had received Payment of her own whole third part of the Defuncts Goods, and so her part was execute; and therefore the *Lords* Found, that no Process could be granted against the rest of the Executors, until some person were conveened to represent the Executor deceased, except the Pursuer would Reply, that the Executors surviving who were conveened, had intromitted with as much of the Defuncts Goods, as would satisfie the Debt acclaimed; which being Replyed, the *Lords* would Sustain the Process against the Executors living for the whole Debt. Actor. *Stuart*. Alter. *Hay* Clerk. *Vid.* 23 *July* 1625, *Aitkin* contra *Ewart*, & 13 *January* 1625, *M'michael*.

L. *Lugton* contra *Somervel*, *Eodem die*.

IN an Action L. *Lugtoun* against *Hugh Somervel* of *Drum*, for Removing from a Rigg of Land, which *Lugtoun* Alledged to be part and pertinent of his

Lands of *Gilmertoun*, wherein he was Heretably Infeft, and that the same was so bruiked by him and his Predecessors, past memory of Man, and possest by them peaceably; and the Defender Alledging, that he was Infeft in another part of the Lands of *Gilmertoun* Heretably, whereof the Rigg libelled was part and pertinent, and which was so possest by him and his Predecessors, past memory of Man. The Pursuer was Preferred in his Reply, and the Defenders Exception Repelled; but it would appear, that the Pursuer ought to have condescended how he lost his Possession, and after what manner the Defender apprehended the same, and both Parties ought to have been urged to Dispute, and make these Points clear. Actor. *Stuart*. Alter. *Scot* Clerk.

Lo. *Borthwick*, *&c.* contra *Hilstain*, *&c.* *July* 22. 1628.

IN a Suspension Lord *Borthwick* and *Walter Hay* against *Hilstain* and *Smith*, where two Creditors had Compryfed the Lands of their common Debitor, and had Charged the Lord *Borthwick* Superior of the Lands, to enter them both, and the Creditor who was prior in Compryfing and Diligence Alledging, that he only ought to be received by the Superior, in respect of his said Diligence, and the other contending, that the Superior ought to receive him also. The *Lords* Found, that the Superior ought to receive both the Compryfers, without prejudice to them in their own time and place, to dispute which of their Rights should be preferred to others: for the *Lords* Declared that the Superiors receiving of them both at one time, now conform to this Ordinance, should not prejudge any of the Compryfers in the just advantage, which the priority of Diligence might give to the one before the other; which priority should not be prejudged by this receiving of the last, as soon in his Entry by the Superior, as the first; and as concerning the Duty to be payed to the Superior, because it was questioned, if both the Compryfers, and each one of them, should pay a years Duty of the Land to the Superior, or that one years Duty should only be payed, and by which of the two the same should be payed. The *Lords* decided not that point that day: but thereafter upon the 26 of *July* 1628 in this same Cause, this point being heard, and considered, they Found, that the Superior ought to have one years Duty from all the Compryfers, or any of them, who most trusted to his Compryfing; which years Duty, so to be payed by the Compryfer to the Superior, the *Lords* Found in the like Cases in all time coming, should be repayed again to the Payer, if his Right shall be rejected, and another Preferred to him, he who shall be Preferred, and by whom he shall be excluded shall reimburse him. Actor. *Hay*. Alter. *Gibson* Clerk. *Vid.* 11 *March* 1628, L. *Kilkerren* contra *Cowper*.

L. *Drumquhashill* contra *Cleeland*, *July* 23. 1628.

IN the Removing Laird of *Drumquhashill* against *Cleeland*, mentioned 17 *July* 1628; The *Lords* Found the Exception Relevant against the Warning, that the same was null, because it was not Execute at the Paroch Kirk where the Lands lay, in so far as the Teind-sheaves, and other Teinds, both Parsonage and Vicarage of the saids Lands, are payed to the Parson of the Kirk of to whom the same pertains, and are no ways payed to the Titular of the Kirk, where the Warning is Execute, and that he hath no Right thereto, whereby the saids Lands must be found to ly in that Paroch, where they pay their Teinds, and consequently the Warning not being Execute there, must be null; which Alledgance was Found Relevant, notwithstanding of the Reply, bearing, *that the Indwellers of the Lands libelled, have had continual Repair, past memory of Man, and went to the Kirk where the Warning was Execute, and hears continually the Word and Preaching there, and receives Baptism and the Lords Supper, and Marriage there, and their Dead are Buried in the Church-*

yard

yard there, so that they must be repute Parochioners there; and the Warning at the Kirk being ordained, that the Persons warned get knowledge thereof, that was the surest way to make it come to their knowledge, it being done at the part where they only resort; which was Repelled, and this Qualification not respected to sustain the Warning.

La. *Ednem* contra the Laird, *Eodem die.*

IN an Action for Poynding of the Ground Lady *Ednem*, mentioned 11 *July* 1628; The *Lords* Found, that a Seasin of an Annualrent, taken at any part of the Barony, out of which the Annualrent is Disponed to be uplifted, where all the Lands of the Barony lyes contigue, doth affect all the Lands and others belonging to the Barony, the same lying contigue as said is: albeit the said Seasin be not taken at the place, destinate and appointed for taking of Seasin in the Charter and Evidents of that Barony, made and granted to him, who is the Granter of the Annualrent; and there being Exception proponed, that the Defenders had a Tack of the Lands Set for an onerous Cause by him, who was the Pursuers Author, and before the Pursuers Right, whereby they Alledged, that the Ground could not be poynded for any more at the Pursuers instance, but for the Duty of their Tack, seing conform to their Tack they were in Possession of the Land, divers years before the decease of the Setter, and had payed the Tack-duty to the Setter, and had reported his Discharge thereon: This Exception was Found Relevant, notwithstanding of this Reply, that the Pursuers Seasin was given for Implement of her Contract of Marriage, and was so the more favourable, and the same was more real than a Tack, which Tack could not maintain the Excipients, except it had been clad with Possession before her Seasin, for her Husbands Possession was her Possession, and no subsequent Possession of the Tacksman after her Right, could make the Tack to subsist against her; which Reply was Repelled, and the Tack Sustained, being Set for an onerous Cause to lawful Creditors, and before her Seasin; which Tack being clad with Possession in the Setters life-time, albeit not before the Pursuers Right, was found sufficient; and Found that the Defenders needed not to alledge Possession before her Right, and so the said Exception was admitted. *Vid.* 17 *Nov.* 1627. & 16 *Nov.* 1630, L. *Clackmannan.* 15 *Dec.* 1630, *Stirling.*

Stirling contra *Panter* & *Ogilvie*, *July* 25. 1628.

IN a Reduction betwixt *Stirling* contra *Panter* and *Ogilvie*, for Reducing of an Infeftment, in respect of a preceeding Inhibition; the Defender *Alledging* the Inhibition to be null, because the Dwelling-Place of the Party Prohibited to Annailzie, whereat the Inhibition was Execut, was within a *Regality*, where conform to the 264 Act. 15. *Par.* Ja. 6. The same should be Execut at the Head-Burgh of the Regality; Likeas the same should be Registrat in the Registers of that Regality, and this Inhibition is neither Execute, nor *Registrat* there, but only at the Mercat-Cross of the Head-Burgh of the Sheriffdom, and Registrat in the Sheriff-Clerk's Books. This *Alledgance* was Repelled, and the nullity foresaid was Found, ought not to be received, by way of Exception, but was Reserved to the Party, to be pursued by way of Ordinar Action of Reduction, *prout de jure*; And thereafter the Defender Alledging Improbation of the Inhibition, which being found *Relevant*, the *Pursuer* Alledged, that seing Improbation was the last Exception, which excluded the proponing of any other Defence, therefore he Alledged, that the Defender could not thereafter be heard, to return to pursue any Action of Nullity against the Writ. The *Lords* Found, that notwithstanding the Improbation, he might thereafter pursue the Nullity, seing the same Nullity being in this same *Process* proponed by way of Exception, and found not to be admissable in this place

by way of Exception, but reſerved by way of Action, the Party ought not to be prejudged, to Inſiſt thereon in an ordinary Purſuit, albeit the Purſuer Contended, that the ſaid Improbation ſhould either alſo be reſerved by way of Action, and not proponed in this Place; or elſe if the Defender would propone the ſame here by way of Exception, that thereby he did prejudge himſelf, and could not thereafter return to Purſue upon the Nullity thereof, which was Repelled. This Deciſion was ſtopped, and the Cauſe ordained to be heard over again, and the ſame being *Reaſoned*, *July ult.* 1628. *The* Nullity forſaid was received by way of Exception, and admitted to the Excipients Probation. Actor. *Advocatus Hope* & *Nicolſon*. Alter. *Stuart*. *Gibſon* Clerk. *Vid. Decem.* 14. 1621 E. of *Winton*. *Jan.* 29. 1629. betwixt thir Parties. The like done in a Declarator, Mr. *Alexander Burnet* contra Ladie *Bonitoun*, of her Liferent-Eſcheat, *March* 10. 1637. where ſhe firſt proponing a Nullity againſt the Horning, *viz.* That ſhe dwelt within another Sheriffdom, than at the Head-Burgh, whereof by the Horning ſhe was Denunced, which was *Repelled hoc loco*, and reſerved to her to *Reduce* thereupon: and ſhe thereafter proponing Improbation, The *Lords* Found this Alledgance of Improbation ſhould not prejudge her, to purſue Reduction, upon the ground of Nullity, which was proponed by her, and was Found not admiſſable, in this place, by way of Exception againſt his Purſuit.

Reull contra L. *Aiton*, *July* 26. 1628.

IN an Action to make Arreſted Goods forth-coming, *Reuell* contra L. *Aiton*, and his *Tennents*, who were conveened to make the Farms adebted by them to their Maſter, forth-coming to him, as Arreſted in their hands at his Inſtance, for ſatisfaction of a Sum contained in a Decreet, obtained by him againſt their ſaid Maſter, and one who was made Aſſigney to the L. *Aitons* Liferent, by the Donatar thereto, and in and to the Decreet of General Declarator obtained by the Donatar thereupon, Compearing and Admitted in this Proceſs, for his entreſs, and which Aſſigney having raiſed a ſpecial Declarator againſt theſe ſame Defenders, for payment to him of thir ſame Terms Lybelled; In reſpect whereof, he Alledged, that he ought to be Preferred to the Creditor Purſuer, and the Purſuer proponing ſundry Arguments of Simulation againſt the ſaid Gift, and the Aſſigney *Anſwering*, that they could not be received againſt him the *Aſſigney*, albeit they might be received againſt the Donatars ſelf, if he had not been denuded, ſeing any Simulation betwixt the *Donatar* and the Rebel, whereof the *Aſſigney* was not Partner, could not be now obtruded to the ſaid Aſſigney. The *Lords* Found, ſeing the Purſuer had Arreſted the ſaids Farms Lybelled, before the *Donatar* was denuded thereof by this Aſſignation Excepted upon, that whatſoever Alledgance of Simulation could have excluded the Donatars ſelf, after the laying on of the Arreſtment by the Purſuer, if the Donatars ſelf were Compearing, and not denuded, the ſame ought to be received, now in the like-manner, againſt the Aſſigney conſtitute, after the Arreſtment. *Actor.* Alter. *Belſhes*. *Hay* Clerk. *Vid. Decem.* 10. 1623. *Douglas* contra *John Belſhes*.

L. *Wardis* contra L. *Dinkintie*, *Eodem die.*

THE L. of *Wardis* purſues the L. *Dinkintie* for the *Aſtricted* Multars of his Lands, in the which Multars *Wardis* was Infeft, and the Defender proponing a Nullity againſt the Purſuers Infeftment, the ſame being of Lands of the Abbacy of *Lindors*, ſince the Annexation whereof to the Crown, there was no Diſſolution made before the Purſuers Infeftment, without which had preceeded, the Purſuers Infeftment could not be found valid, the ſame being granted ſince the Annexation: this Nullity of not Diſſolution was not received againſt

againſt this Infeftment *hoc ordine*, Becauſe it was offered to be proven, that the ſame was Clad with real Poſſeſſion thir 15. years by-gone, and becauſe there was three Infeftments ſtanding in the Perſons of three of the Purſuers Authors, which the *Lords* Found could not be taken away ſo Summarly, by Exception in this Judgment, tending to continue a Poſſeſſion, and not to acquire a new Poſſeſſion, but they reſerved Action upon that Nullity to the Excipient, as accords: Actor. & *Davidſon*. Alter. *Advocatus*. *Gibſon* Clerk.

Mitchelſon contra *Ker*, *Eodem die*.

IN this *Action* two Compriſers, who were both Infeft in the Lands, contending for the Mails and *Duties* thereof, and having conveened the Tennent therefore; and the laſt Compriſer proponing Nullity of the other Parties Compriſing and Infeftment, albeit prior to his; which Nullity, the *Lords* Finding, was receivable, *etiam hoc ordine*, without Reduction, where none of the Parties Alledged Poſſeſſion, thereby to claim the Benefit of a Poſſeſſor Judgment, but were in preſent Diſput for the Poſſeſſion, that by vertue of their Rights he having the beſt Right might be *Authorized* to Poſſeſs, whereby the Party againſt whom the Nullity was proponed, was forced to *Alledge* Poſſeſſion by vertue of his Right, and conſequently that the Nullity could not be received, but by way of Action, which Poſſeſſion he qualified, in ſo far as the Tennent conveened bruiked the Land by his tolerance. 2°. That the Tennent, and the ſaid Compriſer verbally agreed together, to pay to the ſaid Compriſer twenty ſhilling yearly for the ſaids Lands, and which Duty the Tennent had payed divers years ſince his Right; Neither of theſe Qualifications was Found Relevant, *viz.* Tollerance to bruik, which the *Lords* Found no Poſſeſſion in the Compriſers Perſon, neither verbal *Setting* for twenty ſhilling each year of Land eſtimat yearly to 500. Merks, which was to be ſuſpected in a Compriſer, who is preſumed in Law, if he had not Intended Fraud and Prejudice to other Creditors, would not have Set the Land ſo far within the worth, and ſo the Nullity was received, by way of Exception, notwithſtanding of the foreſaid Anſwer, and Qualification of Poſſeſſion. Actor. *Craig*. Alter. *Gibſon* Clerk *Vid. Feb.* 24. 1627. *Andrew Lows. Feb.* 1. 1631. *Blaus* contra *Wimaham*.

Martin contra *Birſs*, *July Penult.* 1628.

IN a Reduction *Hory Martin* contra *Birſs*, for Reducing of an Infeftment of two Aikers of Land in *Preſton*, the Defender Alledged, that the Purſuers Seaſin was null, becauſe it proceeded upon a *Retour*, whereby ſhe is ſerved Heir to her Father in the Lands Lybelled, before the Sheriff of *Edinburgh*, albeit the Lands lyes in the Conſtabulary of *Haddington*, and ſo the Service ſhould have been deduced before that Judge, and not being ſo done, the *Retour* was *a non ſuo Judice*; and therefore null *ope exceptionis*, this Alledgance was *Repelled*, and the Nullity not received *hoc loco* by way of Exception, ſeing the ſame conſiſted *in facto*, and that the Retour was not produced in this Proceſs, but only the Seaſin, which bore no ſuch thing of the lying of the Lands, and reſerved Action of Reduction againſt the ſaid *Retour* as accords *Actor*. *Mowat*. Alter. *Hay* Clerk.

Rachelet contra *Lawder*, *July ult.* 1628.

IN the *Action* of *Rachelet* contra *Lawder*, mentioned *July* 4. 1628. The *Lords* Found that albeit the Charge given to the Sheriff, to take a *Rebel*, Execut upon a *Sunday*, was not of Force, to make the Sheriff lyable to the *Creditor*, for his diſobeying of the Charge given that day. Yet it was effectual to make him lyable to the Creditor, if after that day the Rebel was in the Sheriffs company upon a week day, & within the Sheriff his Juriſdiction; & that the ſaid Charge was given upon a *Sunday*, as ſaid is, was ſufficient to produce that effect, without any other new Charge, albeit the Party *Alledged*, that the Charge given that day, was a null

Charge, and so could not be effectual to work any thing, whereon any Act or Pursuit might be founded, which was not respected; & also Found, that the Sheriff remained obliged to the Creditor, if the Rebel remained in the Sheriffs House all the night, with the Sheriffs knowledge: for albeit a Magistrat cannot be Charged in the night, to take a Rebel, yet he being Charged before, and the Rebel being all night in the Sheriffs House, with the Sheriffs knowledge, he might have detained him upon the Morrow, and so obeyed the tenor of the Charge, and not doing the same, he was lyable to the Party for the Debt. *Vid. March* 12. 1629. *Cunninghame* contra Sheriff of *Stirling*. *Item Novem.* 19. 1628. *James Rae.*

Betson contra L. *Grange, November* 14 1628.

IN an Action of Exhibition of Writs *Betson* contra L. of *Grange*, The *Lords* Found, that the Advocats Compearing for the Defender, in that same Cause, might be used by the Pursuer, as Witness to prove the Summons, anent the Defenders having of these Writs Lybelled, and that they ought to *Depone* thereupon, and that it was no competent Objection to Repel them *a testimonio*, that the *Defender* was their Client, *cui patrocinabantur in hac eadem causa*, against whom they could not be compelled to bear Witness, in that which their Client had communicated to them in secret, and thereby to Publish against him, and to his prejudice, that which he had either spoken, or shown to them under Trust, which if they should be subject to do, by compelling them to depone upon their Oaths as Witneses, they could not but incur a great Suspicion of prevarication; and it was desired, that the *Lords* would consider the Consequence and Preparative thereof, which tends to force Advocats, to Detect the Secrets of their Clients Cause, which *Alledgance* was Repelled, and Found, that they ought to be Witness; in doing whereof, the *Lords* Found, that thereby they incurred no Suspition of Prevarication; for though they were not holden to detect the Secrets of the Cause intrusted to them, which is to be understood, anent the Counsel and advise given by them to the Client, for the best and most lawful means of his Defence, and Prosecuting of his Cause, yet that thereby they could not be fred, of being Witness upon any thing Lybelled, and admitted to Probation against their Clients, being Found Relevant by the Judge, consisting in their Knowledge, and whereof possibly there was no other means of Probation but by them. Actor. *Nicolson* & *Lermonth.* Alter. *Aiton.* *Hay* Clerk.

Cuming contra *Cuming, Eodem die.*

IN an Action *Cuming* against *Cuming*, the Buyer of Land having given a Bond to pay the price thereof to the Seller, and which bore the Sum to be owing for the price of the Land; and at the date of the said Obligation, the Seller by a Back-bond binding himself to the Buyer, to Ratifie the Alienation made by him at his perfect Age, and if he failzies, to pay a great Sum, contained in the Back-bond, which exceeded far the price contained in the Buyers Bond foresaid, obliged to be payed for the Land; and the Seller thereafter having made another Assigney to that Bond, given to him for the price of the Land, which was pure and simple, and affected with no condition; and which Assigney having Charged therefore, it was Found, that albeit the Bond Assigned was pure, yet it was affected with the condition of the Back-bond made of the same date; and it was respected as a part of the said Alienation, and as if it had been infert in the Bond, and was found met the Assigney, as it would have met the Cedents self; and seing the Bond made by the Buyer to the Seller, which was Assigned, bore to be granted for the price of the Land, It was Found, that the Buyer could not be compelled to pay the same, before that the

Assigney

Assigney should obtain the Cedents Ratification of the Alienation, done by the Cedent after his Majority, conform to the Back-bond, or else until the time he was past the age of 25 years, and so after the years of his Restitution; and which was so Found, albeit the Back-Bond bore no Clause, that the Buyer should not pay the price till that were done, but only astricted the Seller to pay a greater Failzie to the Buyer, if he Ratified not, which was not respected as said is; but in the mean time, during the Retention of the Money, the Buyer was obliged to pay Profite to the Assigney yearly, while the Sum were payed by him. *Actor. Lawtie. Alter. Nicolson & Neilson. Hay* Clerk.

Rae contra *Dowglass*, *Novemb.* 19. 1628.

IN this Process, Charges being Execute by a Creditor against two Baillies, Deputes of a Regality, which being Suspended by one, upon this Reason that the Charge and Execution bore not, that a Copy was delivered to him who Suspended; this Reason was not sustained, because the Execution bore, *That both the Baillies were standing together, and the Rebel in their company with them then, when Charged personally to take the Rebel at the Creditors instance, and that a Copy was delivered to one of the Baillies for himself, and for the other Baillie, they being then both present together*; which Execution was found sufficient, albeit a Copy was not delivered to each of them, and the Letters were found orderly proceeded against both, they being conjunct in the Office, and being both present together. Actor. *Belshes.* Alter. *Scot* Clerk. *Vid. Ult. July* 1628. *Rachelet* contra *Lawder*, and the other Cases there.

This same day, in this same Process, betwixt thir same Parties, a Charge given to the Baillies to take the Rebel, Execute upon a Sunday, was not sustained, and the Magistrat found needed not to obey that Charge; But because it was Replyed by the Charger, that the Rebel was thereafter upon other lawful days since the day of that Charge, in the company of the Baillies now Charged within some part of his Jurisdiction, and which was referred to the Baillies Oath; This Reply was sustained, to fortifie the said Charge; which although it was not of that force, being Execute upon a *Sunday*, that might compel the Baillies to give obedience on that day, yet that was found sufficient to make him lyable in Law, for his accompanying with the Rebel thereafter within his Jurisdiction, and then not doing his duty to take him, which was admitted, being referred to his Oath; And the *Lords* declared, if he should Depone and Declare by his said Oath, that at that time he accompanied with the Rebel, he had not power then to take him, as if he had been been better Horsed, or more people with him, or that being in the Fields the Baillie was alone, or such like other considerable Circumstances; That the *Lords* would at the Advising of the Cause and Oath have regard thereto, and consider if the Defender had probability of excuse, for not taking the Rebel.

Westoun contra *Stuart*, *Novemb.* 20. 1628.

A Declarator of Liferent being sought upon a Gift granted at Court, and Superscribed with the Kings own hand there, wherein there was no special mention made of any Horning, bearing the Rebel to be put to the Horn for whatsomever Cause preceeding. The *Lords* Found no Declarator could pass upon that Gift, wherein no special Horning was insert, albeit the Summons of Declarator was Libelled upon a special Horning, which preceeded the Gift year and day, and which the Pursuer produced, and whereto he restricted his Gift, as if the same had been insert specially therein, and which he Alledged was sufficient, seing there was no contrair Donatar, and that the Kings Officers quarrelled not the same, and that it was obtained at Court, where the ignorance of that omission is excusable; and that the *Donatar* is

content to pay the Debt of that Horning produced, notwithstanding whereof no Process was found upon that Gift, wherein no special cause of Rebellion by a special Horning was expreſt. Actor, *Burnet.* Alter. *Gibſon* Clerk.

Watſon contra *Reid*, *Novemb.* 21. 1628.

IN a Spuilzie *Watſon* contra *Reid* of *Aikenhead*, an Exception of Poynding was ſuſtained, deduced upon a Decreet, Decerning the Ground to be Poynded for an Annualrent, wherewith the Land was burdened; and the ſaid Decreet was ſuſtained, albeit the Heretor of the Land, and alſo that the Tennents of the Lands, againſt whom the Sentence was given, were all dead the time of the Executing of the Sentence, by Poynding, which was not found to be an impediment to the Execution thereof, ſeing Sentences of that kind are Reall *& afficiunt fundum*, and may be lawfully Execute againſt the ſame, whoever be the Heretor of the Land, and whoſoever be Poſſeſſor thereof, without any new Sentence, ſo long as the Party Obtainer of the Sentence lives. Alſo the *Lords* Found, that the Tennents Goods may be Poynded by the Annualrenter for more than was owing to his Maſter by him, and for more than the Duty which he pays for the Land, notwithſtanding of the Act of Parliament *Ja* 3. which was found to have place only where the Tennent may be diſtreſt for his Maſters Moveable Debts, and not to concern Debts and Burdens wherewith Lands are really affected; for if the Maſter ſhould collude with the Tennent, or otherways Set the ſame to him for a ſmall Duty, the Annualrenter might greatly be prejudged thereby, that he could not Poynd the Tennents Goods for more than that ſmall Duty; and it was not reſpected, which was Anſwered, that the Annualrenter might Compriſe the *Heretable* Right of the Lands, which was more equitable than that the poor Tennent, or Labourer of the Ground, ſhould be diſtreſt therefore; notwithſtanding whereof the Poynding was ſuſtained, but here it tended to purge a Spuilzie. *Actor. Rollock.* Alter. *Gibſon* Clerk. *Vid. Ult. June* 1624. *Keir* contra *Hepburn*, for the laſt part of this Deciſion. 11 *July* 1628. La. *Ednem.* 22 *Novemb.* 1628. Betwixt thir ſame Parties.

Lockie contra Baillies of *Glaſgow*, *Eodem die.*

IN an Action againſt the Magiſtrats to pay the Debt, becauſe the Debitor being Incarcerat in their Ward eſcaped. The *Lords* Found an Exception Relevant to produce Liberation to the Magiſtrats, *viz.* That the Debitor by Inſtruments of Iron in the night time, broke up the Lintel of the Window in the Priſon-houſe where he was detained, and eſcaped thereat, which was a caſe like to *caſus fortuitus*, for which they cannot be anſwerable, neither can be *in culpa* thereby, ſpecially ſeing that ſame night of his eſcape, the Magiſtrats ſought him in all the parts of the Town, and upon the morrow, and the next day thereafter ſearched and ſought him through the Countrey; which manner of eſcaping and diligence done immediatly thereafter, was found Relevant to liberat the Magiſtrats, ſeing it was not Alledged, that either the Magiſtrats, or any of the Under Officers, or Keepers of the Goal were acceſſory to the eſcape. Actor. *Lawtie*, Alter. *Aiton* & *Cunninghame*. *Hay* Clerk. *Vid.* 6 *July* 1631. Town of *Perth.*

Bruce contra *Bruce*, *Eodem die.*

IN an Ejection *Bruce* againſt Maſter *Robert Bruce*, who being Purſued at the inſtance of one as Mailler to another; The *Lords* ſuſtained the Action, and the Purſuers Title as Mailler was ſuſtained to produce that Action, albeit the perſon to whom the Purſuer condeſcended himſelf to be Mailler, had no Right to the Lands out of which he was Ejected; and albeit he to whom he was Mailler was Decerned to Remove at the inſtance of that Defender, who was conveened

veened as Ejector, which Decreet was given against the Tennents also, who were Possessors of the Lands, after whose Removing, for obedience of the Sentence, the Pursuer Intruded himself in the void Possession viciously, so that he could not thereby have Action of Ejection, seing he himself might be conveened as succeeding in the *Vice*; notwithstanding whereof the Ejection was sustained, for the *Lords* Found, that the Pursuer being once Possessor *sive Jure, sive non*, the Defender could not at his own hand, without Order of Law, put him from that Possession, nor enter thereto, but by Warrand of Law, albeit the person to whom the Pursuer was Mailer, was Decerned to Remove at the Defenders instance. Actor. *Advocatus* & *Belshes*. Alter. *Nicolson* & *Chaip-Hay* Clerk. *Vid. Ult, January* 1628. *Nasmith* contra *Hume*. 26 *Novemb.* 1628. Betwixt thir same Parties. 13 *January* 1629. *Ross* contra *Butler*. *Penult January* 1624. *Greenlaw* in *Leith*.

Watson contra *Reid*, *November* 22. 1628.

IN the foresaid Action of *Watson* against *Reid* of *Aikenhead*, mentioned 21 *November* 1628, it being Replyed, that the Poynding could not be Sustained to purge the Spuilzie, because the Goods libelled were Pleugh-Goods, and that the Pursuer had then other Goods poyndable condescended upon, conform to the Act of Parliament *James* 4, *anno* 1483; and the Defender Duplying, that before the Poynding, the Pursuers Bear-Land was compleatly tilled, sowen and harrowed, so that the time of Labouring ceased, and so that the Act of Parliament had no place in this Case. This Duply and the Poynding was Sustained, notwithstanding of the Reply and Act of Parliament, and notwithstanding that the Pursuers Summons and Reply bore and expreſt, & the Pursuer offered to prove that the Goods were taken away that same day, immediatly when they were looſed out of the Pleugh, being the 10 of *May*; which was not respected, for the *Lords* Found that they might lawfully be Poynded that same day after the Ploughing, if that same day before they were Poynded the Labouring was Outred, neither was it respected, that the Pursuer might have had *Fauchin* to Till after the Bear-Seed was ended. *Vid.* 15 *Novem.* 1627, *Guillan* contra *Dunmoor*.

Clapperton contra *Hume*, *Eodem die*.

IN an Action of Removing at the instance of one *Clapperton*, the Compryter of the Land, the Relict of the Husband from whose Heir the Land was Compryled, compearing for her Intereſt, and being admitted, and defending by vertue of a Seasin of the Lands given to her by her Husband, which Seasin bore to be given to her *intuitu matrimonii*; likeas thereafter they were married, and conform whereunto she was in Possession of the Land divers years preceeding the Warning immediatly: This Exception, and the said Seasin was Sustained, being clad with Possession, to exclude the Compryser; albeit he Replyed, that it was a naked Seasin, without any Adminicle or Warrant, for that Word bearing, to be given *intuitu matrimonii*, was only *assertio Notarii*, which could not have respect against the Compryser who was singular Successor, although it might have Faith against the Giver and Granter, and his Heirs; and the Possession of two years immediatly before the Warning ought likewise to have no force, being but lately acquired to her by some Collusion or Consent, either of the Tennent or of the Heretor, from whom he hath sensine Compryſed, there being many years interveening since her Husbands decease, who died 14 years before the Compryſing, during which whole space she acquired no Possession until these two late years before his Warning, and which Possession could not be qualified to be acquired by her *via juris*, by any Legal Deed done by her upon her Right to recover Possession, notwithstanding whereof, this Seasin was Sustained in this Possessory Judgment, albeit having no other Warrant but the said late Possession, and albeit acquired by her without Order or Process of

Law, and long after her Husbands decease. Actor. *Belshes.* Alter. *Gibson* Clerk. *Vid.* 23 *March* 1622, *Scot* of *Hayning* contra *Bonnitoun*, where some contrary thing is done.

Goodlet contra *Adamson*, *Eodem die.*

IN an Action *Goodlet* against *Adamson*, one being conveened as Heir to his Father, and for verifying him to be Heir, a Sentence and Ward of Court of the Town of *Glasgow* being produced, whereby he was recognosced in their Court by Testimony of Witnesses, to be eldest Son and Heir to the Defunct; this Act was found not to prove him to be Heir, albeit it was used to prove *passive* against him, seing there was no Seasin following upon the said Act given to the Defender produced in this Process, for without Seasin had followed upon the Act, the same alone was Found not to prove, likeas the Defender was Minor the time of that Act; but that was not the cause of the Decision, seing the Act stood against him, if it had been otherways in it self lawful, for it was Alledged that he had then Curators.

Hill contra *Wright*, *November* 25. 1628.

IN a Removing *Hill* against *Wright*, a Compryser pursuing Removing from the Lands Comprysed, and the Defender Alledging a Right of Wodset of the same Land, given to him before the Denunciation of the Comprysing by him, from whom the Lands were Comprysed, and Possession conform thereto; which Right and Possession, he Alledged was sufficient to defend him against this Removing, albeit the Pursuer was but a singular Successor to the Granter thereof, and albeit the Wodset was only constitute by a Contract, and so Personal, and without Charter and Seasin, seing the Wodset was under Reversion, whereof the benefite might be sought and used by the Pursuer, when he pleased, after the years of the Suspension, contained in the Contract; and also that the Contract of Wodset provided, that the Party might not redeem for eleven years, which was not yet out-run, and which Clause he Alledged was of the nature of a Tack for that space, and so the Security was real for that time: Which Alledgance was Repelled, and the Wodset constitute only by the Contract, albeit having that Clause of the Suspension for certain years, was found only personal, and not to be as a Tack, and so not sufficient to defend against a Compryser, or any other singular Successor. Actor. Alter. *Lawtie*, *Gibson* Clerk. *Vid.* 16 *Dec.* 1629, *Hunter* contra his Tennents.

Bruce contra *Bruce*, *November* 26. 1628.

IN the Ejection *Bruce* against *Bruce*, mentioned 21 *November* 1628, an Exception was admitted to Eleid the Ejection which was Pursued by the Pursuer *super hoc titulo*, as Mailer to another Person condescended in the Summons, to Eleid that Title, *viz.* that the Pursuer had Taken the Lands libelled, before the alledged time of the Ejection, from the Excipients self, and so became Tennent thereof to the Pursuer, whereby he could not pursue as Mailer to another; which Exception was Found Relevant, but Found that it ought to be proven *scripto vel juramento partis*; this was also Found Relevant, where the Defender Alledged, that the Pursuer had accepted a Tack from the Defender from *Martinmass* to *Martinmass*, which immediatly preceeded the time of the Ejection, which was Alledged to be in *December*, before which *Martinmass*, which was the issue of the Setting, after the Cropt and Corns was led and win, the Pursuer voluntarly transported himself, Wife and Family, and Goods wherewith he laboured the Ground, *& omnia instrumenta fundi*, and left the same void, so that the Defender in entring to the vacuous Possession of his own Land, could not be found an Ejector: This voluntar Removing was Found Relevant also, after the issue of the said Term of the Tack, albeit there was no Warning

Warning made to the Purſuer before to *Remove*, which Warning was not found to be needful in this Caſe, where the Setting was made from *Martinmas*, to *Martinmas*, and that Warning could not be made at *Martinmas*, and if it ſhould not have been made while *Whitſunday* thereafter, if the Land had not been Laboured *medio tempore*, the Defender would have wanted a years Farm, wherein the Purſuer, when he Removed, would not have been lyable. In this Proceſs, The *Lords* Found, that no Perſon had entereſt to purſue any *Action* of Ejection, but only the actual and natural Poſſeſors of the *Land*, and that none could purſue the ſame, for the Deed done to his Tennents, in Ejecting of them, but it is competent to the Maſter for Ejecting of his *Servants*, Hynds, and Cottars; For the Maſter by them had natural Poſſeſſion, but not by the Poſſeſſion of his Tenents. *Vid. March* 2. 1637. *Keith.* The like done 19. *June* 1637. in an Ejection, betwixt Crowner *Ruthven* and *Gairden*, where an Exception of voluntar Removing, and tranſporting of the Goods by the *Purſuer* of that Ejection to another Houſe, albeit there preceeded no Warning, was found Relevant, to be proven, *pro ut de jure*, without neceſſity to prove it *ſcripto vel juramento.* Actor. *Stuart. Hay* Clerk.

Stirling contra *M'phadrick, Eodem die.*

IN a Purſuit, *Stirling* againſt *M'phadrick*, for delivery of four Mears, with four Foals yearly, by the ſpace of three Years, or the Prices thereof lybelled, Conform to a *Paction* made betwixt the *Parties*, for that effect, when the Mears were Delivered, and put by the *Purſuer*, to the Defender in Graſſing; this was ſuſtained to be proven by Witneſſes, and it was not Found neceſſar, that the *Purſuer* could be compelled to refer the *Summons*, or *Paction* therein contained, to the *Parties* Oath, albeit the *Action* was not purſued, till three or four years were paſt, after the *Alledged* time, of the *Paction* and delivery of the Mears. Actor. *Nicolſon.* Alter. *Gibſon* Clerk.

Bailzie contra *Potter, Novem.* 28. 1628.

IN this *Action* a Magiſtrat being purſued for the Debt, for not taking the *Rebel*, he being Charged for that effect, and he Alledging, that the Horning ſhould be produced, which was the Ground of the Charge of Caption, and which he Alledged was null. The *Lords* Found, no neceſſity to produce the Horning againſt the *Rebel*, in this Judgment and *Action* againſt the Magiſtrat; but the Defender might produce the Horning himſelf, as alſo ſuch Actions needed not to abide Continuation, where the Summons has a Priviledge. Actor. *M'gill.* Alter. *Gibſon. Scot* Clerk. *Vid. July* 11. 1628. *Dumbar. July* 14. 1626. *Adam. Decem.* 4. 1628. betwixt thir ſame Parties.

Borthwick contra *Clerk, Eodem die.*

IN an Action of Removing by a Compriſer againſt another Compriſer, who had both Compriſed the Lands of the common Debitor, and the Purſuer having firſt Compriſed, & being firſt Infeft, the Defender having denounced before the Purſuer, after which Denounciation, the common *Debitor* having raiſed Suſpenſion of the Charge and Denunciation, during the Dependance whereof the *Purſuer Exped* and Intented his Compriſing; and this Suſpenſion being Diſcuſt againſt the Suſpender, which was Alledged by the Defender, in this Removing, to have been procured by this Purſuer, by his Travel and Expenſes, and by his finding Caution, whereby he was in *dolo* to paſe through his own Compriſing, whereby the Defenders Denunciation, which was firſt made, became extinct, ſo that he was forced, after the diſcuſing of the *Suſpenſion*, to Denunce of new, and ſo he was after the Purſuer, *ejus dolo & culpa, quæ non debet ſibi prodeſſe*, This Alledgance was ſuſtained in favors

of the Defender, the second Compriser, but that the Suspension was purchast by the Pursuer *ut supra*, that was Found ought to be proven by Writ, or by this Pursuers Oath.

The Kirk of *Selkirk* contra *Stuart*, *Penult November* 1628.

IN this Pursuit, a Stent being Set down by the Parochin for Reparation of the Kirk, where the Quier is not distinctly known from the rest of the Body of the Kirk, the Third Part of the Sum Imposed, ought to be payed by the Parson, or his Tacksman, who medles with the Parsonage Teinds, seing commonly the Quier is to be reput the Third Part of the Kirk; but if the Quier be distinctly known from the rest of the Kirk, it may seem to be reasonable, that if the Parson, or his Tacksman will uphold the Quier, that they ought to pay no part of the Sum Imposed, and so it was Found in this Process. Actor. *Lawtie*. Alter. *Stuart*. *Scot* Clerk.

Fa. Livingston contra L. *Bass*, *Eodem die*.

IN this Pursuit, a Compriser was found might bestow Charges for Intertaining of the House, and Dwelling-place, being upon the Compriſed Lands, for preserving of them in the same Estate, wherein they were the time of his Compriſing, and also for Intertaining the Barns and Byres, which were thereupon, allswel which were upon the principal Mains, as upon any other Roums, which were Compriſed, and albeit the saids Roums were possessed by the Tennents, and had not been before Laboured by the Heretor; and that he might Beit and Repear the Tennents Houses, the necessar Expenses whereof, debursed by the Compriser, The *Lords* Found, ought to accresce to the Reversion, and should be resounded to him, the time of the Redemption of the Lands from him; and therefore the *Lords* Found, that this Order ought to be taken in thir, and the like Cases, *viz*. That a Pre-cognition, and Action ought to be intended by the Compriser, for tryal taking of the Estate, of the Ground and Houses thereon, principal Dwelling House, *Byres*, Barns, *&c.* wherein they were at the time of the Compriſing, and what the danger and prejudice is, that may result there-through, if they be not repaired, and if it be necessar and profitable to the Heretor, from whom the Lands were Compriſed, to repair the same, that after this tryal taken the *Lords* may interpone their Authority, after they have tryed, and found the Reparation necessar and useful; after which Sentence the Compryser may Deburse the Expenses, necessar to the said Reparation, in these particulars, which has been so tryed to be necessar, for Beiting, which being Beited and Repaired, he may Intent his Action, to hear and see it be tryed, that he has bestowed such particular Expenses condescended on, upon the said Reparation, and that to the said Reparation, the said Debursings were necessar, and could not be outred without the same, and that these expenses should accresce to the Reversion, which Expenses by tryal and cognition taken by the *Lords*, being Found to be truely and necessarly debursed, their Sentence is Interposed thereto, *ut supra*. Actor. *Hope*. Alter. absens. *Hay* Clerk. *Vid. July* 22. 1626. *Morison*, L. *Preston-grange*.

Whitsoord contra L. *Johnston*, *Decembe*r 2. 1628.

IN a Removing, Mr. *Walter Whitsoord* against L. *Johnston*, by a Compriser against the Tennents, Possessors of the Compriſed Lands, the Defenders Alledging them to be Tennents to the L. *Johnston*, to whom they had been in use to pay their *Duties*, for the Lands Lybelled, diverse years before the warning and Compriſing, and which L. *Johnston* had taken Rental of the Lands from the Lo. *Herris*, from whom the Pursuer had Compriſed the same, at least

who

who bruiked the ſame *per tacitam Relocationem*, and he was not warned; this Alledgance was found Relevant for the Tennents, and it was not Found needful to alledge, that their ſaid Maſter had Tacks for Terms to run the time of the warning: but albeit his Tack had been expired, he then bruiking, *per tacitam Relocationem*, as it would Defend himſelf in any other Judgment, where he, as Poſſeſſor, was not lawfully Interrupted, ſo it was found, that it ſhould Defend his Tennents, until he was warned, that he may be heard to Diſpute thereon, albeit the L. *Johnſton* was not actual, nor natural Poſſeſſor himſelf. Actor. *Lermonth.* Alter. *Cunninghame. Gibſon* Clerk. *Vid. March* 6. 1632. Lady *Lawriſtoun* *.

Zair contra *Ramſay*, *Eodem die.*

IN a Purſuit *Zair* contra *Ramſay*, for payment of the by-gone Annualrents, of a Sum contained in a Bond, which was of this Tenor, that the Debitor was obliged to pay, 1000 pounds at the Term in the Bond, and in caſe of failzie, to pay 100 pounds for Annualrent and profit thereof, with 300 merks of expences, if the Creditor ſhould be compelled to ſeek and Charge for the ſame; this Bond was found to be Heretable, and the Debitor was found ſubject to pay the whole by-run Annualrents, yearly ſince the Term of payment, albeit the Bond bore only the Debitor to be bound to pay one years Profit, and a Penalty, and not to pay yearly that Annualrent, ſo long as the Sum was unpayed. *Vid. Decem.* 7. 1627. *Porteous* contra *Veitch.* *

Lyll contra *Hepburn*, *Eodem die.*

IN this Action, a Creditor conveening the Executrix to the Debitor, who Alledging, that the whole free Goods in the Teſtament were exhauſted, by Sentences recovered by other Creditors upon lawful Probation, whereof ſhe had made payment. This was not ſuſtained to exclude this Purſuer, and to liberat the Executrix, except ſhe ſhould Alledge, that theſe other Decreets were obtained by the other Creditors againſt her, before the Intenting of this Purſuit againſt her, without which ſhe was not *in bona fide*, to have payed them after the Purſuers Citation, if the Decreets were recovered ſenſyne, but ſhe ought to have Suſpended it upon double Poynding, that the Purſuers Debt might have been diſcuſt, and ſhe either freed thereof by the Judge, or that he might have come in with the reſt of the Creditors *pro rata*. Actor. *Craig.* Alter. *Mowat. Vid. June* 14. 1625. *Andrew Couper March* 21. 1628. *Elies* contra the Relict of *Bernard Lindſay* *.

Robiſon contra *Jameſon*, *Eodem die.*

IN a Transferring of a Contract betwixt two Parties, whereby the one Sells ſome Waires to the other, at the Price contained in the Contract for ilk Stone thereof, and granted him to have received 80 pounds in part of that Price: This Contract being Regiſtrat, was deſired to be transferred in the Heir of him, who was obliged for the Waires, after the Contracters Deceaſe, and the Defender Alledging a Nullity of the Contract, becauſe it was of a matter for above 100 pounds, which thereby was a matter of Importance, and was only ſubſcribed by a Nottar before three Witneſſes, againſt the Act of Parliament. This Alledgance was Repelled, becauſe the Purſuer reſtricted his Purſuit, to have Execution only for the 80. pounds confeſt to be received thereby, for the which the *Lords* ſuſtained the Purſuit, for delivery of als many of the Waires ſold by the Contract, as effeired to that Sum, received by the Conception of the Contract, and alſo becauſe the Contract was Regiſtrat.

Pool contra *Moriſon*, *Eodem die.*

A Legatar Purſuing an Executrix for payment of a particular Legacy of Sheepskins, *Cairſays*, and ſome Money adebted to the Teſtamentar by his Debitor Deſigned in the Teſtament, and which he gave ſpecial power to the

Legatar to seek and pursue for himself, which Testament of the Defuncts bearing this particular, *being Confirmed by the Executrix*, that Debt was not given up by her in the Inventar of the Defuncts Goods, but was omitted to be Confirmed, albeit the Body of the Nomination bearing the Legacy thereof was Confirmed, as it proported; and the Relict being pursued by the Legatar for payment thereof, it was Found that she was not subject to pay the famine, and that her omission could not put her in *mala fide*, seing it might be omitted as a desperat Debt, and her not doing of Diligence was not imputed to her, seing power was given by the Testament to the Legatar to pursue, albeit there was 16 years past since the Defuncts decease, during which time no Diligence was done; but the *Lords* Found, the Executrix should Confirm the particular Legacy, and Eek the same to the Inventar, and make the Legatar Assigney thereto, or lend her name to pursue therefore, and that she should warrand that Debt from her own Deed, *& præstare tantum factum suum*, and the Legatar should have the Expence of this Pursuit payed to him by the Executrix, off the first end of the free Goods and Gear, and that the Executrix was no further obliged to any Legatar in the like cases, *viz. in legatis nominum vel corporum & ejusmodi aliis Legatis particularibus & Circumscriptis.* Actor. *Aiton.* Alter. *Cunninghame. Gibson* Clerk. *Vid.* 11 *June* 1629. *Nivine* contra *Hog.*

Potter contra *Baillie*, *Decemb.* 4. 1628.

IN the Cause *Potter* against *Baillie*, mentioned 28 *Novemb.* The *Lords* Found, that Magistrats in such Actions as thir, when they are moved against them for payment of the Debt, for disobeying of Charges of Caption, might propone nullity of the Horning against the Rebel, which was the ground of these Charges of Caption, and that they might deny to obey such Charges upon their own hazard; for if the Horning be null, the *Lords* Found, that the not satisfying of the Command of the Caption could not produce that Action; and Found that the Defender himself might produce the Horning, and oppone against the lawfulnes thereof, albeit the Pursuer should not be urged to the production thereof; and this Horning was found null, because the Execution of the Charge bore, *that the Party was Charged at his Dwelling-place in* Innerness, *and he was Denounced at* Aberdene; so that either the Charge or Denounciation was not good, and so the Horning fell; neither was it respected, that the Charge was Intimat personally to the Party apprehended after the Charge, seing the Intimation was not a Charge, for it bore not a Copy to be delivered; and there was no Probation received anent the Parties dwelling at the time of the Charge or Denounciation, but in respect the Horning bore, as is above-written, it was Found null in it self. *Vid.* 28 *Novemb.* 1628. Betwixt the same Parties, and the Cases there Cited.

Logan contra *Hunter*, *Eodem die.*

IN a Removing, a Creditor having a Disposition by Conract, containing Procuratory of Resignation of some Land made by his Debitor, and the same Land being Compriſed by another Creditor to the said Debitor, before any Resignation was made, according to the said Disposition, and before any Seasin was taken thereon, and the Compriser having also obtained a Charter from the Superior, of the Lands containing Precept of Seasin, and accordingly he being Seased before the said Resignation was made by the said other Creditor now Pursuer; and the said Seasin of the Compryers not being Registrat conform to the Act of Parliament in the Clerk of Registers Books *debito tempore*, whereby he was forced to take another new Seasin, before the taking whereof, the Creditor who had the first Disposition, caused make Resignation conform thereto, and thereupon was Infeft before the Compriser

Compriſer was of new again valiably Seaſed, albeit after the Charter, and *Precept* of Seaſin, given in favours of the Compriſer, and after the firſt Seaſin was taken thereupon, Un-regiſtrat as ſaid is. This firſt Diſpoſition before the Compriſing and Seaſing, conform to the Diſpoſition taken after the Compriſing & Charter and Seaſin Un-regiſtrat, but before the other valid Seaſin, was preferred, and the ſaid poſterior Seaſin given to the Compriſer was Found, could not be drawn back to the Compriſing, ſeing the Seaſin given conform to the Procuratory, was a mid Impediment thereto, albeit that the Superior was Charged by the Compriſer, to receive him before the uſing of the Procuratory, which Charge he Alledged ought to be ſuſtained, as if he had been then Seaſed, which was Repelled, ſeing conform to the Charge he obtained a Precept in due time, and it was his own fault who *Exped* not his Seaſin thereon lawfully in due time. Actor *Stuart* & *Primeroſe*. Alter. *Nicolſon* & *Mcgill*. *Scot* Clerk.

L. *Drumquhaſhill* contra *Cleland*, *Eodem die*.

IN a Removing L. *Drumquhaſhill* contra Sir *John Cleland*, the Defender defending himſelf with a Diſpoſition of the Lands Libelled, from *Lodovick* Duke of *Lennox*, with Charter and Seaſin thereon, and 16 years Poſſeſſion conform thereto, and that his Author was in Poſſeſſion alſo before him. This *Exception* was Repelled, and the Purſuers Reply was admitted, and the Purſuit ſuſtained, *viz.* That he was Infeft by a Precept of *Clare Conſtat*, by the now Duke of *Lennox*, Heir to Duke *Lodovick*, granter of the Excipients Right, which Precept is given to him as Heir to his Goodfir, who was Infeft by umquhile *Matthew* Earl of *Lennox* in the Lands Libelled, & that his ſaid Goodfir & Grandfir were in Poſſeſſion thereof all the days of his Lifetime. This Reply was ſuſtained, ſeing the Defender *Alledged* not, that his Author was Infeft in the Lands; and albeit he Alledged ſo many years Poſſeſſion, and that both Parties Rights flowed from one Author, and that he had a ſtanding Infeftment, which could not be taken away ſummarly in this Poſſeſſor Judgment without Reduction; yet the ſame was Repelled in this ſame Judgment, in reſpect of the Reply, without neceſſity to Reduce *partibus ut notatur*, 23 *July*, 1628. *Vid.* 10 *Decemb.* 1628. betwixt thir Parties.

Reid contra *Brown*, *Decemb.* 5. 1628.

ONe in the time of his ſickneſs, whereof he ſhortly died, having ſet down and Written in his Compt-book, the particular *Debts* owing by him; one of the Creditors to whom he gave up himſelf in the ſaid Compt-book, to be owing 1000 Merks, after his deceaſe he conveens the neareſt of Kin to the Defunct before the Commiſſar of *Lanark*, to hear and ſee the Hand-writ of the Compt-book to be Cognoſced, to have been the proper Hand-writ of the Defunct, and that he was his *Debitor* therein; and upon this *Purſuit* he obtained Sentence in that Court, whereupon he having Arreſted ſome Debts of the Defuncts, and purſuing to make the ſame forthcoming. This Sentence before the Commiſſar, Cognoſcing the Hand-writ in that Court was found null, as not being a Subject proper to that Jurisdiction, and ſo it could not be a ground of this *Action*. Actor. *Primeroſe*. Alter. *Ruſſel*. *Scot* Clerk.

L. *Corsbie* contra L. *Kilſyth*, *Eodem die*.

A Supplication given in by the L. of *Corsbie* was granted, craving Charges againſt the L. of *Kilſyth*, as Heir to his Good-fir, and as he who was come in his Good-firs place in the Superiority of certain Lands, which *Corsbie* had Compriſed, holden of his Good-fir, and which Compriſing was allowed in the Good-firs lifetime, and Charges ordained to be direct againſt him before he died, and ſince he being deceaſed before the Compriſer was entered, this ſummar Charge was ordained to be granted againſt his Oye, without any other

Process, Action, or Tryal, if he had succeeded to the Right of the Superiority; for if he were thereby prejudged in this Charge, the *Lords* thought that he might Suspend. *Vid. Penult July*, 1625. *Richard Guthrie*, & 11 *Feb.* 1629. *Frazer* of *Techmurie*.

Oliphant contra L. *Monorgan*, *Eodem die.*

IN a Pursuit upon a Bargain for buying of Lands; one of the Parties dying before any Writ was made, albeit none of the Parties Resiled therefrom in their lifetimes; and albeit some things were done betwixt the Parties, in Contemplation of the Bargain, to have been perfected, yet Found the Bargain by the death of any one of the Parties ceases, and either Party hath Action, as the Law may yield, against those who represents the Defunct, for restoring of any thing which their Predecessors received from the other, with the Parties Interest thereby. Actor. *Stuart* & *Aiton*. Alter. *Nicolson*. *Hay* Clerk.

Crichton Sheriff of *Nithisdale* contra *Wilson*, *December* 6. 1628.

IN a Suspension of a Decreet given by the Sheriff against a Party being cited for Blood, for payment of 50 Pounds as for Un-law, for his Contumacy for not Compearance, was not Sustained, but the Un-law was modified to Ten Pounds, and the Decreet ordained to stand for that Quantity only, seing the Penalty which the inferior Judges hath to Inflict for Contumacy, was Found ought not to exceed that Sum. Actor: Alter. *Miller*, *Scot* Clerk. *Vid.* 22 *July* 1631, Sir *Robert Dowglas*, and the Cases there.

Lawson contra La. *Boghall*, *Eodem die.*

IN a Declarator of one *Lawson* a Donatar to a Rebels Escheat may by special Declarator, after the Rebels decease, seek the Goods which were given in Steel-bow by the Rebel to a Tennent of his Lands, and conditioned by the Tennent to be rendered again at the Ish and End of his said Tack, to be declared to pertain to the said Donatar; which Pursuit was Sustained, albeit it was Intented divers years before the Ish of the Tack, before which Ish the Tennent could not be pursued for delivery of the said Goods, seing this Action was only *declaratoria juris*, and also Found, that the saids Goods came under the compass of the Rebels Escheat, and did thereby pertain to the Donatar thereof, and pertained not to the Heirs and Executors of the Rebel, albeit he was deceased before the Ish of the Tack. Actor. *Stuart*. Alter. *Hay* Clerk. *Vid.* 24 *Nov.* 1624, *Turnbul* contra *Ker*, where some different thing is found done. 28 *January* 1642, *Patrick Dundas*.

Maxwell contra L. *Minto*, *Eodem die.*

IN this Pursuit a Decreet given by the Commissar in time of Vacance, being quarrelled by the Suspender by way of Suspension, because the Judge had not a Dispensation to sit in that feriot time: The Decreet notwithstanding was Sustained, because it was given against him compearing, so that he not proponing the same before Sentence, *videbatur consensisse in judicem*, and could not now propone that which he then omitted. Actor. *Stuart* & *Burnet*. Alter. *Nicolson* & *Baird*. *Gibson* Clerk.

Cranston contra *Adieson*, *Eodem die.*

IN an Action *Cranston* against *Adieson*, a Wife Pursuing her Good-son, married on her Daughter, as Intromettor with divers Goods and Bestial, and other Gear pertaining to her, and being in her Possession divers years before, for rendering the same to her. This Action was Sustained at the Pursuers instance for the same, albeit it was Alledged, that she could have no Interest to Pursue therefore, seing the same pertained to her Husband, and was in his Possession when he died, so that the same pertained to his Bairns and Executors, of whom the Defenders Wife was one, and his Relict could have no Right but

but to her own part thereof; which Alledgance was Repelled, and the Action Suſtained at the Relicts inſtance for the whole, in reſpect of the Libel, bearing her own Poſſeſſion divers years before the Defenders Intromiſſion, and ſince her Husbands deceaſe, and that ſhe offered to find Caution to warrand the Defender at all hands, who might claim Right thereto by her Husbands deceaſe; which the *Lords* Found Relevant, ſeing the Defender was not decerned, nor confirmed Executor to the Defunct, Actor. *Craig.* Alter. *Hart.* *Gibſon* Clerk. *Vid.* the Caſe following.

Mackie contra *Dumbar*, *December* 9. 1628.

IN an Action *Mackie* againſt *Dumbar*, the Executors of a Defunct purſuing the Intromettors with the Goods and Gear of another Defunct, for payment to them of a Debt owing by that Defunct to him, to whom the Purſuers were Executors, and they Alledging, that they had payed the third of that Debt to the Relict of the Defunct, to whom they were Executors, for the which they craved Defalcation: This Alledgance was Repelled, and no Defalcation was admitted for the Relicts Third, ſeing no Sentence was obtained by the Relict againſt them therefore, without which they could not have been compelled to pay the ſame, ſeing the Debitor remains only oblig'd to the Executor, and the Executor to the Relict in theſe things, which ſhe hath not in Poſſeſſion in her own Hands, and the Relict hath her direct Action againſt the Executors, and not againſt the Debitors to her Husband. *Vid.* the Caſe preceeding, & *ult. January* 1628, *Naſmith.*

Souter contra *Eodem die.*

IN an Action *Souter* againſt Three Tutors given to a Pupil, and accepting the Office, every one of them is obliged *in ſolidum* to the Pupil, and not each of them for their own part *dividendo*, and here a Decreet obtained by the Minor againſt her three Tutors, albeit neither by the Libel it was craved, nor by the Decreet obtain'd, that they and each of them ſhould pay the whole Debt therein-contained, but they were all three decerned to pay the Sum therein-contained; In reſpect whereof they Alledged, that the Sum ſhould divide amongſt them, albeit it might be granted that each of them was obliged in the whole, if they had been ſo purſued; but they being purſued *conjunctim*, and ſo Decerned; they Alledged, that the Sentence ſhould divide, which Alledgance was Repelled, and notwithſtanding that the Decreet bore them all to be decerned; yet it was Found, that the Minor might execute for the whole againſt each one of them, and that every one of them was totally obliged, and that the words of the Sentence ſhould work againſt them, as they are obliged in Law, of the benefite whereof the Minor was not prejudged by the Tenor of the foreſaid Decreet. Actor. *Ruſſel.* Alter. *Gibſon* Clerk. *Vid. ult. Feb.* 1626, *Dowglas.* 16 *Nov.* 1626, *Chalmer.* 8 *March* 1628, *Muir* and *Thomſon.*

L. *Ley* contra Miniſter of *Lanark*, *December* 10. 1628.

THE Laird of *Ley* having preſented one to the Preceptory of the Hoſpital of *St. Leonards*, who ſeeking Letters Conform to that Proviſion and Gift given to him by the Laird of *Ley* as Patron of that Hoſpital, and the Miniſter of *Lanark* Compearing and Alledging, that he was provided to the ſaid Preceptory by the Kings Majeſty, and had obtained thereupon Letters Conform, by vertue whereof he was in Poſſeſſion; likeas his Predeceſſor was preſented by the King, and by vertue thereof he was alſo in Poſſeſſion, whereby it was evident that the Right to preſent was only proper to the King, and they being ſo in Poſſeſſion, no Letters Conform ought to be granted upon the Laird of *Leys* Gift. This Alledgance was Repelled againſt this Summons, craving Letters Conform, without prejudice always of the Defenders Right thereupon, upon the validity whereof, or of the Purſuers Right, The *Lords* Found it

not proper to dispute in this Process and Action of Letters Conform, but reserved the same to be tryed by Suspension or double Poynding, or in any other lawful Pursuit *prout de jure*, whereto this Decreet should not be prejudicial. Actor. *Mowat.* Alter. *Stuart* & *Sandilands.* *Gibson* Clerk. *Vid.* 4 *July* 1627, *Mackenzie.*

L. *Drumquhashill* contra *Cleland*, *Eodem die.*

IN the Action L. *Drumquhashill* against Sir *James Cleland*, mentioned the 23 *July* 1628, the Pursuer as Infeft in the Lands of *Dormondside* upon the Duke of *Lennox* Precept of Clare Constat, as Heir to his Goodsir, who was Infeft therein, craving Removing, and the Defender Alledging a Right granted to him of the Lands, by umquhile *Lodovick* Duke of *Lennox*, to whom the Granter of the Pursuers Precept was Heir, and by vertue thereof thirty years in Possession. This Exception was Repel'd, notwithstanding this Possessor Judgment, in respect of the Reply, made by the Pursuer, that his umquhile Goodsir was Infeft by umquhile *Matthew* Earl of *Lennox*, and by vertue thereof in Possession, the time of his decease, and he being received by Precept of *Clare Constat*, as Heir to him, and being also Retoured Heir to him, whatsoever Right or Possession was Acquired by the Defender, since his Goodsirs decease, cannot prejudge his Right, seing the Earl of *Lennox* was denuded before, by the Right granted to his Goodsir, who died in Possession. This Reply was admitted, albeit the Excipient Alledged, that there was diverse others condescended on by him in Possession of the saids Lands, diverse years before the decease of the Pursuers Goodsir, and that he Alledged, that in this Possessor Judgment, his Rights Clad with Possession, should be maintained, while his Right were otherwise taken away, in some Ordinary Pursuit, which was Repelled, and the Pursuer preferred in his Reply, offering to prove that his Goodsir continued Possessor to his decease. *Vid. Decem.* 4. 1628. betwixt thir Parties.

Huntly contra *Hume*, *December* 13. 1628.

IN a Triple Poynding, *Huntly* against *Hume* and L. of *Renton*, the Lands of the common Debitor being Compriſed by a Creditor, *viz. Renton*, and he being Infeft thereupon, before the Term of *Whitsunday* and before the Compriſing, another Creditor having Arrested upon his Sentence, that Terms Duty, owing by the Tennent, Possessor of the Land, to the Master, who was the common Debitor, the Arrestment being execut before that Term of *Whitsunday* came, whereat the Debitor was obliged to pay, and while the Term was running, the Arrestment was laid on, and after the Term came, he obtained Sentence, decerning that Terms Duty to be made forth-coming, whereon the Question being drawn in by the Tennent, if he should be subject to pay to the Arrester, or to the Compriser. The *Lords* Found, that the Compriser being Seased before that Term, ought to have that Terms Duty subsequent, after his Seasin, and not the Arrester, albeit the Arrestment was execut before the Compriſing, whereupon the Seasin proceeded, seing the Heretor, who was Debitor, being denuded lawfully of his Right to the Land before the Term, by the said Compriſing and Seasin, he had thereby Right to the Duties of the Terms subsequent, after his Seasin, after the said Term was come, & as the Debitor from whom he Compriſed, could not seek that Terms Dutie, no more could the Arrester, who could not seek the same, but as the Farm or Dutie owing to his Debitor, who ceased to be Heretor, he being denuded of his Right by Compryſing before the Term, at which he might have Craved the Dutie; For, albeit the Creditor might lawfully Arrest before the Term of Payment came, yet the Arrestment affected not the same, to the Arrester, that he might seek the same when the Term came, except at that term

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the Right thereof then ſubſiſted with him, for whoſe Debt it was *Arreſted*, as if the Terms Duty of Lands, Liferented by any, were *Arreſted* for the Liferentars Debt, and that the Liferentar ſhould die before the Term of payment of the Arreſted Duty came, *quo caſu* the Arreſter would get nothing, becauſe the Debitors Right became extinct; even ſo in this Caſe, albeit there be great difference in thir Caſes, yet ſo it was Found, and for the ſame Reaſon, another Creditor claiming the ſame Duty, by vertue of an Aſſignation made to him by the Debitor, diverſe years before the Term Controverted, and before all the other Parties Rights, in and to the Duty of theſe Lands, of certain years preceeding that Term, and diverſe years to run after that Term, which Aſſignation was Intimat long before their Rights, and alſo the *Aſſigney* diverſe years in Poſſeſſion thereof, before the Term Controverted, and done for ſatisfying his juſt Debt, yet the Compriſer was preferred: for the Aſſignation was not found a valid Right againſt a ſingular Succeſſor; and it was found, that an Aſſignation to the Duty of a Tack, Set by the Heretor, made to his Creditor, would not work againſt a Singular Succeſſor, in and to the Setters Heretable Right, but that either the Compriſer, or other Acquirer thereof, or Buyer, would have Right to the Tack-Duty, notwithſtanding of the preceeding Aſſignation, Clad with Poſſeſſion. Actor. *Craig.* Alter. *Lawtie*, *Hay* Clerk. *Vid. June* 12. 1629. *Gray* contra *Campbell*, *Ult. Feb.* 1628. L. *Cleighorn*, *March* 24 1626. *Gray. Feb.* 16. 1633. *Harper* * *Feb.* 13. 1627. *Samuel* contra *Samuel.*

Craig contra *Sinclar*, *December* 16. 1628.

ONe *Margaret Craig* having obtained a Decreet before the Commiſſars of *Edinburgh*, againſt *Oliver Sinclar*, decerning him to take her to his lawful Wife, and to Compleat the Band of Marriage with her, before the face of holy Kirk, after which Sentence he gives Bond to her, to ſolemnize the ſaid Marriage betwixt and a certain day, and in caſe of Failzie, to pay to her 500 Merks, which Bond being Regiſtrat, ſhe thereupon Arreſted certain Moneys owing by the Ladie *Louthian* to him, and thereupon Purſues to make the ſame forth-coming, which *Action* was ſuſtained for payment of the Sum adjected in the Bond, for a penalty, after the expiring of the day preſcribed by the Bond, and to make the Sums Arreſted forth-coming therefore, notwithſtanding that it was Alledged, that it was evident by the Decreets, and Writs produced, that the ſaid *Oliver* was the Purſuers Huſband, and ſo ſhe cannot have *Action* againſt her own Huſband: And next, it was *Alledged*, that no Declarator was obtained upon the failzie. 3*ly*. It was *Alledged*, that pains adjected for fulfilling Marriage, are not allowed in Law, *quia Matrimonia debent eſſe libera*; which *Alledgances* were all Repelled, and the Action ſuſtained at the Womans Inſtance without Declarator, ſeing it was not ſuſtained, that they were Married, and the *Action* was allowed and ſuſtained, for payment of the Sum adjected, in caſe of failzie, becauſe when ever he ſhould compleat the Marriage, the Sum would return to himſelf. Actor. *Craig.* *Alter. Belſhes. Gibſon* Clerk.

Inglis of *Murdiſton* contra his Tennents, *Eodem die.*

IN a Removing, *Murdiſton* againſt his Tennents, a Tack being Set to the Defender, for certain years, the laſt whereof expired at the Term of *Martinmaſs*. The *Lords* ſuſtained the Warning made to the Tackſ-man to Remove, and this Action upon that Warning, albeit the Warning preceeded the Feaſt of *Whitſunday*, before that *Martinmas*, at which Term the Tack expired, ſo that at the Term when the Warning was made, the Tack was ſtanding un-runout, notwithſtanding whereof the Warning was allowed, ſeing albeit it was made before the *Whitſunday*, and before the out-runing of the Tack, yet it was made to Remove at the *Martinmaſs*, and the Action was not intent-

ed while *Martinmas* was past, for otherwise the Tack-man would have bruiked a year longer than the Tack lasted. *Vid. July* 8. 1626. *George Foulis.*

La. *Borthwick* contra *Scot* of *Goldlands*, *Eodem die.*

IN a Removing, the Pursuers Seasin being of Lands lying discontigue, and being Relative to a Charter granted by the Bishop of *St. Andrews*, whereby he had United all thir Lands in one Tenement, which was the Warrand of the Seasin; The Seasin was not sustained, seing none could unite Lands but the King, and no Subject could make an Union except the King had confirmed it, or had Originally given the same, and this was to Found, albeit the Defender, who opponed it, Alledged no Right in his own Person. *Vid. January* 16. 1623. Mr. *Hary Aitkin.*

Straerly contra *Lundie*, *Eodem die.*

IN a Pursuit *Straerlie* against *Lundy*, to find Caution, or els to Remove, was not sustained, being sought against a Defender, who was not Lybelled as Tack-man of the Lands, for the Duties whereof the Caution was craved, but only that she Possessed as Relict of him, who was once Tack-man, albeit the Tack was expired, which was not sustained, to import this Conclusion. Actor. *Aiton.* Alter. *Cheap. Gibson* Clerk. *Vid. Feb.* 23. 1622 Sir. *John Carnegy.* *

L. *Granton* contra L. *Collington*, *Eodem die.*

L. Of *Granton* being Charged by his Father in Law, after his Daughters decease Spouse to *Granton*, to fulfill that part of the Contract of Marriage, whereby he was obliged to imploy on Land a Sum of Money, and to procure himself and his umquhile Spouse Infeft in Liferent, and the Heirs gotten betwixt them in Fee; the Reason he Suspended upon was, that his Wife being dead, that part of the Clause ceased, and for his own Infeftment, it being conceived in his own Favours, he could not be compelled; and as to Infefting of the Heirs of that Marriage, none could Charge therefore but as Heir to him, and none could be his Heir, he living; This Cause was not decided, but the *Lords* inclined to Judge, that the Suspender might be compelled to Infeft himself, and his Heirs of that Marriage, as the Contract bore, which being fulfilled once, such Persons as might be Heirs, might claim the benefit of the Infeftment when the time fell, whereat they might seek the same by Law, but the Cause was not decided. *Actor. Aiton.* Alter. *Stuart. Gibson* Clerk. *Vid. Jan.* 18. 1622. L. *Silvertounhill*; & *Jan.* 27. 1630. *Turnbull* contra *Colmestie*; & *July* 9. 1630. *Veitch.*

Memorandum, *July* 7. 1632. In a Cause of the Bairns of umquhile Sir *James Young*, procreat of his second Marriage, against the Eldest Son of the second Marriage: This same Decision was observed, that the Heirs of that Marriage, as they were Designed in the Contract, were Interpret and Sustained for Bairns of that Marriage, albeit they were not served Heirs. *Gibson* Clerk.

Chalmber contra L. *Craigievar*, *Decem.* 17. 1628.

IN a double Poynding, *Chalmber* against *Craigievar*, for the Feu-Dutie of certain Lands holden of the Abbacy of *Lundors*, which were claimed on the one Part, by him who had the Right of Erection of that Benefice, and on the other Part, by a Pensionar of the Abbots, to whom these Feu-Duties were specially Assigned, for payment of the Pension, the Pension being granted to the Pensionar for his Life-time, *cum potestate transferendi in articulo mortis*, and to Endure for the Life-time of that Assigney; and the Pensionar having transferred the same in the Assigney, three years before his decease, and the Translation appointing his Entry to be immediately after his decease, the

the Cedents self retaining Possession after his Translation, all the time of his Life-time: The *Lords* Found the Translation null, because it was made to the Assigney, as said is, to begin after the Cedents decease, and so was conferred to an unlawful time of Entry, at which time it could not have beginning; for it was Found, that it should have been conferred to a time, which should have begun to the Assigney, in the Cedents own Life-time before his decease; neither was it respected, which was Alledged by the Assigney, that seing the Pensionar had power to transfer *in articulo & ipso momento mortis*, which if he had done, the Assigney could not have had thereby an effectual Entry, but after his decease, that therefore the Translation to begin immediately after his decease was alike, and could not make it null therefore; and also he Alledged, that the Assigney, since the Cedents decease, had both a Decreet of Letters Conform standing, and also conform thereto had been threttieth years in Possession, so that in this Possessor Judgement his Right after so long time could not be summarly annulled, which Alledgance was Repelled, and the Assignation Found null, because the beginning thereof, was not at a time before the decease of the Cedent: In this Process, the Principle Pension being quarrelled, because conform to the Act of Annexation, 1587. it was not clad with Possession or Sentence before that Act, as is thereby required; and as is provided by the Act of Parliament 1592. and 1594. which Acts declares Pensions Null out of Benefices, and Kirk-Lands, not Authorized with Sentence, or Possession before the year 1587. The *Lords* Found, that either Decreet or Possession of the Pension ought to be Alledged, (if it should be sustained) before that year 1587. And because the Pensionar Alledged his Possession of a Part of the Pension, out of the Duties assigned, of a Term before that year, the same was sustained, and was not found necessar to Alledge Possession of the whole Pension, and of more years before that year; and this Possession of one Part, *viz.* That one Part of the Feu-Duties, Assigned for the Pension, was payed to him, was found probable by Witnesses, without necessity to prove the same by Discharges or Writ; and also the Feu-Duties of the Pensionars own Lands, being assigned to himself, by the Pension it self, in satisfaction of the Pension *pro tanto*, his Retention thereof in his own hands, was sustained as a sufficient Possession; neither was it found necessar, that the Pensionar should be Compelled to say, that he had Possession of the whole Pension before the year 1587. for the Possession of one Part thereof was found sufficient, to sustain the Pension for the whole, and to exclude the Nullity objected by the Acts of Parliament foresaid. Actor. *Advocatus* & *Nicolson.* Alter. *Stuart* & *Baird. Scot* Clerk. *Vid. Feb.* 28. 1628. *Mauld* contra L. *Mathers*, & *Penult June* 1622. Tennents of the Bishops Lands of *Aberdene. vid.* for this *January* 14. 1630. *Hunter.*

L. *Johnston* contra his Tennents, *Decemb.* 18. 1628.

THe L. *Johnston* having recovered Decreet against the Tennents, to Remove from the Lands possest by them, so far as pertained to him in absence of the Defenders, and they Suspending, that they bruiked that part pertaining to him with the rest of the same Lands, pertaining Heretably to the Viscount *Drumlanrig* & Lo. *Maxwell pro indiviso*, so that there being three Heretors, Portioners of the Lands undivided, they knew not the Pursuers part from the rest, that they might Remove therefrom. This Reason was rejected, and the Letters Found orderly proceeded, in respect of the Decreet standing, which could not be taken away by Suspension, where there behoved to be Assignation of Terms to prove, but was reserved to be tryed by way of Reduction. Actor. *Cunninghame*, Alter. *Scot* Clerk. *Vid.* 6 *Decemb.* 1623. *Carmichael* of *Potishaw*.

Gemmill contra *Boyl*, *January* 8. 1629.

IN an Advocation, the Procurator-Fiscal *of Glasgow* being Executor Decerned to a *Defunct*, and pursuing the *Debitors* of the Defunct for payment, before the Commissar of *Glasgow*, and the Cause desired to be *Advocat*, because the Procurator-Fiscal was Brother to the Commissar, and so by the Act of Parliament 1594. *A Brother could not be Judge in his Brothers Cause pursued before him.* This Reason was sustained, and found Relevant, and the Cause was Advocat; for albeit it was Answered, that the Cause was Intented at the Procurator-Fiscals instance, who was Brother to the Judge, yet he Pursued only *ratione Officii*, and the profit would not redound to him, but to the nearest of Kin to the Defunct. Likeas the Procurator-Fiscal Declared by the Procurators Compearing for him in this Advocation, that the Pursuit was not to his own behove, and that he Renounced all benefit which he should recover thereby, in favours of the nearest of Kin: yet the Reason was sustained, seing he remained still Pursuer, and that his Brother could not be Judge in no pursuit, wherein he might have interest; But he might surrogat one in his place, after he was Decerned, who Confirming, or obtaining Licence from the Commissar, or the *Bishop* of the *Diocess* to pursue, might then pursue before that Judge: but the Procurator-Fiscal being Brother to the Judge, and being undenuded, if none should seek the Gear, as nearest to the Defunct, and so thereby the same should remain with the Procurator-Fiscal, it were against the Law that the Brother were Judge in the Brothers Cause; And this was also found, albeit the Cause desired to be Advocat, was referred to the Defenders Oaths, without further Process. Actor. *Mcgill*. Alter. *Gibson* Clerk.

Kinloch contra *Finlason*, *Eodem die*.

James Kinloch being made Assigney by *Robert Finlason* to the Maills of an House for certain years, pursues the Indweller for the Maill, who Alledging payment to one who Arrested the same for the Cedents Debt, and who had obtained Decreet thereupon against him; And the Pursuer Alledging, that the payment was made *mala fide*, his *Assignation* being both made and intimat before the *Arrestment*: It was questioned if this Intimation was sufficient, to put him in *mala fide* to have payed thereafter, seing it was only made at his Dwelling-house, and a Copy delivered to his Wife, at which time the Defender was out of the Countrey, whereby he Alledged, that the said Intimation should have been made at the Mercat-Cross of the Head Burgh of the Shire, within which he dwelt, and at the Peer and Shore of *Leith*, as in all Citations of persons who are out of the Countrey, This Intimation being Alledged to be more material, and to require more strict formality than Citations, and the danger being greater; but this was not Decided. *Vid.* 4 *June* 1631. *Jack* contra *Chryssie*.

Brown contra *Nicolson*, *January* 9. 1629.

Brown the Defender being pursued for 200 Merks, for the price of an Horse bought by him from the Pursuer; and he excepting upon his Minority the time of the buying of the said Horse, and having Curators then who consented not, and in his Lesion and Circumvention the Horse being Crooked when he was sold, and that he offered to render him as whole as he received him: This Alledgance was Repelled, and the Action sustained, and it was Found that a Minors Block for a Horse of this price, in respect of the Defenders Estate, who was Laird of *Cockburnspath*, might subsist and take effect, notwithstanding that the Curators consented not, and the Alledged Lesion, and offer of Restitution was not respected, seing it was now made *pendente lite*, whereas it was a year past since the Defender received the Horse, since the which time he had made no such offer. Actor. *Nicolson*. Alter. *Hay* Clerk.

Baron

Baron of *Brughton* contra *Kincaid*, *Eodem die.*

Kincaid of *Waristonn* being pursued before the Baron-Baillie for slaughter, & he having Advocat the Pursuit to the *Lords*, desiring that in respect of the ignorance of the Baron-Baillie, and the consequences of the matter, *viz.* a Pursuit for his life, that the same should be Remitted to the Justice-General, or else that the *Lords* would adjoyn to the Baron-Baillie some of their number, or some others of skill and knowledge. The *Lords*, in respect the matter was Criminal, thought that they could not Judge thereon, but they assigned a day to the Defender to Supplicat the *Lords* of Secret Council in the matter; and in the mean time ordained the Baron-Baillie to cease, while the Councils pleasure were therein known; and if betwixt and the said day nothing should be shown by the Defender to the *Lords*, concerning the Secret Councils proceeding therein, then they would return to the Process, and do Justice anent the Remitting to the Justice-General, or to the Baron, the matter as appertains, and as any of the Parties should crave Process that day. Actor. *Primrose.* Alter. *Craig.* *Gibson* Clerk.

Salmond contra *Courtie*, *Eodem die.*

A Decreet being obtained before the Town of *Edinburgh*, against a Party holden as confest, who was Warned to Compear by the Town-Officer upon 60 days, he being then out of the Countrey; it was Found that that Decreet was null, because no Inferior Judge had power to Summon a Party out of the Countrey upon 60 days, without a preceeding Warrand obtained by the Party from the *Lords*, to Summon the Defender as out of the Countrey, and that such Warnings cannot be made by naked Warrand of an Inferior Judge; This was not clearly Decerned, but the *Lords* inclined to this Decision; for it is usual in Inferior Judgments to crave thir Warrands, when Parties out of the Countrey are Summoned upon 60 days; but in this Process the Parties were ordained to Dispute their Rights, without respect to the Decreet. Actor. *Mc-gill.* Alter. *Craig.* Hay Clerk. *Vid.* 7 *Feb.* 1629. Town of *Irvine.*

Nisbet contra *Nisbet*, *January* 13. 1629.

A Decreet being given against a Party, as lawfully Charged to enter Heir, after the Defender Compeared, and took a day to produce a Renunciation to be Heir, and the Term being Circumduced, for not producing of the Renounciation, and so Decreet given, which being thereafter Suspended, upon Production of a Renounciation. The *Lords* Found, that the same might be received by way of Suspension, without Reduction, and received the same, albeit the Decreet was given against him, for not producing, after a Term Assigned to him for that effect; and so against him Compearing, he being then Major, and so Suspended the said Decreet, upon Production thereof. Actor. *Stuart.* Alter. *Craig.* *Gibson* Clerk. *Vid.* *July* 20. 1626. *Harvy* contra *Baron*, and the cases there cited. *June* 11. 1631. *Tailziefer.*

Finlason contra *Kinloch*, *Eodem die.*

Kinloch being made Assigney by *Robert Finlason*, to the Mails of a House pertaining to him, and the Assignation being Intimat to the Possessor, and another Creditor to *Robert Finlason* having Arrested the saids Mails, after the said Intimation, for satisfying a preceeding Debt, decerned against the said *Robert*, and upon the Arrestment recovering Sentence, and upon the Sentence going to Poynd, for eschewing thereof the Possessor having payed. The *Lords*, notwithstanding of the said Sentence and payment, Found that the Assigney, who first Intimat before the Arrestment, ought to be preferred; albeit the Arrester Alledged, that nothing had followed upon the said Intimation, nor no Diligence done thereupon

by the Assigney, while this present Pursuit moved by him against the said Possessor, which was not Intented untill after his Sentence and payment, so that his prior Diligence *qui sibi vigilavit*, was Alledged, ought to be preferred to the Assigney, who did nothing by the space of a year, or little less, after his Intimation, even as when many Arrestments are made by sundry Creditors, not the first Arrester, but the first *Doer* of Diligence upon his Arrestment, is to be preferred, so not the first Intimation, which is of no greater force than an Arrestment, but the Diligence ought to be Repelled, notwithstanding whereof the first Intimation was preferred. Actor. *Lermonth.* Alter. *Mowat. Scot* Clerk. *Vid.* 8 *January* 1629. betwixt thir Parties.

Ross contra *Butler, Eodem die.*

A Decreet of Removing being recovered by Mr. *George Butler*, against the Relict of *Alexander Vans*, which being Suspended, and one *Vans* being Cautioner for obedience in the Suspension, and the Suspension being discust, and the Letters found Orderly proceeded, and upon the *Act* of Caution, the Cautioner Denunced, and Charged for not obeying of the Decreet, by the said Relict, and thereupon the Obtainer of the Decreet, by command to the Sheriff, conform to the *Lords* Letters, being entered to the Possession of the Lands in *July*, at which time the Corns were Growing upon the Lands decerned, and thereafter that Cropt being Intrometted with, by the Obtainer of the Sentence: The Escheat of *Vans*, Cautioner in the Suspension, being Gifted, and Declared, the Donatar, by the special Declarator, seeks the Corns Intrometted with by *Butler*, Growing upon the Lands, as said is, when he entered thereto, to be payed to him as Donatar, the same being the proper Corns of the said *Rebel*, who was Cautioner, and which was sown thereon by him on the Lands, and the Lands being Possest by him, diverse years before that Cropt, and no Decreet of Removing being given against him, nor of succeeding in the Vice of the Relict, who was decerned: The *Lords* sustained the said Action, and Found, that the saids Corns pertained to the Donatar, and not to him who had obtained the Sentence, albeit he *Alledged*, that he having the only Right to the Lands, and so found by Sentence, whatever was sown thereon *solo cedebat*, and pertained to him, and came in the place of the Violent *Profits*, which belonged to him by vertue of his Decreet; and that the said Rebel could qualifie no Right in his Person to the Lands, by vertue whereof he might maintain his *Possession*, and he was not Rebel the time of his Intromission, and by his becoming Cautioner for the *Relict*, decerned to *Remove*, he could not ascribe the *Possession* to himself, which *revera* pertained to the said Relict, who had a pretended Title of Liferent; which Alledgance was *Repelled*, and the *Pursuit* sustained, in respect of the *Rebels Possession*, offered to be proven, at the time of the Warning made to the *Relict*, and sensine, and of the Cropt Lybelled; and it was not found necessar to *Alledge*, that he *Possest* by vertue of a *Right* to the Lands Lybelled; for the *Lords* Found that the Corns being Sown after a Decreet of Removing, by another *Person*, against whom no Decreet was given, albeit the Person who did Sow the same, had no *Right* to the Lands, wherein they were Sown, and that his Possession could not have been maintained, if he had been *Pursued*, either to Remove, or as succeeding in the Vice, yet that the said Corns pertained to him who Sowed the same, and *Consequently* to the Donatar to his Escheat, and that the same could not be Intrometted with by him, who obtained the Decreet of Removing, the same not being given against the Party who Sew the Land, and that his Entry to the Possession, by vertue of Charges to the Sheriff thereupon, could not give him Right to meddle with the Corns Growing thereupon, pertaining to any other Person, than that Person against whom he had received Sentence

Sentence of Removing. Actor. *Neilſon* & *Mowat*. Alter. *Aiton*. *Gibſon* Clerk. *Vid. November* 21. 1628. *Bruce* contra *Bruce*.

L. *Corsbie* contra *Shaw*, *January* 15. 1629.

BRieves being Impetrat by the Laird of *Corsbie*, for Serving him Heir to one of his Predeceſſors, before the four Macers, and the *Lords* having joyned four *Advocats* with them, two nominat for the Laird of *Corsbie*, and two for *Shaw*, who Compeared, and opponed againſt the Service, and being admitted for his Intereſt therein, he being Heretably Infeft in the Lands, whereunto *Corsbie* craved to be ſerved Heir to that his Predeceſſor, who was Infeft therein; and he Alledging, that that Predeceſſor was a Baſtard, and ſo ſhe could not have an Heir, nor he be ſerved as Heir to him; And the Aſſeſſors differing in Judgment, and being of contrary Opinions, and craving the *Lords* Advice therein, by their Supplication given in for that effect, whereupon they being heard in preſence of the *Lords*, the *Lords* gave Advice, that that Alledgance ſhould not ſtay the Service; For they thought all that the Exception of Baſtardry, by the 94. Act of Parliament 6. *Ja.* 4. is Ordained to be received againſt the Service, ought to be underſtood of the Baſtardry of him, who Impetrats the Brief, and not of the Predeceſſor, to whom the Party deſires to be Served Heir, ſpecially in this Caſe, and Caſes of Antiquity, where the Predeceſſor was deceaſt many years before, as in this Caſe, where he was dead 50 years before; for if this Exception of the Predeceſſors being Baſtard, were received, it would be a way to ſtop all Services. Actor. *Craig*. Alter. *Neilſon*.

La. *Aiton* contra *Hume*, *January* 21. 1629.

THe Wife of an Huſband being Infeft in her Conjunct-fee Lands, the Huſband dieing after the *Whitſunday*, and before the *Martinmas*, the Lands wherein ſhe was Infeft, being Sold by the Huſband after the Infeftment, and ſhe Purſuing the Buyer for the half years Duty of the Lands, alſwel for the half of the Duty payed for the Graſs, as for the Duty payed otherwiſe for the Lands, the ſame being Set by him, who had bought the ſame from her Huſband, for a Silver Duty to be payed for the Hay and Graſs at *Whitſunday*, and for a Victual Duty to be payed of that ſame Cropt, at the Ordinar Terms of paying of Victual; and the ſaid Silver Duty being payed to the Herctor at the *Whitſunday*, before her Huſbands deceaſe, before which time the Hay was Mown: It was nevertheleſs Found, that albeit he was only Singular Succeſſor to her Huſband in the Right of the Lands, who was Conveened, and that the Tennent of the Ground was not Conveened, nor yet the Husbands Heir; And albeit the *Whitſundays* Terms Duty was payed before, as ſaid is, yet that the Relict by vertue of her Right, had Action againſt the Singular Succeſſor, for the whole half of any Duty payed for the Lands, albeit her Huſband deceaſed after the whole *Whitſundays* Dutie was payed, for that whole years Graſs; and that the whole half Duty of theſe Lands was due to her, ſeing the Husband died before the *Martinmas*; for that *Whitſunday* interrupted is compted for the next years Duty, and not for that year wherein he died. Actor. *Craig* & *Stuart*. Alter. *Aiton*. *Gibſon* Clerk. *Vid. March* 9. 1631. Lady *Huttonhall*.

Scot contra *Turnbull*, *Eodem die*.

IN a Reduction upon an Inhibition, for Reducing of a Diſpoſition of Lands made after the Inhibition, was ſuſtained, albeit the Defender Alledged, that the ſame was made to him, for ſatisfying of a Debt of Money, owing by the Perſon Prohibit, who was a Common Debitor to both Parties, and which Debt was owing to him by Obligation long before the Inhibition, ſo that the Obligation being of a date long anterior to the Inhibition, as it was lawful to him,

to have taken payment of his ſaid anterior Debt, after that Inhibition, ſo it was lawful to him to receive the ſaid Alienation, for ſatisfying of the ſaid Debt, the ſame being made *ex hac cauſa*, and for ſatisfaction thereof, and bearing to be due for that Cauſe, which Exception was Repelled, and the Alienation after Inhibition was Reduced, albeit the Bonds for the Debt preceeded, ſeing the Bonds bore not, *that the Debitor was obliged to give the Party Creditor an Alienation of theſe Lands for that Sum, but was made upon borrowing of Money to be repayed again*; And albeit it bore alſo, *that the Debitor was obliged to Infeſt the ſaid Defender in an Annualrent for his Money, out of any of his Lands*, which was Found, could not ſuſtain the Heretable Alienation, made after the Inhibition. Actor. *Stuart.* Alter. *Cunninghame* & *Scot.* *Gibſon* Clerk. *Vid. Jan.* 24. 1629. *Dickſon* contra L. *Urtill* * *Feb.* 17. 1629. *Blackburn, Feb.* 22. 1631, L. *Corsbie.*

The like Deciſion was done *in terminis*; *March* 19. 1633. *Kennedie* and *Irvin* contra Captain *Annand*, in a Reduction of a Diſpoſition of Land, made by the Common Debitor to one of his Creditors, for ſatisfying of a Debt owing before the Inhibition, and the Debt whereon it was Served, notwithſtanding whereof the Diſpoſition of the Land, done after the Inhibition, was Reduced, by the ſecond Creditor, Server of the Inhibition. Actor. *Davidſon*, Alter. *Mowat.* *Gibſon* Clerk.

K. Advocat & L. *Clackmannan* contra *Livingſton*, *Jan.* 22. 1629.

IN an Action purſued by the Kings Advocat and the L. *Clackmannan* againſt *Livingſton* of *Barownie*, to hear and ſee it found that the Defender had taken more than ten for each Hundred in a Wodſet, acquired by him from *Balnamon* who was alſo a Creditor to *Clackmannan*, and who had Compryſed the Lands Wodſet to the Defender, and therefore that the Right of the Sums, for which the Defenders Wodſet was acquired, pertained to the King, conform to the 247 Act 15 Parl. *Ja.* 6, which Act was the ground of the Libel. This Action was Suſtained at the Kings Advocats inſtance, albeit there had been no Party to aſſiſt the Purſuit, and to concur with the Advocat, and albeit no Donatar was conſtitute by the King, to whom theſe Sums were gifted. Actor. *Advocatus.* Alter. *Aiton.* *Hay* Clerk.

Maſterton contra *Robertſon*, *Eodem die.*

AN Exception of Poynding was Suſtained to Eleid an Action of Spuilzie, albeit the Goods were Intrometted with by the Defender at his own hand, by the ſpace of three Hours before the Officer who Poynded came, or entered to any Act of Poynding; and alſo albeit the Sheriff who directed the Precept of Poynding was not in Office, nor Sheriff at that time when the Precept was Execute, but that the time of the Poynding there was another Sheriff; which was not Reſpected, but was Found that a Precept direct by a Sheriff before, albeit not Execute ſo long as he was in Office, yet might be Execute thereafter in the time of the next ſucceeding Sheriff, without any new Precept to be direct by him, for that would put the Subjects to unneceſſary Charges, and there was two years almoſt betwixt the date of the Precept and the time of the Execution, yet the ſame was nevertheleſs Suſtained. Actor. Alter. *Nairn.* *Gibſon* Clerk.

Fairbairn contra *Kello*, *Eodem die.*

HENRY *Fairbairn* being Warded in the Tolbooth of the *Cannongate*, for not payment of a Sum owing to *Bartholomew Kello* contained in his Bond, and eſcaping out of Ward, and Sentence recovered againſt the Baillie thereupon for payment of the Debt; thereafter the Bond is deſired to be Reduced by *Fairbairn*, upon a reaſon of his Minority, and the Creditor having Summoned the Purſuer, he being out of the Country, to give his Oath *de calumnia* upon the

the Reason, with Certification; and this Reduction being desired to be transferred in the Cautioner for the Jaylor, who was decerned to relieve the Baillies, it was Found that it ought to be Transferred, and that the Cautioner might insist thereon, even as a Cautioner might Transfer a Suspension, tho the Principal would not insist thereon, who raised the same, or as a singular Successor might seek Transferring of that which was competent to his Predecessor, and albeit the Raiser of the Reduction were holden as Confest upon his Oath *de calumnia*, as would grant the Defenders desire by his Compearing, yet that ought not to prejudge the Cautioner to insist and prove the Reason. Actor. *Mcgill.* Alter. *Nairn.* *Vid. 6 March* 1632, *Redycks* contra

Scrimzeour contra *Lawson*, *Eodem die.*

A Debitor being taken by Letters of Caption, and ready to be Incarcerate, another gives his Bond to the Creditor to Re-enter him, betwixt and a certain day in als good Estate to be Incarcerate then, or else to pay the Sum; whereupon the Debitor being Liberate, thereafter the said Debitor after the giving of the foresaid Bond, and before the day appointed therein for the Re-entry, obtains Suspension of the Charges for that Debt, for the which Caption was used; after the expiring of the day of Re-entry, the person bound for the failzie of not entry, conform to his Bond, being charged to pay the Sum, and he suspending upon an offer yet to re-enter him in as good Estate as he was in at that day, wherein he was bound to re-enter him: This offer was Sustained, and Admitted to purge the Failzie, albeit it was long after the day in the Bond; and thereafter the Creditor Alledging, that he was not in als good Estate as he was in, when he was relieved from Warding upon the said Bond, because since that time he had obtained a Suspension, which was an Impediment that the Creditor could not Incarcerate him. This Alledgance was Repelled, and the Debitors obtaining of Suspension was not Found a Cause, whereby the Debitor could be repute in a worse Estate, seing Caution was found in the Suspension, against whom the Creditor would obtain Execution, if the Suspension should discuss in his favours; but it would appear that this should not have liberate the person bound to enter the Debitor, for if the Cautioner in the Suspension was not answerable to pay the Debt, the Creditor would be prejudged, who would not find the Debitor so easily to be apprehended, and put again in Ward; so that it might seem reasonable, that if the Suspension should discuss in favours of the Creditor, that he who was bound to enter him, should be holden to enter him, *eo casu* to the Creditor to be Warded. *Hay* Clerk.

La. *Renton* contra L. *Renton*, *January* 24. 1629.

UMquhile L. *Renton* being oblig'd to provide his Wife to her Liferent of all Conquish, to be made by him during the time of their Marriage, whereupon she having charged her Son his Heir, to provide her to some Lands conquish'd by her Husband after the Bond, which Conquish being made by Contract, no Infestment having followed to him in his Lifetime but only a Contract, by vertue whereof he possest the Land: The Charges were Sustained, and albeit the Husband was not Infeft, yet it was Found a Conquish, he possessing by vertue of that Contract, and dying in Possession, and the Son continuing in that same Possession, and because the Husband the time of his decease stood oblig'd in a part of the price of the Land conquish'd to the Seller, which his Heir was compelled to pay to him since, who sold that Land to him. It was Found, that the Heir ought not to provide the Relict to her Liferent thereof, but with the Burthen of paying Annualrent for that Sum unpayed, and which the Heir was compelled to pay sensine of all Terms after the Provision, to be made to her by the Heir, of her Liferent thereof, seing the Sum

which he was compelled to pay, was by vertue of a Bond made by the Husband, expresly bearing payment of the Sum, owing by him for the price of the same Land, whereas if the Bond had not made specifick mention, that the Sum was owing by the Defunct for the same cause, *viz.* for the price of these Lands: the *Lords* would not have so decided; for if the Price had been provided by the Defunct to the Seller of the Land, and if he had borrowed the Money from another to pay the samine, and that he had remained at his decease Debitor therein to that Creditor, the Bond making no mention that that Sum was borrowed for the Cause of that Alienation, *eo casu* the Burthen of Payment of that Annualrent of that Sum so borrowed, would not ly upon the Relict, but she would have her Liferent free of that Burthen; and the Contract bearing, to provide to her her Liferent of all Possessions purchased by him, it was questioned, if that should extend to Tacks acquired by him, but that was not decided. Actor. *Oliphant.* Alter. *Craig. Gibson* Clerk. *Vid.* 3 *July* 1627, La. *Dumfermling*, and the other Cases there cited.

Dickson contra L. *Urthill*, *Eodem die.*

TWo Creditors to one common Debitor contending for a Sum owing to them, It was Found, that an Inhibition used by the one Creditor against the common Debitor, was no Impediment to him to make, nor to the other to receive an Assignation to that Debt controverted, albeit made after the Inhibition Execute, the same being made for satisfying of the Debt owing to that Creditor before the Inhibition, albeit the Inhibition might be an Impediment to the common Debitor, to contract new Debts after the executing thereof, which might hinder the Inhibiter in his lawful Execution, competent to him by vertue of that Inhibition, which would appear to be understood anent contracting of Debts thereafter, which may affect Heretable Rights, whereupon Inhibition only struck, but not for Movables which are affected with other manner of Diligence. Actor. *Advocatus & Craig.* Alter. *Nicolson & Gibson. Gibson* Clerk. *Vid.* 21 *January* 1629, *Scot* contra *Turnbul*, where the contrair appears done. 22 *March* 1623, L. *Braco.*

Auld contra *Smith*, *January* 29. 1629.

ONe being made Assigney to a Debt owing to the Cedent, and thereafter the same Debt being arrested by another Creditor to the Cedent, the said Cedent being Bankrupt, and the Disput being betwixt the Arrester and the Assigney, the Assigney craving preference as anterior to the Arrester, and the Assignation being made for Debts owing by the Cedent, and for satisfying some others of the Cedents true Creditors; it was Found, that if the Assigney could not instruct by Writ, that the Cedent was the time of the Assignation Debitor to himself, that the Assignation could not be Sustained, and it was not Found sufficient Probation of the Debt, that the Assigney offered to give his own Oath thereon, alledging no other Probation to be required by the Act of Parliament anent Bankrupts, which the *Lords* Found was not sufficient, but was Found ought to be Proven otherways than by the Assigneys Oath, specially because there was evident Presumptions of Fraud, qualified betwixt the said Assigney and the Cedent, who were confident persons, being two Brethren, and there were some circumstances qualified, whereby it appeared that there was simulation betwixt them, and consequently that the Assigney could not Dispon the same by making election, to pay such of the Cedents Creditors as he pleased, and thereby to prejudge another Creditor, and which other having Arrested and Comprysed that same Debt assigned, albeit after the Assigney was denuded in favours of other Creditors, whose Debts were true and instructed, yet the said Creditor Compryser was preferred as said is, because of the defect in the

Assignation

Aſſignation made by the one Brother to the other, who could not ſhew any Debt owing to him for which it was made. *Gibſon* Clerk. *Vid.* 12 *Feb.* 1622, *Denniſtoun* contra *Young*, and the Caſes there cited. 22 *January* 1630, *Hoppringle* contra *Mark Ker*.

Gibſon contra *Kowie*, *Eodem die.*

A Decreet Arbitral being Subſcribed by one of the Judges, to whom the two Parties had ſubmitted, he being one of the four Judges to all which it was ſubmitted, they agreeing together, and the ſaid Judge having Subſcribed as Nottar for both the Parties Submitters, and alſo as Judge foreſaid, the ſame was ſuſtained, ſeing it was for a matter of ſmall concernment, *viz.* 80 Merks, and betwixt two Friends, which were but poor men, and done in Landwart, out-with Burgh, where Nottars are not frequent. Actor. *Gibſon*. Alter. *Gibſon* Clerk.

Kellie contra *Winraham*, *Eodem die.*

A Decreet of Deprivation pronounced by the Biſhop of *Dunkell* againſt *Robert Winraham*, as one of the Prebendars of the Chappel-Royal, was ſuſtained, tho it was quarrelled by way of Suſpenſion, becauſe the Biſhop who was Judge was Rebel at the giving thereof, and ſo had no perſon to Judge, which was Repelled after Sentence, the ſame not being proponed before the pronounciation thereof, *l. Barbarius Philippus* 3. *ff. de officio Prætorum.*

Lands contra *Dowglaſs* and *Lands*, *Eodem die.*

THe Father as Adminiſtrator and Tutor to his Son, who was Heretor of a Tenement in *Edinburgh*, having Sett a Tack for certain years, for payment of a Duty yearly therefore to the Father, in name of his ſaid Son, as Tutor and Adminiſtrator to him; and this Tack-duty being Aſſigned by the Father to one of his own Creditors, for payment of his own Debt, which Duty being ſought by the ſaid Aſſigney, it was found, that the Father as Tutor to his Son, albeit he might yearly receive the ſaid Tack-duty, and diſcharge the Tackſ-man thereof valiably, and that the payment to the Father would relieve him, yet that he could not Aſſign the ſame Tack-duty to his own Creditor, by paying of his own Debt with the Pupills Goods, and therefore would not ſuſtain the Aſſignation, eſpecially the Father being *lapſus bonis*. *Scot* Clerk. *Vid.* 3 *March* 1629. *Carmichael.*

Stirling contra *Panter*, *January* 30. 1629.

AN Alienation being deſired to be Reduced, becauſe it was made by the Diſponer after Inhibition, and an Exception of Nullity being proponed againſt the Inhibition, upon the 268 Act of Parliament 1597. Becauſe conform thereto it was not Execute at the Head Burgh of the Regality, within which the Party prohibited then dwelt; for the Execution bore, that the Party was prohibited at his Dwelling-place at *Pitmewis*, which he offered to prove was within the Regality of *Kyllimuir*, at the Head Burgh whereof it was not Execute. This Exception was Found Relevant, and the Nullity was found might be diſcuſt *hoc ordine*, without further Proceſs of Reduction, albeit the ſamine conſiſted *in facto*, and required probation, and albeit it could not be inſtantly proven: And it being Replyed, that albeit the ſaid Nullity might be admitted, yet it could not be admitted *in totum*, to make the Inhibition null, except only for any Lands lying within the Regality, and could not annul the Inhibition, as it is Execute at the Parties Dwelling-houſe, and at the Head Burgh of the Sheriffdom, within which the Dwelling-houſe is, for the Lands Libelled, which lay within that Sheriffdom, and not within that Regality; for he Alledged, that that neither was nor could be the mind of the Act of Parliament, ſeing

the ſame extends only to make ſuch Inhibitions null, which are not Execute at the Head Burgh of the Regality, for ſuch Lands only as are within the Regality, and cannot annul the ſame for the Lands within the Sheriffdom, at the Head Burgh whereof it is Execute, no more than if he had been Inhibited perſonally apprehended, and Execute againſt the Leidges at the Head Burgh of the Sheriffdom, he dwelling at that time within the Regality, where no Execution was made, *quo caſu* the Inhibition could not fall for the Lands within the Sheriffdom, *ergo* no more here, and therefore it is clear that the Act of Parliament cannot extend thereto; which Reply was Repelled, and the Exception ſtill ſuſtained, in reſpect of the Act of Parliament, which declares ſuch Inhibitions null without Reſtriction, or words Taxative, but indefinitly. Actor. *Advocatus* & *Nicolſon*. Alter. *Stuart* & *Fletcher*. *Gibſon* Clerk. *Vid.* 25 *July* 1628. Betwixt thir Parties. *Item* 20 *January* 1632. *Haliburton* contra *Monteith*.

Capt: *Crawfurd* contra L. *Lamingtoun*, *Eodem die*.

IN an Action of Exhibition of a Contract, the *Lords* Found, that in this and the like Actions for Exhibition of Writs, that the Purſuer ought to Libell and prove, that the Defenders called as Havers, either had the Writs the time of the Citation, or had the ſame ſince, which was found probable by Witneſſes; or if he inſiſt, that he had the ſame at ſome time before the Summons, that he ought therewith to conjoyn, that he had fraudfully put the ſame away, which part of his fraudful away-putting, *viz. quod dolo deſiit poſſidere*, the *Lords* Found only probable by Writ, or Oath of Party. Actor. *Cunninghame*. Alter. *Advocatus* & *Nicolſon*. *Gibſon* Clerk. *Vid.* 17 *Novemb.* 1627. *Inglis* contra *Kirkwood*.

E. *Rothes* contra *Wardlaw*, *Eodem die*.

IT was queſtioned, if the Tutor to a Pupill might take the Gift of his Pupills Ward to his own uſe, and not to the Pupills; and if the Judge ſhould allow the Tutor to Purſue thereon, without giving ſome Security to apply the ſame to the Pupills uſe, he being ſatisfied of his Charges. Actor. *Hay* & *Aiton*. Alter. *Nicolſon*. *Gibſon* Clerk.

Horſeburgh contra *Macklevain*, *Eodem die*.

IN an Action of Tutor-Compts purſued before the Commiſſar of *Glaſgow*, The *Lords* Found, that the Commiſſars were competent Judges thereto, and refuſed to Advocat the ſame to the *Lords*, upon that Reaſon, that the Commiſſars were not Judges to ſuch Actions.

Blackburn contra *Gibſon*, *Eodem die*.

AN Exception upon a Compriſing clad with Poſſeſſion divers years before the Warning, was not ſuſtained againſt a Removing founded upon a prior Compriſing, ſeing the Excipients Poſſeſſion, which he had before the Warning, was by vertue of a Tack, which he had then ſtanding, and before the Warning the Tack was expired; after the expiring whereof, albeit he continued his Poſſeſſion, yet the ſame cannot make his ſecond Compriſing to prevail againſt the prior, he acquiring no Poſſeſſion Legally, by vertue of his Compriſings, but continuing that which he had by vertue of the Tack before. Actor. Alter. *Gibſon*. *Hay* Clerk.

Davidſon contra *Balcanqual*, *Eodem die*:

A Debitor having made his Creditor Aſſigney to a Debt, owing to him, the Term of payment of the which Debt owing by the common Debitor to the Aſſigney his Creditor, was not come by the ſpace of three or four Moneths after the date of the Aſſignation; and this Aſſignation being intimate that ſame day after the date thereof, that ſame very day another Creditor Arreſts

rests the same, whose Term of payment was past the time of the Arrestment, and Summons to make the same forth-coming, being pursued by them both, the difference of days of Compearance, and Citations was in four or five days, whereof the *Arrester* had the advantage of Priority: Likeas his Arrestment bore the hour of his Execution; As also the Intimation bore, the hour of the making of the same for the Assigney, which hour in the Arrestment proported a time, which conferred with the hour of the Intimation, preceeded the same by the space of two hours: The *Lords* preferred the Arrester; the reason specially was, because of the priority of the hour, which the *Lords* Found in this case to be material, for after that moment of *Arrestment*, neither could the common Debitor do any thing in prejudice thereof, neither could the Intimation made any space thereafter, affect the Debt to the Assigney, it being affected of before to the Arrester, and the Intimation and Arrestment bearing thir hours, it was *Found*, there needed no other Probation to prove the priority. *Actor. Stuart.* Alter. *Hay* Clerk.

Mawer contra *Hadden*, *Ult. January*, 1629.

A Decreet dated and given the 27 of *December* 1628. by the Provost and Baillies of *Edinburgh*, being desired to be Reduced, because it was given in the time of *Yuill* Vacance, which was *feriot*, and wherein no Judicial Act ought to be done; this Reason was not sustained, but the Decreet found well given, because the *Decreet* was desired to be Reduced by him, who was Pursuer of the Cause wherein *Decreet* was given; for albeit Absolvitor was given to the Defender, by reason the *Pursuer* failzied in Probation, yet seing the Pursuer then insisted in his Pursuit, the *Lords* Found, he could not Reduce the same upon that Reason, no more than the Defender could, if Sentence had been given against him Compearing, and that no Dilator had been Alledged before the Sentence.

La. *Aiton* contra *Hume*, *February* 4. 1629.

THe young Laird of *Aiton* and the Lady *Pursuer*, then his Contracted Spouse, by Contract of Marriage betwixt them, wherein old *Aiton* was obliged to Infeft the young Laird and his future Spouse in Conjunct-fie, in the Lands of *Hundwood*, to be holden of the Superior, and conform thereto they were Infeft; after which Infeftment granted so to be holden, and before the same was Confirmed by the Superior, the old Laird and the young sells the Lands to another, to be holden of themselves; and in the Contract of Alienation the Buyer takes them obliged, to procure the young Lairds Wife, now *Pursuer*, her consent to the *Alienation*, and her Ratification thereof in Judgment; and upon this Contract the Buyer is Infeft holden of the *Annailzier*, and by vertue thereof in Possession thereafter two or three years, and before the young Lairds decease, that Infeftment given to him and his Wife, is Confirmed; after the Husbands decease she pursues for the *Duties* of the Lands, by vertue of her said Infeftment of Conjunct-fie; and the Relict of the Buyer of the Lands, she being Tercer, defending with the said Infeftment granted to her Husband, and his Possession, and that the Pursuers Rights and her Husbands was null, being given to them to be holden of the Superior, and not Confirmed before her Husbands Right acquired for great Sums; and that the subsequent Confirmation could not be drawn back, in prejudice of that Infeftment interveening, which was a mid impediment. The *Lords* Found, that the Lady Conjunct-fiar had good Right, notwithstanding of the Alienation before the Confirmation, seing that Alienation was granted to be holden of the Annailzier, who being their Author and Superior, they could not quarrel his Right nor hers, which were one. Likeas the Buyer had acknowledged that Right, by taking

the Seller obliged under a Pain, and for which Pain they had obtained Sentence, to procure the Lady now Pursuer, her consent *habili modo* to the said Alienation, and so they conld not quarrel the Pursuers Right, upon that Alledged Nullity, specially the said Nullity being supplied by a Confirmation, perfected in her Husbands Lifetime; Therefore the Alledgance was Repelled, Founded upon the said Alienation, in respect of the said Reply, and the Pursuit sustained, upon the said Confirmed Infeftment. Actor. *Craig.* Alter. *Belshes.* *Gibson* Clerk.

La. *Borthwick* contra *Scot*, *February* 6. 1629.

THe Lady Pursuing a Removing upon a Warning, whereupon Summons of Removing was not Intented, and Execute within the Space of Three Years, after the Execution of the said Warning, and fell under the Act of Prescription, 1579. and the Pursuer Replying, that albeit the Summons of Removing was not raised, and Execute within Three Years after the Execution of the Warning, yet the Warning was not prescribed, seing the Summons was Execute within Three Years after the Term, before which the Warning to Remove was made, and the Act of Parliament ought so to be understood: The *Lords* Repelled the Alledgance, and sustained the Pursuit and Warning, as not prescribed, seing it was found sufficient, that the Summons was Execute before the Expiring of the Three Years, after that *Whitsunday*, to the which the Warning was Indicted, albeit it was not Execute before the expiring of the Three Years, after the Execution of the Warning: For if Warning were made almost a year before the *Whitsunday*, to which the Party was Warned to Remove, it were hard to compt the Three Years of prescription, to take beginning at the time of the Execution of that Warning, made so long before the Term, but Found it ought to begin at the Term as said is. Actor. *Nicolson.* Alter. *Hay* Clerk. *Vid. March* 5. 1629. betwixt thir Parties. *Novem.* 11. 1630. L. *Lempit-law.*

T. of *Irvin* Supplicant, *February* 7. 1629.

IN a Supplication at the Instance of the Town of *Irvin*, and of a party, who had a pursuit depending before them, making mention, that the Parties Summons was admitted to his Probation, and because the Witnesses were actual dwellers in a Forraign Kingdom, by whom the Pursuer would prove his Summons, and that they, by their Authority, could not direct a Commission to the Judges, in the part where they dwelt, for their Examination; Therefore they craved, that the *Lords* would give them Power and Warrand to direct such Commission, by Authority of Session; The desire of this Supplication was granted, *Parte non audita. Vid. Jan.* 9. 1629. *Salmond* contra *Courtie.*

Brown contra *Dalmahoy*, *Eodem die.*

AGnes *Brown* the only Bairn procreat betwixt umquhile *Brown* her Father, and *Naismith* her Mother, being Executrix Confirmed to her said umquhile Father, obtained Decreet against her Mother, who was Executrix Confirmed with her, and against *James Dalmahoy* her second Husband for his Interest, for payment of the equal half of the Inventar of the Goods Confirmed, contained in the said Testament; and the said Relict thereafter dieing after her decease, the second Husband is Pursued by the said *Agnes Brown*, and her Tutor, as Intromettor with the Goods and Gear of his said Spouse, *hoc nomine* to make payment to the Pupil, of the particular Sums contained in that Sentence, obtained against his Wife, and himself for his Interest; wherein the *Lords* Found, that albeit Sentence was Recovered against his Wife, before her decease, and against himself, for his Interest, yet that he could

could not be Conveened *hoc nomine*, as vitious Intromettor with her Goods, to pay her Debts, he being her Huſband, and ſo *dominus omnium ejus bonorum*, and continuing only in that Poſſeſſion after her deceaſe, which he once as Husband had lawfully acquired, and ſo thereby he could not be conveened as univerſal Intromettor, to make him a vitious Intromettor, and lyable to her Debts; but the Purſuer might conveen him, to make forthcoming the Particulars Intrometted with by him, pertaining to his Wife, for payment of that *Debt*, or might Confirm her ſelf Executrix, as Creditrix to her, that ſhe might be payed of her Debt, for the which they found the Proceſs might be ſuſtained. Actor. *Burnet. Vid. March* 20. 1627. *Knows* contra *Kneeland. Jan.* 16. 1628. *Allans* contra *Lawder.*

Falconer contra *Blair, February* 10. 1629.

IT was queſtioned, if the Creditor to a Defunct by an Heretable Bond, might ſeek payment thereof from the *Defuncts* Executors, before the Heir were firſt purſued therefore, as the Purſuer Contended, who affirmed that the Heir, ſpecially he being reſponſal, ought to pay the Defuncts Heretable Debt, as the Executors are obliged to pay the Moveable; even as the Executors has no Right, but only to the *Defuncts* Moveables, and the Heir to the Defuncts Goods Immoveable, and to his Heretage, *& quem ſequuntur commoda, debent etiam ſequi incommoda, & quemque in ſuo genere.* But this Point was not decided, nor yet if the Executor will get Reſtitution thereof from the Heir, the Executor having payed the Creditor that Heretable *Debt*. Actor. *Nicolſon* & *Falconer*. Alter. *Stuart*: *Gibſon* Clerk. *Vid. March* 7. 1629. betwixt thir Parties.

Oliphant contra *Finnie, Eodem die.*

THe Husband being obliged to provide his Wife to a Liferent of all Sums to be Conqueſt by him, during their Marriage, whereupon ſhe having purſued the Heir, to provide her to her Liferent of ſome particular Sums, contained in certain Bonds, which the Husband had taken the Debitor obliged, to pay to ſome others of his Bairns, to whom the payment by the Bond, was appointed to be made, and which Sums he had provided to the ſaid Bairns. It was Found, that that Clauſe, and the like Clauſes contained in ſuch Contracts, could not oblige the Heir to provide the *Relict* to the Liferent of Sums, which in the Bonds and Securities made thereupon, were provided to the Defuncts other Bairns: For ſuch a general Clauſe in Contracts made by the Husband, in favours of his Wife, ought to be underſtood only of ſuch *Sums* as the Husband acquires to himſelf, and his Heirs, and whereunto his Heirs may ſucceed to him after his own deceaſe; and whereof the Fee remained in his Perſon, while he lived; For if it ſhould receive any larger Interpretation, it would tend to take away all power from the Husband, to provide any thing to his other Bairns; But to acquire all which he had or might purchaſe to his Eldeſt Son only; yet to this it's anſwered, that the Bairns Proviſion is unaffected with the Wifes Liferent. Actor. *Oliphant*. Alter. *Nicolſon. Hay* Clerk. *Vid. Feb.* 20. 1629. *Dowglas* contra *Whyt. March* 14. 1628, betwixt thir Parties, and the other Caſes there. *July* 16. 1625. *Knox* contra *Brown*. *

Stuart contra *Wilſon, February* 11. 1629.

IN a Sentence obtained againſt One as Heir to his Predeceſſor, for payment of a Sum of Money, wherein his Predeceſſor was Debitor, for the Price of a Tenement ſold by the Obtainer of the Sentence, to the Father of that Defender, who was heir to his Father, was decerned to pay the Sum; and the ſame Defender, upon the ſame Contract of Alienation thereafter, Intenting Action of Warrandice of that Tenement, as Heir to his Father, againſt the ſaid Party

Seller of the Land, in which Purſuit having produced the foreſaid Sentence given againſt him as Heir, to Verifie and Inſtruct his Title and Intereſt, *viz.* that he was Heir. The *Lords* Found the ſame not to Inſtruct him to be Heir, but that he ſhould otherwiſe Inſtruct the ſame, than by the ſaid *Decreet*, albeit he Alledged, that ſeing the Defender had recovered Sentence againſt him as Heir, upon the ſame Contract, that Sentence ſhould work betwixt thir Parties themſelves, to make them Heirs *hinc inde* in the Diſput, to be moved betwixt them, upon this Contract, *pro & contra*, which was not Reſpected, but it was Found he ſhould prove it otherwiſe, ſeing that will not prove *Active* which proves *Paſſive*.

Frazer of *Techmuiry Supplicant*, *Eodem die.*

A Supplication was given in by one *Frazer* of *Techmuiry*, as Heir Retoured, by General Service, which was produced, to his Good-dame called *Hay*, who had Compriſed for a Debt certain Lands pertaining to the L. *Philorth*, making mention in his Bill, that his Good-dame the Compriſer deceaſed before the ſaid Compriſing was allowed by the *Lords*; Therefore he being General Heir to her, craved the ſaid Compriſing, which he produced with his Bill, to be allowed by the *Lords*, and a Command to the Superior, to receive him as Heir to the Compriſer, in the Compriſed Lands: The deſire of this Supplication was granted, and no neceſſity was Found, that the Heir ſhould be put to any new Proceſs for the effect deſired, or that the Appryſing ſhould be transferred in him, or the Party either Superior or Debtor warned to hear the Deſire thereof granted, but the ſame was ſummarly granted, conform to the deſire of the ſaid Bill. *John Gilmer* was writer thereto. *Vid. Decem.* 5. 1628. L. *Corſbie*, *March* 22. 1626. Mr. *Patrick Collace*, and the Caſes there, *Decem.* 22. 1626. *Gordon* *.

Lo. *Leſly* contra L. *Boquhen* and L. *Pitcaple*, *February* 12. 1629.

IN a Purſuit upon a Clauſe irritant, the Lord *Lindores* having Set a Tack of the Teinds of certain Lands to *Boquhen*, with expreſs Condition, that if he Sell any of theſe Lands, whereof he had Set the Teinds in Tack to him, without Conſent of the ſaid Lord *Lindores*, in that caſe the Tack to expire, and the Right of the ſaids Teinds to return to him again: after which Tack *Boquhen* Sells the ſaids Lands to *Pitcaple*, and thereafter the Lord *Lindores* makes the Lord *Leſly* Aſſigney to the Contract, bearing the foreſaid Clauſe and Proviſion, and Sets him a new Tack of the ſaids Teinds; whereupon he as Aſſigney Purſues Declarator of the ſaid Irritant Clauſe againſt *Boquhen* and *Pitcaple*, who Compearing and Alledging, that the Lord *Lindores* before the making of the Lord *Leſly* Aſſigney, by his Miſſive Letter all written and ſubſcribed with his own Hand, directed to the Laird of *Boquhen*, conſented to the Alienation foreſaid, and the Purſuer Anſwering, that the Conſent could not be proven by a Miſſive Letter, which was a Writ wanting Witneſſes, to work againſt the Purſuer as Aſſigney, except that the Defender could both qualifie, that the ſame was truly done and delivered to the Defender, before the Purſuer was made Aſſigney; for albeit it be all the Lord *Lindores* Writ, yet that will not be enough againſt the Aſſigney, ſeing the Cedent might write ſuch a Letter after his Aſſignation, and therefore the date and delivery thereof ought *poſitivè* to be proven by and beſide the Letter it ſelf. The *Lords* Found the Alledgance Relevant, notwithſtanding of the Reply, which was not reſpected, ſeing the Letter behoved to bear Faith in the Date, which it proported, except the Purſuer would Improve the ſame, or otherways take it away. *Actor.* *Alter. Baird. Hay* Clerk. *Vid.* 22 *January* 1630. contra

La. *Dum-*

L. *Dumfermling* contra *M'gill* Minister there, *February* 13. 1629.

IN a Suspension of Charges for Removing from a Ministers Gleib, upon a Reason that there was als much Land as would extend to four Acres nearest to the Manse, and nearer than the Land designed, which was condescended to be of the Lands within the Precinct of the Abbacy, and which the Suspender Alledged ought to be designed, conform to the Act of Parliament *anno* 1512, the same being Arrable Land: This Reason was not Sustained, because that Land within the Precinct condescended upon in the said Reason, was Parked in within the Precinct, which now was become the Kings Park, the Abbacy being annexed to the Crown, and the said Precinct keeped for the Kings Park, and that Land never being Laboured nor Tilled of before: Neither was it respected that the Suspender Alledged, that the same might be Tilled, and was commodious for that use, and that the Minister had his Manse within the Precinct, which ought to draw with it the Gleib thither also, where there was the conveniency of a Gleib, which was not respected. Actor. *M'gill*. Alter. *Stuart*, *Gibson* Clerk.

Wright contra *Stirk*, *Eodem die*.

IN a Reduction of a Breive of *Lyning* or Limiting, and Decreet conform thereto, given by the Provost and Baillies of *Dumfermling*, to whom the Brieve out of the Chappel of *Dumfermling* was directed to that effect: This Reason of Reduction was Found Relevant, and the Breive was reduced, because the Breive was not proclaimed upon 15 days, nor a Precept direct upon a Claim, given in by the Purchaser of the Breive against the special Parties, having Interest in the *Lyning* of the Tenement therein contain'd, for summoning them thereto, nor no formal order of Process keeped; which Reason was Found Relevant, albeit the Defender contended, it was not Relevant in this Case of Breives of *Lyning*, which hath summar proceeding. And that by the Consuetude in the Burgh of *Dumfermling*, no other Claim is given in but summar Tryal taken betwixt the Parties; likeas the Parties are summoned by the Breive and Warrant thereof, which Exception was Repelled. Actor. *Mowat*. Alter. *Gibson* Clerk.

Cochran contra *Dawling*, *Eodem die*.

AN Husband being oblig'd to employ 10000 Merks to his Wife in Life-rent, and when it was uplifted, to employ the samine again als commodiously as he might to her use: And he having employed the same, after his decease, it is redeemed from her and his Heirs by the Debitor, at the time of which Redemption, the Heirs being Minors, and the Curators offering the Money to the Relict to be employed by her self, and offering their Concourse thereto, which being refused by her, and they desiring her Concourse to seek and find one to take the same for Profite, and she not finding any, but refusing to meddle therewith, and the Minor having done most exact Diligence to get Employment, and finding none till Mid-term was past, and then being constrained to let it out for a Quarter-terms Profite, and so contending that they had done all they might, and which the most Provident could do in their own Affairs, they Alledged that they could be no further obliged: Notwithstanding whereof it was Found, albeit the Contract oblig'd only to employ to the best Commodity might be, that for the by-gone Terms no more should be asked and payed to the Liferenter but that quantity which was received for the Money; but Found, that in time-coming the Heirs remained ever and still oblig'd to the Liferenter in Annualrent for that Money, of all Terms after the Term of Payment of the Money employed by them as is above-written, albeit the Heirs did never so great Diligence, and albeit they should never get it employed, which should not liberate them thereafter. Actor. *Aiton* & *Stuart*, Alter. *Advocatus* & *Neilson*. *Scot* Clerk. *Vid. Penult. Feb.*

1629, betwixt the same Parties. 2 *July* 1628, *Nasmith* contra *Menzies*.

Grant contra L. *Balvanie*, *February* 14. 1629.

ONe having Compryſed Lands as pertaining to his Debitor, and having thereupon charged *Balvanie* as Superior of the Lands, to enter him therein as Vaſſal, in place of his Debitor from whom he had Compryſed; and the Superior Suſpending, Alledging that that Debitor was never his Vaſſal, and that he could not be compelled to enter the Compryſer, until he produced and ſhewed where the Debitor was Infeft in the ſame Lands as his Vaſſal, and the Compryſer Anſwering, that he could not alledge that he was not his Vaſſal, becauſe he had accepted of him a Reſignation of the ſame Lands made by him in his Hands *ad perpetuam Remanentiam*, and alſo that he had received from him divers years before, Payment of the Feu-duties owing by him, and contained in the Infeftments of the ſaids Lands, and that his ſaid Debitor had alſo a Charter of the ſame Lands, granted to him by another, who was Vaſſal admitted and entred by *Balvanie*, which were great Preſumptions that he was Infeft, and by the which he had acknowledged the ſaid Compryſers Debitor to be his Vaſſal. This Anſwer was not Suſtained to inforce the Superior to receive the Compryſer in place of his Debitor in theſe Lands, except he ſhewed where the Debitor was Seaſed therein: for the Superior might receive a Reſignation in his own Hands from one who was never Infeft, and when he liked he might enter or not enter him who reſigned, as he thought expedient for his Security; but he not being Infeft, and the Compryſing deduced againſt him as having Right to the Lands, he ought to ſhow the ſamine to the Superior, and alſo he might receive Payment of his Feu-duty from any who would pay the ſamine, from whence it could not be neceſſarily inferr'd that the Payer was his Vaſſal. *Hay* Clerk: *Vid.* 12 *March* 1629, *Colmſtie* contra E. *Roxburgh*. 23 *March* 1622, Mr. *Simeon Ramſay*.

Farquhar contra *Wallace*, *Eodem die*.

THe Defender being called for Delivery and Exhibition of a Bond, which was libelled to have been put by the Purſuer, and depoſitate by him in the Defenders hands to the Purſuers uſe; and the Defender Alledging, that the Depoſitation in his hands of the ſame by the Purſuer to the Purſuers own uſe, could not be Proven but by Writ or Oath of the Party Depoſitar, who was Defender, or by the Oath of the Party Maker of the Bond. This Alledgance was Repelled, and the Summons in that part about the depoſitating thereof, was Found probable by Witneſſes, as the having of the ſame, or the having of Writs in other ſuch Caſes are probable by Witneſſes. *Hay* Clerk. *Vid.* 22 *January* 1624, *Lermonth*.

Steven contra *Paterſon*, *Eodem die*.

ONe *Paterſon* being conveened as Heir to his Father *John Paterſon*, by Intromiſſion with his Heirſhip-Goods, for payment of a Debt of 1000 Merks owing by his Father, and the Defender purging his Intromiſſion by Warrant of the *Lords* granted to the Defender, and direct to the Baillies of *Edinburgh*, to make Inventar of the Goods being in his Fathers Houſe; according whereunto Inventar was made, the Goods contained in the which Inventar are extant to be made forth-coming: wherefore he Alledged, that he could not be thereby conveened as Heir. And the Purſuer Replying, that by and attour the Goods contained in the Inventar, the Defender had Intrometted with his Fathers Bible, a Muſket, a Sword, a Stand of Curtains, and two Pillows, which were the beſt his Father had, and which was Heirſhip, which the Defender had uſed, and were not contained in the Inventar; theſe Particulars and this manner of Intromiſſion, albeit both the Particulars were few and little worth,

worth, and also that the Defenders Intromission was only qualified in using of them, and not in disponing of them, or making any advantagious use or benefite thereof, was Sustained to make him Heir and subject to pay the Debt of 1000 Merks. Actor. Alter. *Aiton*. *Hay* Clerk.

Inglis contra La. *Dumfermling*, *February* 17. 1629.

IN an Action for Letters Conform being sought by *Alexander Inglis* to two Pensions, granted to him by the umquhile Earl of *Dumfermling*, against his Lady Relict, & Liferentrix of the Lands, out of which the Pension was granted, the Duties whereof was assigned to him *pro tanto* for Payment, and against the Earl his Son, and against the Possessors of the Lands, and all others having Interest; The Pursuit was Sustained, albeit the Defenders Alledged, that no such general Letters ought to be Sustained, in respect of 140 Act 12 Parliament *James* 6, which Prohibites all such general Letters, and whereby it is Provided also, that Letters Conform, and general Letters are only ordained to be granted to the beneficed person, or any having Right flowing from him, and that the same then serves only for an Intimation, and not to be a Warrant, to denunce any Party to the Horn, and whereby such Letters of Horning, if any were, should be null; which Alledgance was Repelled, seing if Horning were used contrary to the Tenor of the Act of Parliament, it was then time to the Parties interessed to quarrel the same. Actor. *Belshes*. Alter. *Stuart*. *Gibson* Clerk.

Blaikburn contra *Gibson*, *Eodem die*.

A Removing being Pursued by a Compryser, and the Defender excepting upon a Tack Set by the Debitor before the date of the Compryseing, albeit it was after the Denunciation; The *Lords* Repelled the Alledgance, seing the Tack Set after the Compryseing was Found not to be a valid Right, to exclude the Comprysers Right and Compryseing following upon the Denunciation, the said Denunciation made before the Tack being Found by the *Lords* to be such a Diligence, that albeit no Inhibition was Served against the Debitor, yet that he could do no Deed after the Denunciation which might prejudge the Compryser, and derogate to the force of the Compryseing depending thereon, neither was it respected that the said Debitor was not a Bankrupt the time of the said Denunciation or Tack; for it was Found, that albeit he was neither Bankrupt, nor at the Horn by the Party, nor yet prohibited by Inhibition, yet that after the Denunciation he could do no Deed in that which was denunced to be Compryseed, by any voluntar Act and Fact of his own, which might be prejudicial to the Party Denuncer therein, he having lawfully and timously perfected his Compryseing thereafter. Actor. *M'gill*. Alter. *Mowat*. *Hay* Clerk. *Vid.* 24 *Jan.* 1627, Lord *Erskine*. 21 *Jan.* 1629, *Scot* contra *Turnbul*, and the Cases there. & 5 *March* 1629, La. *Borthwick*.

Kirk contra *Gilchrist*, *Feb.* 19. 1629.

A Minister having charged the Possessors of the Lands, the Teinds whereof great and small were ordained by the *Plantation* 1618, to be lyable to the Minister for such Proportion of his Stipend as was laid on & divided amongst the saids Lands, and a Possessor of some of the Lands who was charged, Suspending that he had only taken the Grass of the saids Lands from the Heretor of the Lands, for the Summer-pasturage of some Goods, for a certain Silver-duty to be payed therefore to the Heretor, and which Duty he had payed to him before the Charge given to him by the Minister. The *Lords* Found, that albeit the Suspender had only taken the Grass of the Room, for Pasturing his Goods for a Duty to be payed to the Minister and Heretor, and albeit the Heretor had Right also to the Teinds of the Land both great and small, and

that he had payed that Duty alſo before the Charge to the ſaid Heretor, both for Stock and Teind, yet that the Miniſter might ſeek Payment of that proportion, laid on upon the Teinds of that Land from the Suſpender, ſeing the Teinds and Intromettors therewith were by the Decreet ſubject to the Miniſter, the Miniſter proving that the Suſpender poſſeſt the Land the Year controverted, and that the ſmall Teinds of the Goods which he paſtured thereon, and which he intrometted with, *viz.* Sheep, extended that year to as much as the Sum wherewith he was charged, and that in reſpect he had his relief againſt the Heretor, to whom he payed the Duty for Stock and Teinds, the payment to whom relieved him not from the Miniſters Charge. Actor. *Gibſon.* Alter. *Vid.* 21 *March* & 23 *July* 1633, Miniſter of *Strabrock.* & 20 *Dec.* 1622, Sir *John Preſton.*

Mr. *John Galloway* contra L. *Bog-miln*, *February* 20. 1629.

IN a Removing a Compriſing and Charges againſt the Superior thereon, to receive the Compriſer, with a Proteſtation againſt the Superior, becauſe of the Suſpenſion raiſed by him of theſe Charges, was not ſuſtained withour Seaſin, to produce Removing from the Lands Compriſed, albeit the Warning and Proceſs of Removing was only purſued by the Compriſer againſt the Debitor allannerly, againſt whom the Compriſing was deduced; and this Alledgance proponed by him, was Found ſufficient, ſeing a Removing was Found could not be purſued by a Compriſer againſt the Debitor, without a Seaſin. Actor. *Lawtie.* Alter. *Gibſon* Clerk. *Vid.* 25 *March* 1628. L. *Barr* contra his Tennents, & 18 *Decemb.* 1632. *Dalrymple* contra *Dowglaſs.*

Blaikburn contra *Gibſon*, *Eodem die.*

IN an Action of Removing upon a Compriſing from the Debitor, of the Right which he had to ſome Lands *Jure Mariti*, by reaſon that his Wife was Liferentrix thereof, was ſuſtained at the Compriſers inſtance, the Husband being dead, who was the Debitor at the time of the diſcuſſing of the Removing, he being dead only after the Term, againſt which he was Warned to Remove, and ſo being on life at that Term, ſeing thereby he might have attained Poſſeſſion of the Land, and it was not not reſpected which was Alledged, that that ought not to be admitted againſt the Woman who was Liferentrix, and who was not Debitor, and who by the Entry would be prejudged, if ſhe were forced to remove. Actor. *Mcgill.* Alter. *Mowat.* *Hay* Clerk. *Vid.* 17 *Feb.* 1629. Betwixt thir ſame Parties.

Dowglaſs contra *White*, *Eodem die.*

A Husband being obliged to his Wife in his Contract of Marriage, to Infeft her in Liferent in all Lands and Annualrents, which he ſhould Conquiſh and Acquire the time of their Marriage; and he having lent out ſome Moneys to certain Debitors by Obligations, whereby they were obliged yearly to pay to the Creditor 10 for 100, ay and while the Principal Sum were payed; the ſaids Bonds neither bearing a Clauſe of Infeftment therefore, nor of paying Annualrent as well not Infeſt as Infeft, but being of the foreſaid Tenor, to pay Annualrent ay and while the Principal Sum were re-payed. It was Found, that the Heir of the Husband, albeit he could not give her Infeftment and Seaſin of the ſaid Annualrent, he neither being Infeft therein, nor the Creditor bound to give him Infeftment, yet that the Heir ſhould give her her Liferent-right *habili modo*, of the ſaid Sums, albeit the Tenor of the Contract proports as ſaid is. *Hay* Clerk. *Vid.* 10 *February* 1629. *Oliphant* contra *Finnie.*

Blyth contra *Trotter*, *Eodem die.*

IN an Action, wherein the Purſuer was to prove his Libel, the Witneſſes being going out of the Kingdom, to Sail to Forreign Countreys, ſo that the Purſuer

suer was in hazard to tine his Probation, if they should die before their return, it being desired therefore by the Pursuer of the Cause (no Litis-contestation being made therein) that the saids Witnesses should be Examined, and the Depositions kept *in Retentis*; It was Found, that the desire could not be granted, while the Defender were Summoned to hear what he would say against that desire, and because he was then out of the Countrey, so that he could not be Summoned in due time before the Witnesses would depart; therefore the desire of the Examination was refused.

L. *Drumkilbo* contra Lo. *Stormonth*, *Eodem die.*

A Father, Fiar of some Lands, selling the saids Lands, and the price in the Contract of Alienation being obliged to be payed to the Father, at the Term therein-mentioned, and in case of his decease to his Son named in the Contract, and in case of failzie, the Debitor being obliged to Infeft the Father in an Annualrent therefore during his Lifetime, and his Son in Fee thereof, yearly to be payed to the Father so long as he lived, and to the Son in Fee yearly thereafter, ay and while the said Principal Sum were re-payed, the Father living after the Terms of payment were expired in the Bond, whereby it was Provided that the Sum should be payed to the Son, if the Father had died before the Term; and the Father after the next subsequent Term was expired and past, having granted to the Debitor a Discharge of that Sum after the Fathers decease, and the Sons also; the Heir to that Son seeking payment of that Sum, and Alledging that that Discharge granted by the Father, who was only Liferenter of the Sum, could not liberat the Debitor, the Fee being provided to the Son as said is. The *Lords* Found, that notwithstanding that the Bond was of the Tenor foresaid, yet that the power of the Sum remained with the Father, who might uplift or continue the same from Time to Time, or Discharge the same at his pleasure effectually to the Creditor in any time of his life, seing there was no Infeftment Exped upon the said Bond, nor the Fee really established in the person of the Son, and that Obligations conceived in this manner (no Seasin specially following thereon) might be effectually *Discharged*, and the Sums thereof uplifted by the Father, and disponed on by him in his lifetime, notwithstanding of the Conception and Tenor thereof foresaid; neither was it respected that the Father was alledged not to be *suæ rei satis providus*, and that the Discharge was purchast by the Debitor, without any Sums really payed to him therefore, which was Repelled, seing it was Found that he might have freely Discharged the same. Actor. *Nicolson* & *Stuart*. Alter. *Advocatus* & *Aiton*. *Gibson* Clerk. *Vid.* 28 *July* 1626. L. *Clackmannan*. 2 *July* 1630. Town of *Perth*, & *March* 10. 1631. Lady *Samwelstoun*.

Kennedy contra *Grahame*, *February* 21. 1629.

IN a Removing from some Lands, with the Miln thereof, the Pursuers Seasin was sustained to produce Action to Remove, as well from the Miln as from the Lands Libelled; albeit the Seasin foresaid bore not, *That the Pursuer was Infeft in the Miln by Tradition of* Clap *and* Happer, *but only by Tradition of* Earth *and* Stone, which was found sufficient, the same bearing Seasin to be given to him of the Lands and Miln, by Tradition foresaid of *Earth* and *Stone*; and because also the Seasin bore in the Clause of *Acta erant hæc*, &c. that the same was done *super fundo dictarum terrarum & infra dictum molendinum & domum ejusdem*, albeit in Milns usually Seasin is given, and the words bears (*per traditionem lie*, Clap & Happer:) And here also the less respect was had to that Alledgance proponed against the Seasin, the same being proponed by a naked Tennent, and not by one having Right to the Lands and Miln. *Hay* Clerk. *Vid.* 15 *March* 1631. L. *Smeitoun*.

Pollock contra *Muir* & *Sempill*, *Feb.* 24. 1629.

IN a special Declarator for Maills and Duties, the Husband of a Wife, who is only Liferentrix of Lands, being year and day at the Horn; The Wife who is Liferenter not being Rebel, the Superior of the Lands whereof the Wife is Liferenter, having gifted the Husbands Liferent of these Lands, so far as he had Right thereto *Jure Mariti* to a *Donatar*, who after General Declarator claiming the Maills and Duties by a special Declarator; it was Found, that albeit the Husband was at the Horn year and day, yet that thereby his Liferent of these Lands for the time of his living with his Wife together, pertained not to the Superior, seing he was not a Vassal to the Superior, but only his Wife was the Vassal, who was not at the Horn, whereby the Superior could not have Right thereto, but the said Liferent would fall as a Casuality of single Escheat, and belong to be disponed only by the King, by a Gift of single Escheat. *Hay Clerk.*

Dowglas contra *M'michael*, *Feb.* 26. 1629.

IN an Action for delivery of a Bond made to the Creditor, which bore, the Debitor to be obliged to pay the Principal Sum borrowed by him at the Term contained in the Bond, and also the *Annualrent* thereof from the Term of Lending to the said Term of Re-payment (for by the Act of Parliament, *Annualrent* could not be taken in hand, but only at the Term of payment of the *Principal* Sum) and in case of failzie, to pay a certain Penalty, together also with the Annualrent, ay and while the Sum should be re-payed; And the Creditor dying before the Term of payment in the Bond, and the Obligation being sought to be delivered to the Heir of the Defunct, the Executors Alledging, that it pertained to them, and not to the Heir. The *Lords* Found, the Bond pertained to the Executors, and not to the Heir, albeit it bore payment of the Annualrent *ab initio*, and was of the Tenor foresaid, the Creditor having deceast before the Term of payment, whose surviving after the Term, and not the Clause of paying Annualrent for that interveening Term, betwixt the Term of Lending, and the *Re*-payment, should only have made the Bond to pertain to the Heir. *Hay* Clerk. *Vid.* 7 *Decemb.* 1627. *Porteous* contra *Veitch.* 21 *Decemb.* 1626. Executors of *Brown.* 15 *July* 1623. *Anderson*, where the contrair appears done.

contra *Eodem die.*

IN an Action of Adjudication, to hear the *Debitors* Heirship-goods be *Decerned*, to be Declared to pertain to the Creditor against a *Party*, who being Conveened before, as lawfully Charged to enter Heir to the Debitor, for payment of the Debt, had Renounced; This Action was Found needed no Continuation, being accessory to the preceeding Decreet obtained, wherein the Defender had Renounced: for here no Party was conveened for delivery of the Heirship, but only Adjudication craved of the Right to be Declared to belong to this Creditor, which was but only to put the Creditor in the Heirs place. *Hay* Clerk.

Cochran contra *Dawling*, *Penult Feb.* 1629.

IN this Action, whereof mention is made 13 *Feb.* 1629, it was Found that the Heirs were bound to make the employment to the Liferenter profitable to her in all time to come, during her Lifetime at the proportion of Ten for the Hundred, and at no less Profite, albeit the Heirs should not receive so much Profite themselves, and albeit the Money in the Country should be lent for less Profite, and albeit they were only oblig'd in the Contract, to employ the Money as commodiously as they might get the famine, which they alledged would not bind them to pay the Profite, which could not possibly be had, which was Repelled, but it was Found that they might either employ it upon Land as said is, or else pay within 40 days after each Term Ten for the Hundred in the Heirs option, which payment should supply the Infeftment. *Muir*

Muir contra his Tennents, *Feb. ult.* 1629.

AN Incident used by a Defender against a Party called as Haver, upon 60 days Citation as being out of the Country, was not Sustained, because the Letters bore no Warrant to Summon the Party as out of the Realm upon 60 days, neither did the User thereof Protest when Litiscontestation was made for Incident after that manner, but because the Procurators for the Raiser of the Incident offered to make Faith that he was not informed, or knew at that time that the Parties were out of the Country then, therefore albeit Incident was refused, yet a long day was Assigned to the Party User thereof, to deduce all his Probation upon the Exceptions, for which the Incident was used, during the which time he might use his Incident against the Parties called therein, and Prosecute his Probation against them, and that he should conclude all against the day foresaid, at which time they would conclude the Cause and advise the same. Actor. *Cunninghame.* Alter. *Miller. Scot* Clerk. *Vid. 6 Feb.* 1622, *Grier.*

The like done 19 *March* 1629, L. *New-wark* contra *Maxwell*, where *Belshes* was Actor. *Gibson* Clerk.

Murray contra Lo. *Yester*, *March* 3. 1629.

Drummelzier having Set a Tack of Teinds to *John Murray* of *Halmyre*, and obligʼd him to warrand the same, and the Teinds being evicted by a Decreet of Spuilzie against *Murrays* Tennents, wherein the quantities were referred to their Oath, and they holden as confest thereon, whereupon Warrandice being sought by *Murray* against *Drummelzier*, it was Found that the Decreet of Spuilzie was not Found a sufficient Ground, whereupon Warrandice might be sought for the Quantities contained in the Sentence, whereon they were holden as Confest, but seing that the Quantities far exceeded the just Avail of the Teinds, they Found that he ought to prove the Quantities otherways by some other lawful manner. Actor. *Cunninghame.* Alter. *Stuart. Scot* Clerk.

Fletcher contra L. *Craigivar*, *Eodem die.*

L. *Craigivar* being Cautioner for one *Irwine*, and paying the Debt to the Creditor, being distrest by him therefore, and he being thereafter Debitor to *Irwine* in a proper Sum owing to *Irwine* by him, and *Irwine* being Rebel, the Donatar to his Escheat seeking Payment by special Declarator of the Sum owing to him by *Craigivar*, it was Found, that *Craigivar* having payed as Cautioner for *Irwine* a greater Sum before that *Irwine* who should have relieved him was at the Horn, by vertue of which Horning his Escheat was taken, he might Compense with the Donatar in the Sum owing to the Rebel by the said Payment of a greater Sum for the Rebel, which Compensation was received against the Donatar, the Payment being made as said is before the Rebellion. Actor. *Fletcher.* Alter. *Lermonth. Hay* Clerk. *Vid.* 26 *July* 1622, *Davidson* contra L. *Buckie.*

Carmichael contra *Gibson*, *Eodem die.*

A Father being Debitor to the Son in a Legacy left by the Mother, and after the Fathers decease, the Fathers Executor being conveened to pay the Legacy, It was Found, that Payment made by the Father for binding of the Son as Prentice to a Craft, ought to be ascribed in Satisfaction of the Legacy *pro tanto*, and ought not be found to have been given *ex affectione domestica*, or *ex pietate paterna*, for it was presumed that he would liberate himself of his Debt before he would gift any thing, but this Cause was betwixt poor Persons, whose Substance was mean, and the Sums small, the Legacy being of 80 Pounds, and the Prentice-fee payed 60 Pounds, and the whole Gear in the Testament not exceeding two or three hundred Pounds, and that was the chief Reason of the Decision. *Vid.* 24 *July* 1623, *James Stuart.* & 29 *January* 1629, *Lands* contra *Dowglas.*

Herreis contra *Stuart*, *Eodem die.*

IN a Removing, an Exception being proponed upon an Infeftment proceeding upon a Compryſing, It was Found, that the Compryſing might be Eleided upon a Reply, that conform to the Act of Parliament anent Compryſings, the Compryſer had intrometted with as many Duties of the Lands as compleatly payed him of his whole Debt before the expiring of the Seven Years, as is preſcribed by the ſaid Act of Parliament, whereby the Compryſing became extinct; which Reply was Found Relevant, albeit the Excipient alledged, that this not being proponed in due time before the expiring of the Seven Years after deducing of the Compryſing, as he alledged it ought to have been, therefore he alledged that the ſaid Seven Years being now all expired divers Years, before the proponing thereof, the Party had no place to propone the ſame, and that the ſame was not quarrellable upon the ſame Ground, not being quarrelled thereon before the expiring of theſe Years; which Alledgance was Repelled, and the Compryſing was Found might be taken away upon the foreſaid Ground, albeit not proponed before theſe Years, but after the ſame were all expired, and the ſame was received by way of Reply, being betwixt mean and poor Folks, whereas otherways the *Lords* were of opinion, that it could not have been taken away but by way of Declarator. Actor. Alter. *Mowat.* *Vid.* 15 *Jan.* 1624, V. *Annand.* and the Caſes cited there.

La. *Borthwick* contra *Goldilands*, *March* 5. 1629.

IN a Removing, a Tack Set by the umquhile Lord *Borthwick*, after the Setting whereof, the Setters Right was Reduced at the inſtance of the Lord *Newbottle*, who had acquired a more valid Right than the Setter had, upon a Clauſe irritant contained in the Setters Infeftment, and in the ſaid Reduction, the Tack being alſo reduced *per expreſſum*; this Reducer having thereafter oblig'd himſelf to Diſpon the Lands in favours of the Son of the Setter of the Tack, for a Sum of Money agreed to be payed therefore, which Son was Served Heir to his ſaid Father, who was Setter of the ſaid Tack; after which Obligation the ſaid Reducer having given Infeftment to the Lord *Borthwicks* Son, who was Heir to the Granter of the Tack, and to his Wife in Conjunct-fee, and to the Heirs to be begotten betwixt them, which failzieing to the Heirs of the Husband after the Husbands deceaſe; the Lady ſeeking Removing upon the ſaid Conjunct-fee Infeftment, and *Goldilands* defending himſelf with the ſaid Tack, and the Relict opponing the Reduction foreſaid, and the Defender Duplying upon the Superveniency of the Reducers Right in the perſon of her Husband, who was Heir to the Setter, and whereby his Tack convaleſced, and that the Ladies Conjunct-fee Right flowed from her Husband, whoſe ſupervenient Right by the Tackſ-mans Right revived, and the Lady could not quarrel the ſame upon that Right given to her by her Husband, who was oblig'd to warrand his Fathers Deed: The *Lords* Found the Tack, being reduced as ſaid is, could not defend againſt this Removing purſued by the Lady, and that the Bond made by the Reducer to Diſpon the Lands to him who was Heir, and his being Heir to the Setter of the Tack, made not the Tack to convaleſce before the Heir was Infeft in the Lands, for there was found no ſuperveniency before there was a real Right eſtabliſhed in the perſon of him, who was Heir to the Setter, and that the Bond to give a Right made no ſuperveniency, nor yet his being Heir, except alſo he had been Infeft, and alſo Heir, and that his being Heir without Infeftment made not the Right to convaleſce, but might furniſh perſonal ground of Warrandice againſt him as Heir, and the real Right being made by the Reducer to the Husband and his Wife in Conjunct-fee at one time, and in one Writ; it was Found that this was not a Donation flowing from the Husband to his Wife, albeit the Bond was granted

granted of before, as said is, to the Husband alone, not mentioning the Wife; and albeit the Husband payed the *Sum*, for the which the Disposition was made, and so albeit the Right Superveened to the Husband, whereby the Tack *Revived*, and might have Defended the Tacksman, against the Lo. *Borthwicks* self, so long as he lived, yet he being dead, the Tack could not convalesce against the Relict, who *eodem tempore* acquired with him the Real *Right*, for her Lifetime, from the Reducer, which was not esteemed, to have proceeded from her Husband, as said is, but from a Third Person to her. In this Process it was Found, that a Disposition, albeit made without a Cause Onerous by the Debitor, after he was Debitor to his preceeding lawfull Creditors, could not be found as coming under the Act of Dyvory, except the Debitor, who Disponed, had been then Dyvor; For he not being Bankrupt then, the Prior Creditor could not, upon that *Act*, then quarrel the Posterior Right, made *etiam sine causa onerosa*; It was also Found, that payment of Taxation, for the Lands by the Tacksman Defender, made at Command of the Pursuer lyable for the *Taxation*, after the Warning, which the Defender *Alledged*, was als sufficient, as if he had received payment of the Tack-Dutie, after the Warning, was not Relevant, to infer *Absolvitor* from that Warning, except that the Command had been given to him, to pay it, as *Tacksman*, or to be payed out of the Duty of his *Tack*, which was so Found, and the said Exception Repelled, albeit the Defender Alledged, that he was not the Pursuers Debitor, but in the Duty of the Tack, and he was not obliged to pay Taxation for her, or to relieve her thereof, neither could the Command given by her have any respect, but to the *Tack*, and Duty thereof, he not being otherwise Debitor, which was Repelled. Actor. *Nicolson* & *Belshes*. Alter, *Advocatus* & *Cunninghame*. *Hay* Clerk. *Vid.* Feb. 6. 1629. betwixt thir same Parties, Feb. 17. 1629. *Blackburn*, & *infra hic*. *March* 5. L. *Ley*, *March* 4. 1635. Lady *Borthwick*, *Feb.* 22, 1628. Lo. *London*.

White contra *Dowglas*, *Eodem die*.

THe Husband being obliged to provide his Wife, as is Deduced, and Marked, Feb. 20. 1629. And one of the Bonds whereof the Relict craved a Liferent of the Sums therein contained, being made to the Husband by his Brother, which Brother was Tutor to the Heir of the Defunct, who was Conveened, for fulfilling of his Fathers Obligement, and the said Relict having Discharged the said Tutor of the Annualrent of that Bond, for her lifetime, in favours of the Tutor, for love and favour born by her to him, and for his Pains as Tutor, in the Minors affairs; It was Found, that albeit this Discharge was sufficient to exclude the *Relict*, and to denud her of her Liferent thereof, yet that could not Liberat the Tutor at the Minors hands, but that he remained obliged to his Pupil in the said Annualrent, and that the benefit of the Discharge of the Liferent, albeit in favours of the Tutor, yet should accresce to the Pupil, and be profitable to him, and not to the Tutor, who was Debitor, seing the Cause thereof was for the Tutors Pains, in the Minors Affairs, whose Affairs was seen, might be done without great Cost and Travel, and the Tutors Expense would be Refounded, *actione tutelæ contraria*; And also the Discharge by the *Relict* bore, *that the Tutor would make no benefit nor profit in his office of Tutory*, which was not a Clause allowable, the Tutor being bound in Law to do his Office, without respect of Profit, but this Decision was thereafter altered. Actor. Alter. *Burnet*. *Hay* Clerk.

L. *Ley* younger contra *Kirkwood*, *Eodem die*.

A Service done by the Tennents since the Warning, which was a part of the Duties used to be payed for the Lands, done at Command of the

Purſuers Grieve, and who was ſole Guider of his Affairs. The Purſuer, who made the Warning being then in *England*, the time of the Command, and doing of the Service, was not Found Relevant, to Defend the Tennents from Removing, by vertue of that Warning: for none could Prejudge the Warning made and ſubſcribed by the Maſter but himſelf, or ſome having Power from him, whether he had been without, or within the Countrey; For no Servant might do that, but by expreſs Warrand to that ſpecial effect. *Item* a Rental Set to a Man and his Wife, during their Lifetimes, not bearing *to be Set during the longeſt Liver of them two*, but *during their Lifetimes*, was found ſufficient to Defend the Relict, during her Lifetime, and was found to be expired, by the deceaſe of the Husband; for otherwiſe, if the Wife had died, and the Husband had ſurvived her, it would not have Defended him thereafter during his Lifetime, which had been unreaſonable. *Item*, a Tack Set for payment of a hundred Merks yearly, to endure ay and while the Tackſman were payed of a thouſand Merks lent to the Setter, and the Tack-Duty therein allowed to the Tackſman, for the Annual of the ſaid Money, was not found ſufficient to *Defend* againſt the Removing purſued by the Singular Succeſſor, for ſo it had neither Iſh nor Duty. *Item*, a *Rental* bearing Power to the *Rentaller*, to Remove, Out-put and In-put Tennents, and alſo to place Sub-Tennents under himſelf, and to Set Sub-*Tacks*, and give Sub-altern *Rights* to others, the Diſpoſition of ſuch a Rental to another made not the ſame to fall. *Gibſon* Clerk. *Vid. Supra hoc Eodem die.* Lady *Borthwick*, concerning paying of *Taxation* for the Maſter, and for this firſt Part, *viz.* of a Tack without Duty, *June* 20. 1629. *Keith.* and *For* this laſt *Part*, *July* 15. 1628. L. *Maxwell*, and *July* 5. 1625. L. *Aiton*, and the Caſes there.

Biſhop of the *Iſles* contra his Vaſſals, *March* 6, 1629.

IN an Improbation, a Defender being Summoned at his dwelling Place, which was the Principal Houſe of his Lands, wherefrom he was Stiled, and he Compearing by his Procurators, and *Alledging* no Proceſs upon that Citation, ſeing then he had no Remaining, nor dwelt there, but by the Contrair it was offered to be proven, that the time of the Citation, and diverſe Moneths before, and by the ſpace of a year ſince that time, he dwelt and remained at the Schools in *Leith*, being a Minor, and brought up there. This Alledgance was Repelled, and the Execution ſuſtained, but prejudice to Reduce thereon, *prout de Jure.* Actor. *Advocatus* & *Aiton*, Alter. *Nicolſon* & *Stuart*: *Gibſon* Clerk. *Vid. July* 2. 1630. E. *Hume.*

Falconer contra *Blair*, *March* 7. 1629.

THe Relict of a Defunct, who by an Heretable Bond was adebted to his Creditor in a Sum of Money, being Executor to her Husband, and having payed the ſaid Debt, after her Husbands deceaſe, and Reported the Bond from the Creditor, and having thereafter Cancelled the ſame, ſhe purſuing the Heir of her Husband, as he who ſhould relieve the Executor, of that Heretable Sum for re-payment thereof to her, ſeing it was *rationi & naturæ conſentaneum*, that as the Executor is obliged to pay the Defuncts Moveable Debts, off the firſt end of his Moveables; So that the Heir, out of his Lands and Heirſhip ought to pay the Defuncts Heretable Debt, *Nam quem ſequuntur commoda, debent etiam ſequi incommoda*: This Action was ſuſtained at the Executors Inſtance, againſt the Heir, albeit he Alledged, that ſhe ought to have no Relief, nor Repetition of that Payment, which ſhe made *ſcienter, volenter & ſponte*, without any Charge or Compulſion uſed by the Creditor againſt her, ſpecially the Bond *Alledged* ſatisfied by her, being now produced by her Cancelled, whereupon neither the Heir, nor no other could be diſtreſſed by the Creditor, and no Diſcharge being produced, granted to her by the Creditor; For it might be

be that the Defuncts self had payed the Debt therein contained in his own Lifetime, or that the Creditor had otherwise Cancelled the Bond, and that the Relict could never have been distressed therefore; which Alledgance was Repelled, and the Action sustained, and the *Lords* Found the payment Alledged made by the Relict, after her Husbands decease, might be proven by the Creditors Oath, and that the Bond was wholly Un-cancelled at that time, and after his decease might be proven by the Heirs Oath, which manner of Probation was sustained, to infer Repetition to the Relict, although the Bond was Cancelled, and the *Lords* declared, that they would not respect any qualification, which the Defenders should adject to their Depositions, anent Conditions made betwixt them & the Relict, at the time of the said payment, but simply would take their Oaths, upon the two Points foresaids, which were sustained as Relevant, *viz.* that she her self, made payment since her Husbands decease, and that the Bond was then Un-cancelled. Actor, *Nicolson* & *Aiton*. Alter. *Advocatus* & *Nairn*. *Gibson* Clerk. *Vid. Feb.* 10. 1629. betwixt thir Parties.

Mories contra *Johnston*, *Eodem die.*

IN a Reduction and Improbation, the *Lords* Found a general Heir Served, and Retoured to the Father, might call for Improbation of any Writs made by his Father, whereby the Right of an Annualrent was provided to the Father, and his Heirs, which was Alledged to have been thereafter Disponed to the Defender, and so thereby the Pursuer might be prejudged in that Prior Right, and it was not Found necessar, that the said Pursuer should have been specially Served Heir to his Father in that Annualrent, or Infeft therein, seing it was Constitute to the Father by Contract only. *Vid. Jun.* 28. 1626. *Patrick Eviot. Feb.* 4. 1630. E. *Kinghorn*.

Muirhead contra *Wilkie*, *Eodem die.*

A Pursuit at *John Wilkies* Instance, for payment of certain Prices of Victual, sent by him to *David Muirhead*, was sustained against the said *David*, being pursued in *Scotland*, before the *Lords* of Session, albeit the Defenders Procurators Alledged, that he could not be conveened *in hoc foro*, seing he and his Family were actual Dwellers, and Residenters at *London*, where they remained *animo remanendi*; Likeas the Victual was *English* Victual, and the Pursuer then dwelt in *Berwick*, where he is Burges, and the Writ for the Bargain was made, and dated at *Berwick*, whereby the Defender Alledged, that neither *ratione domicilii*, *neque rei de qua agitur*, *neque contractus*, he was subject to this Judicatory, which Alledgance was Repelled, and the Process in this Judgment sustained against him, to have Execution against his Person, when he came to *Scotland*, and against his Goods and Gear in *Scotland*, he being a *Scotishman*, and Factor to *Scotishmen*, and being Summoned personally in *Scotland*. Actor. *Belshes*. Alter. *Stuart*. *Gibson* Clerk. *Vid. November* 15. 1626. *Galbraith* contra *Cunninghame*.

Shaw contra *Kinross*, *March* 10. 1629.

ONe being Infeft in an Annualrent out of some Lands, who disponing that Annualrent to another, after which Disposition (which contained a Procuratory of Resignation therein) the Acquirer of the Disposition before he was Infeft conform thereto, by the Superior of the Annualrent, who was Heretor of the Land, out of which it was Disponed, gives a Bond to the Disponer, reponing her to her Liferent thereof, after which Bond immediately he uses the Procuratory of Resignation, and was Infeft by the Superior, in the said Annualrent, the Disponer nevertheless retains the Possession, after which the Acquirer of the Infeftment, upon the said Resignation, Resigns the said Infeftment, and Right of Annualrent, in the hands of the Heir of the Superi-

or and Heretor of the Lands, who notwithstanding thereof, is still decerned to pay the Annualrent to the said first Resignant, conform to the foresaid Back-bond made to her; Thereafter the Right of the Land being Compriſed from the said Heretor, and it being questioned, if the Land was affected with the burden of that Annualrent, and that really the Compriſer was holden to pay the same, as the Author was conform to the foresaid Bond: It was Found, that the Compriſer might bruik that Land, without that Burthen, which the Singular Succeſſor was not holden to pay, albeit his Debitor, from whom he Compriſed the Land, might be Perſonally, and his Heirs subject therein, yet seing the Real Right was Resigned in the Superiors hands, no Bond given by the Resigner, or acknowledged thereafter, by the Superior, would affect the Land, againſt a Singular Succeſſor; and therefore the Perſon first Heretor of the Annualrent, by the Right of the said Back-Bond, with continual Retention of Poſſeſſion conform thereto, was not found to have any Right againſt the Land, or againſt the Singular Succeſſor, but only againſt the Heirs of the makers of the Bond, and others whom she might Perſonally conveen. Actor. *Rollock.* Alter. *Burnet. Gibſon* Clerk. *Vid. June* 27. 1629. *Hamilton. July* 8. 1629. *Durie* contra *Kinroſs.*

Merſhall contra L. *Drumkilbo, March* 12. 1629.

ONe provided to a Chaplanry in the Colledge-Kirk of *Dunkell*, and having thereon obtained Letters Conform, and Charged for an Annualrent of Ten pounds out the same Lands, as due to the said Chaplanry, and to the last Chaplan, by whoſe deceaſe the Charger was provided, having obtained Decreet before the Commiſſars of *Dunkell*, againſt the Heretors of the same Lands, for payment of the said Annualrent for diverſe years, as adebted to him, and he having thereupon Poynded the Tennents, and received Payment: Thir Charges being Suſpended by the Heretor, it was Found, that the Decreet foreſaid, obtained before the Commiſſar of *Dunkell*, and the Poynding conform thereto, by the said late Chaplan, could not be ſuſtained as ſufficient grounds to aſtrict the Heretor, to burden his Lands with the Servitude of this Annualrent, except there were either a Mortification produced, to ſhew where this Annualrent was Mortified by the Heretor, to that Chaplanry, or elſe that the Chaplan had been in Poſſeſſion thereof, either before the Reformation of the Religion, diverſe years, or thirty years ſince, and no otherwiſe: And they reſpected not the said Decreet, and three years Poſſeſſion therein contained, and Poynding therefore. Actor. *Fletcher.* Alter. *Nicolſon. Hay.* Clerk. *Vid. March* 17. 1629. *Yeaman* contra *Stuart.*

L. *Gallowſheils* contra L. *Mckerſton, Eodem die.*

IN a Removing, a Tack Set by one who was Infeft in Lands, was ſuſtained to produce Action of Removing at the Tacks-mans inſtance, albeit it bore not a Clauſe therein of power to in-put and out-put Tennents, the Tacks-man proving that the Setter was Heretor of the Lands, eſpecially seing the Defenders had no Right to the Lands, which was ſo found, albeit ſome were of opinion, that ſuch Tacks were only Obligations, whereby the Setter might be compelled to Enter the Tacks-man in poſſeſſion of the Land, but were not real Securities of force to produce Removing, and thereby to make Warning, being of the nature of perſonal Securities; but moſt part were of another Judgment, there being no Tack nor Right in the Proponers perſon, and Found *ut ſupra*, Actor. Alter. *Nicolſon. Gibſon* Clerk.

Colmſlie contra E. *Roxburgh, Eodem die.*

A Charge againſt the Superior to receive a Compriſers Aſſigney, being Suſpended by the Superior, becauſe the Compriſer had made another Aſſigney

signey to that Compriſing Judicially, as uſe is frequently to be done; and that Aſſigney had made another Aſſigney, and ſo the ſame had paſt from hand to hand, and might be tranſmitted by many Aſſignations, which the Superior was not holden to acknowledge; for he Alledged, that albeit he might be compelled to receive the Aſsigney to whom the Compriſing was Legally Aſsigned, yet he could not of Law be compelled to receive that *Aſsigneys Aſsigney*, no more than upon his Vaſſals Reſignation he could be compelled to receive him in whoſe favours the ſame was made; which Reaſon was Repelled, ſeing he only received but one Vaſſal by vertue of that Compriſing, no other being received thereupon: It was alſo here Found, that the Superior could not be compelled to receive the Compriſer, except he ſhew'd that the *Debitor* was Infeft; albeit the Charger offered to prove, that his Father to whom he was appearing Heir was Infeft; and alſo ſhew'd a *Decreet of Declarator* of this ſame *Debitors* Liferent of the ſame Lands, gifted by the ſame Superior to a Donatar; in which Gift the Superior had granted, that the ſame Lands pertained Heretably to the ſaid Debitor, and thereby gifted his Liferent thereof, which Liferent was declared in favours of the *Donatar*. Likeas the ſaid Liferent-right being again returned by the Donatar to the Superior, the Superior was in Poſſeſsion of the Lands by vertue of that Liferent, and ſo he could not Alledge that the *Debitor* was not Infeft; notwithſtanding whereof it was Found, that the Compriſer ſhould ſhew that the Debitor was Infeft, ſeing the Declarator of Liferent might be againſt an appearand Heir as well as againſt one Infeft; but this Declarator was not obtained but as the Liferent of a Vaſſal who was Infeft. Actor. *Craig.* Alter. *Nicolſon.* *Gibſon* Clerk. *Vid.* 14 *Feb.* 1629. *Grant* contra L. *Balveny*, & 23 *March* 1622. Mr. *Simeon Ramſay.*

Cunninghame contra Sheriff of *Stirlings* Deputs, *Eodem die.*

THe Sheriff-Deput being Charged to take a Rebel, who Suſpending on obedience and diligence done by him, in ſearching and ſeeking him, and that he could not be found, as Inſtruments produced bore; And the Charger Replying, that ſince the Inſtrument the ſaid Deput had been in company with the Rebel divers times within the place of his Jurisdiction, where he had at that time power to take the Rebel. This Alledgance was ſuſtained, being proven to infer Sentence againſt the Deput for not taking the *Rebel*, for no further was ſought by the *Proceſs*, for payment of the Sum was not ſought therein; and it was not found needful that the Charges of Caption ſhould have been left with the Deput, or delivered to him for his Warrand of taking the *Rebel* at the times foreſaids of his being with the *Rebel*; neither was the want of theſe Charges found any cauſe whereby the Deput ſhould be excuſed to take him, he having received a Copy Subſcribed by the Meſſenger the time of his firſt *Charge*. *Vid. Ult.* & 4 *July* 1628. *Rachelet* and the Caſes there Cited. And 12 *June* 1630. Mr. *Rodger Mowat.* 13 *July* 1630. *Hay* contra E. *Marſhal.*

Yeoman contra *Stuart*, *March* 17. 1629.

A Seaſin of an Annualrent of 20 pounds to be taken out of a Tenement in *Dundee* granted to the Purſuer by the Baillies of *Dundee* by Haſp and Staple, as Heir to his Father, who was Infeft therein upon his Authors Reſignation, mentioned in his ſaid Fathers Seaſin, proporting the ſaid *Reſignation*; Likeas his ſaid Fathers Authors Seaſin proported to be given by the Heretor of the Land to the ſaid Author of the ſaid Annualrent, to be taken out of the ſaid Land, there being no other Adminicle, neither of the firſt Seaſin, nor none of the ſubſequent Seaſins, but the *Aſſertion* of the Nottar to the Seaſin, who was Town-Clerk; and there being no other preceeding Writ for the Warrand thereof, nor no Poſſeſsion had of the ſaid Annualrent at any time ſince the firſt

Seasin, which was dated and given 38 years since, the Seasin foresaid given to the Pursuer by Hasp and Staple, with the other Seasins preceeding, as said is, was sustained, to produce Action at the Pursuers instance, (albeit he was not Retoured Heir in the said Annualrent to his Father; and albeit there was neither preceeding Adminicle to the Seasins, nor yet any Possession since the date thereof: And albeit it was only testified by the Clerks assertion, Nottar thereto) for Poynding of the Land, both for bygones and time to come, seing the same was given by the Baillie, and Town Clerk, according to the usual form within Burgh in such cases, which was sustained, albeit the Seasin of the said Annualrent bore not, *to be given to be holden Burgage*; and which the Defender Alledged ought not to be respected as in other Seasins of Lands holden Burgage, where the assertion of the Baillie and Town-Clerk, testified by the Clerks Instrument, is sufficient; which was Repelled, and the Seasin sustained. Actor. *Fletcher.* Alter. *Hay* Clerk. *Vid.* 27 *Novemb.* 1630. L. *Lawder. Vid.* 16 *July* 1629. *Scot* contra *Deans*, & *Penult July* 1629. *Stuart.* 12 *March* 1629. *Marshal.* 8 *July* 1629. *Durie* contra *Kinross*, & 21 *July* 1629. *Moreis.*

Barclay contra *Stevinson*, *March* 18. 1629.

A Creditor having obtained Infeftment of his Debitors Lands, and having Set a Back-Tack again to him, during the not Redemption, with a Clause Irritant, that if the Duty of the Back-Tack be unpayed two years, the same, and the Reversion should expire; upon the which Failzie Declarator being sought, another Creditor Compearing Alledged Absolvitor, because the years Libelled whereon the Failzie Alledged was committed, the Pursuers self possest an House of the Lands, Sett in Back-Tack; the Maill of which House, as was used to be payed therefore the years before the Pursuers Occupation, extended yearly to 10 pounds, whereby the Pursuer must be Compted to have received payment of a part of the said Back-Tack-Duty, and a part being payed for the years Libelled, the Failzie cannot be Compted to have been Committed, seing the whole Duty rested not owing. This Exception of partial payment, and this manner of payment, *viz.* By Occupation, was Found Relevant to Eleid the Declarator; and also it was Found Relevant to be proven by Witnesses, and no wayes necessar to be proven by Writ. *Hay* Clerk. *Vid.* 1 *Feb.* 1631. *Calpie.*

Russel contra *Paterson*, *March* 19. 1629.

A Merchand furnishing Wines to a Woman, and she being pursued by him for the price thereof, the Action and Process was sustained against her, albeit she Alledged, that she was clad with a Husband, who not being conveened in the Process, nor Summoned thereto, no Process ought to be granted against her; which Alledgance was Repelled, seing the Husband was 10 years out of the Countrey together before the Pursuit, and was not returned, and it was not known whether he was dead or living; and all this time the Defender was in use to Bargain with this Pursuer, and buy Wines, and keep an Inns, so that she ought to be answerable for her own Receipts. Actor. *Aiton.* Alter. *Russel. Gibson* Clerk.

Herries contra Lo. *Herries*, *Eodem die.*

A Summons bearing that a Charter was Subscribed and perfected to the Pursuer of certain Lands, and Seasin taken thereupon; after the taking whereof the Subscriber of the Charter having borrowed the same from the Pursuers Father (the Pursuer being then Minor) to be seen by him, the said Subscriber and Granter Cancelled the same, and sensyne retained possession of the Lands Disponed, therefore the Pursuer craved both that the Defender should make

make up the Evident again, and also refound the Profits of the Lands medled with by the Defender since the Cancellation thereof. This Action was sustained, and both the Conclusions of the Summons Found Relevant, albeit both craved together, and no necessity found first to Pursue for the making up of the Evident, and then to Pursue thereafter for the Maills and Duties; but the whole Summons was referred to the Defenders Oath *simpliciter*. *Hay* Clerk. *Vid.* 1 *Decemb.* 1629. *Lawson* and *Reid*, &c.

Dowglass and E. *Angus* contra E. *Lauderdale*, and L. *Ley*, *Eodem die*.

A Declarator of Non-entry of Lands being sought, and one of the Defenders Compearing, and Alledging that *Lauderdale* was Infeft in thir Lands, and that he and his Author immediatly before him were Infeft therein, by Rights and Infeftments these 40 years by-past, whereby the Land was full that space, and which by the Practique of the Kingdom purged all Non-entry; this Exception was Repelled, being proponed by the Defender, who Alledged no Right to the Lands flowing from the Earl of *Lauderdale*, by whose Right the Lands were Alledged to be full; and so it was *Jus tertii*, and not competent to the Proponer; whereas if he either had Right from the Lo. *Lauderdale*, or that the Lo. *Lauderdale*'s self had proponed it, the same would have been found Relevant; for a Defender, excepting upon his own Right, or his Authors, that the Lands was full in their person by the space of 40 years, it is enough to purge all preceeding Non-entry; but the Lo. *Lauderdale* not being Compearing (being a Party called) to propone this, as said is, it was Repelled *ut supra*, as not competent to the Proponer; for in effect the Non-entry was pursued to the behove of the Lo. *Lauderdale*, to eschew a Pursuit of Reduction Intented against his Right to these Lands, by the same Party Proponer of this Exception, which was Intented by him, as Heir to that person, by whose decease the Non-entry now acclaimed, was ever sought sensyne; neither was it respected, where it was Alledged that the Lands being full, *eo casu* there could not be a Non-entry; far less where their two Rights are contrair and incomptable; and so they might be proponed by any Party called, being a defence, which extinguisheth that Right *in totum*: And if that Right whereby the Lands were full, were called in question, the Non-enty ought to sleep while the event of that Process; for if the Party Infeft prevailed, he was in surety, and there needed no other Right of Non-entry to secure the same; and if it should be Eleided by any better Right, then the Non entry might be sought, but so long as that Right stood, all Non-entry was thereby excluded; which was Repelled *ut supra*. Actor. *Stuart* & *Aiton*. Alter. *Nicolson* & *Mowat*. *Hay* Clerk. *Vid.* 24 *June* 1629, Sir *Mungo Murray*.

L. *Affleck* contra *Mathie*, *March* 20. 1629.

IN a Removing, the Receipt of an Herezeld from the eldest Son of the Father, who was Liferentaller of the Land, is sufficient to save the Payer from Removing from that Land for a year after the Rentallers decease. *Item*, a promise not to Remove, made by the Pursuer, may be proven by Witnesses, to save the person to whom the promise is made from Removing, for the space of a year only after the promise; and if it be proponed for longer space, it must be therewith Alledged, that the promise was then accepted, and must only be proven *Scripto*, or by the Oath of the Maker of the promise.

E. *Buccleugh* contra *Young* and *Ker*, *Eodem die*.

AN Order of Redemption being used against the Heir of one who was Infeft under Reversion, and Declarator sought thereupon; the Creditor of him, from whom the Redemption was used, having Compriled his Wodset-Right, and having Charged the Superior to receive him upon that Compriling,

which Superior was User of the said Order of Redemption, being Heretor of the Lands, and to whom the Reversion was granted. It was Found, that there was no necessity to have premonished the said Compriser, by the said Order of Redemption, albeit he had Charged upon the Comprising, before the using of the said Order; and so that he Compearing in this Process for his Interest, Alledged that the Pursuer being so Charged, could not have miskenned the Excipient; which Exception was Repelled, and the Order sustained, seing the Pursuer had Suspended that Charge, which stood undiscust; but Ordained the Excipient, to propone against the Order in the Cause, what other Defence he pleased, but would not cast the Order for his not being Warned. Actor. *Nicolson.* Alter. *Cheap. Scot* Clerk. *Vid.* 25 *March*, Betwixt thir same Parties.

L. *Finmouth* contra *Weems*, *Eodem die.*

THe Laird of *Kincraig* in his Sons Contract of Marriage being oblig'd to Infeft his Daughter in Law in certain Lands, and therein obliging himself to warrand these Lands to her free of all Teinds, except the payment of Seven Bolls of Victual yearly; for these are the very Words of the Contract: the Father in Law being then Tack-man of these Teinds for payment of the said Tack-duty, and after the Sons decease the Relict continuing divers years in Possession of these Lands and Teinds for paying of this Duty, the Good-father being still on life; thereafter the Good-father in another Contract of Marriage of one of his Daughters, for Security of the Sums promitted in Tocher to his Good-son, makes him Assigney to his said Tack of the saids Teinds, whereupon the Relict foresaid of his Son is pursued for the saids Teinds of the Lands, provided to her by her said Contract of Marriage, who opponing the foresaid Clause of the Contract, bearing her Father in Law to be oblig'd to Warrand the saids Lands to her free of all Teinds, except the said Seven Bolls, which she Alledged, with her Possession sensine, to be als good to her as if she had obtained an Assignation to the Tack, or had been made Sub-Tack-woman. And the other Alledging, that it was only a Personal Bond, which obliged himself and his Heirs, and could not exclude the Real Right now standing in the person of a Singular Successor, who had valuably acquired it *ex causa oneroſa.* The Alledgance was Sustained, and the Clause was Found sufficient, to maintain the Defender in her Right, to bruik the Lands against any whosoever claimed Right to that Tack. Actor. *Aiton.* Alter. *Nicolson. Gibson* Clerk. *Vid.* 27 *March* 1628, Lord *Blantyre.*

James Weyms contra L. *Kincragie*, *March* 21. 1629.

ONe being Infeft in an Annualrent out of the Lands holden of the Granter, and after the Granters decease, the Annualrentar pursuing the ground, to be Poynded, the Donatar to the Waird, which fell by the decease of the Granter, Compearing to stay the same; and the Annualrentar Replying, that the Waird was taken to the behoose of the Appearand Heir of the Granter of the Infeftment, which being confest by the Donatar; It was found nevertheless, that the Annualrentar could not Poynd, during the time of the Waird, because albeit the Waird was taken to the use of the Appearand Heir, yet seing the Appearand Heir had Renunced to be Heir, being Conveened by other Creditors of the Defunct, to whom he was Alledged to be Appearand Heir; And this Annualrentar could not Qualifie, nor Alledge that he was Heir to him, That Renunciation standing, the Ground could not be Poynded during the time of the Waird, albeit the Waird was taken to the use of the Appearand Heir, no more than it had been to the use of a Stranger. Actor. *Aiton.* Alter. *M'gill. Gibson* Clerk. *Vid. July* 2. 1624. L. *Hemsfield.*

E. *Bucclengh*

E. Buccleugh contra *Young* and *Ker*, *March* 25. 1629.

THE Earl of *Buccleugh* pursuing Redemption against *Young*, who had a Redeemable Wodset of him, mentioned *March* 20. 1629. And in this Redemption, one *Ker*, who was Creditor to *Young* the Wodsetter, had for Sums owing to him by the said *Young*, Compriſed the said *Young's* Right of Wodset and Inteſtment, and who upon that Compriſing, had Charged the Earl to enter him, and by vertue thereof Compearing, and deſiring that the Conſigned Money, whereupon the Lands Wodset were Redeemable, might be delivered to him; And the Earl Alledging, that he ought to have Right thereto, in reſpect that *Young* the Wodsetter before *Kers* Compriſing was decerned to pay to the E. certain Sums of Money, wherein he was his Debitor, ſo that he might compenſe therewith, and might therefore take up the Money conſigned for the Redemption; And the Compriſer anſwering, that ſeing the Compriſing gave him Right to the Wodset, the Money whereupon the Land was Redeemed behoved to pertain to him, and the Purſuer could not compenſe therewith, for that Debt owing to him, the Compriſer having Compriſed an Heretable Right, for eliding whereof, nothing could be obtruded of any Moveable Debts owing to the Redeemer. The *Lords* Found, that the Compriſer had the only Right to the Sum, whereupon Reverſion was granted, and not the Redeemer, for albeit the Wodsetter was owing a Moveable Sum to the Redeemer, before the Wodsetters Right was Compriſed, yet ſeing the Compriſer had Compriſed that Right at that time when the Wodset ſtood, and before any Order of Redemption uſed; and ſeing the Redeemer had done nothing before the Compriſing, nor yet ſince the Redemption, nor Conſignation (whereby it might be ſupponed that the Sum became Moveable) to make that Sum conſigned lyable, or to affect the ſame to him for his Debt; Therefore it was Found, that the Compriſer had Right to the Sum, the ſame becoming in the place of the Right of Wodset Compriſed, and which was Redeemed by the ſaid Sum, which being conſigned by the Redeemer, in the Depoſitars hands, could not be claimed by the Redeemer, to be compenſed with, and to be taken up by him, and retained; for then there could not be a Redemption uſed by him, ſo that he was Found not to have Right thereto, and that the Redeemer could not compenſe the Sum conſigned for Redemption, with a Debt owing to him by the Wodsetter, againſt the ſaid Compriſer, who was a ſingular Succeſſor, albeit it had been granted, that he might have compenſed againſt the Wodsetters ſelf, if he had not been denuded of his Right. Actor. *Nicolſon*. Alter. *Cheap*. *Scot* Clerk.

Ruſſell contra *Paterſon*, *Eodem die*.

ONe being purſued for payment of Ninty nine Pounds, conform to his Promiſe made to pay the ſame, it being contended, that it was probable by Witneſſes, as the Purſuer deſired. The *Lords* Found it was only probable by the Defenders Oath, or by Writ, and admitted not the ſame to be proven by Witneſſes. Actor. *Ruſſell*. Alter. *Aiton*. *Gibſon* Clerk.

Lo. *Couper* contra Doctor *Strang*, *Eodem die*.

DOctor *Strang* having Charged the Lo. *Couper* to pay a Penſion of Fourty pounds, given to him yearly, during his Lifetime, he being their Minister at *Errol*. The words of the Penſion bearing, *That the* Lo. Couper *underſtanding, the pains taken, and to be taken by the* Dr *upon his Vaſſals in that Paraoch, and for love and favour he gives the ſaid Penſion to the Doctor during his lifetime*; and the Party Suſpending, that the Penſion bears, *To be given to the Doctor, for ſerving the Cure of that Kirk*; and he being now tranſported to another

Charge, and that Kirk served with another Minister, the Pension should cease, specially seing there is an expres Clause in the Pension, whereby the Defender accepts the same, in Satisfaction of all that he can crave of the Lo. *Couper*, for his Service. The *Lords* Found not this Reason Relevant; but Found that the Lo. *Couper* was Debitor to the Doctor in the Pension so long as he lived, albeit he Served not the Cure at that Kirk, seing the Pension bearing, to be given as said is, for pains to be taken *in futuro*, which now ceased, was Found not to be the finall Cause, whereby the Failzie could make it to cease, but was an Impulsive Cause only, which, although it held not, yet thereby the Pension was not restricted to the time of his Service, but was given expresly, during his lifetime, and ought not to cease, so long as he lived; and so a Pension given to a Pensioner for his Lifetime, for Services done, and to be done, ceased not, by not doing of Service thereafter continually. Actor. *Nicolson* & *Neilson*. Alter. *Gibson* Clerk.

Duff contra *Boyd* and *Wilson*, *March* 26. 1629.

TWo Creditors contending, which of them should be found to have best Right to a Sum of Money Arrested, as pertaining to their common Debitor. The one claiming the same by vertue of an Arrestment layed upon that Sum, before the other Parties Diligence; and the other Partie Alledging, that that Arrestment ought not to be respected; because the Principal Letters, which should be the Warrand to all Arrestments was not produced, seing there was nothing produced, but an Extract of the Letters of Horning, out of the Clerk of Registers Books, wherein the Horning was Registrat; In the which Extract, there was contained a Warrand to Arrest, and by vertue of the Warrand in the Extract, the Arrestment was made by the Officer, since the Letters of Horning were Registrat, and which Extract he Alledged could not be a Warrand to any Officer, or to any Partie whereupon to make Arrestment, except the principal Letters bearing that Warrand themselves were shown. The *Lords* Found the foresaid Extract, albeit proporting a Warrand of Arrestment, could not be a Warrant, whereby Arrestment could be execute, the principal Letters themselves not being shown, which principal Letters Signed and Signet, could only be a ground of Arrestment, and therefore the said Arrestment was not sustained, but the other Party was preferred. Actor. *Davidson*. Alter. *Boyd*. *Gibson* Clerk.

Rollo contra *Murray*, *Eodem die*.

A Pensioner having a Pension granted to him, by the Bishop of St. *Andrews*, and the Feu-Duty of some Lands payable by the Feuar to the Bishop, being assigned to the Pensioner, for payment of the Pension, whereupon the Pensioner having Charged the present Feuar of the Land, who had lately bought the same from the old Feuar, for payment of the said Feu Duty, resting unpayed, diverse years before he had acquired the Feu; It was Found that the Pensioner could not Charge by any Personal Charge, or Execution, the said Feuar, for payment of the said Feu-Duties, of any years owing before the Acquiring of his Right, but prejudice to seek the same really, against the Ground, by Poynding, or otherwise; Likeas the Pensioner, *July* 8. 1629, pursuing for Poynding of the Ground, for the said Feu-Duty owing, before that Singular Successor obtained the Right of the Lands. It was then Found, that the Ground was Poyndable for the years, not only since he acquired his Right, but also for the years preceeding, and that there was no necessity to pursue him, who was then Heretor, for payment of the same. Actor. Alter. *Rollock*. *Scot* Clerk. *Vid. July* 21. 1630. Mr. *Archibald Moncrief*. *July* 9. 1629. *Urquhard* contra E. *Caithness*.

Colledge

Colledge of *Aberdene* contra *Menzies*, *Eodem die.*

THe Colledge of *Aberdene*, having the Deanry of the Cathedral Kirk of *Aberdene*, Annexed and Mortified to them, purſues Reduction of certain Tacks of Lands, pertaining to the Deanry, Set by the ſaid Colledge, becauſe the ſame was not with conſent of the Biſhop, and remanent Members of the Chapter of the ſaid Cathedral-Church; And the Defender Alledging, that there was no neceſſity of any of the Chapters Conſent, ſeing the Deanry was Mortified to the Colledge, whereby in effect the Deanry was ſuppreſt and extinct, and no Conſent was requiſit, but of the Principal and Members of the Colledge, to whom the Rents and Fruits of the Deanry did belong, and whoſe Conſent he had, and which was Set by them: The *Lords* Found the Tack null, wanting the Conſent of the Chapter: for albeit the Deanry, and Fruits and Rents thereof was Mortified to the Colledge, yet the Dignity was not thereby Extinct, for thereby the Colledge came in place of the Dean, and as deeds done by the Dean, before the Mortification, required the Conſent of the reſt of the Chapter, ſo the Deeds done by the Colledge required the like Solemnity, they being only become in the Deans place. *Actor. Nicolſon.* Alter. *Cheap. Scot* Clerk. *Vid. November* 9. 1624. Mr. *Tho. Hope* contra Miniſter of *Kerſe March* 9. 1630. Mr. *Walter Whiteford.*

Mathiſon contra L. *Wariſton*, *March* 28. 1629.

A Son purſuing his Mother, who was made his Tutrix, and her preſent Huſband with whom ſhe was married the time of the Purſuit, for payment of the Particulars Intrometted with by her, in the time of his Pupillarity for diverſe years, in which ſhe was married with another ſecond Huſband, in theſe years; And the preſent Third Huſband Alledging, that he could not be conveened for theſe years wherein ſhe was married with another Huſband, ſeing that Huſband Intrometted with the Pupills Eſtate theſe years, and whoſe Heirs and Executors ought to pay the ſame to him, and ought to be called therefore, and not this Third Huſband, ſpecially ſeing the Wife having married that Huſband, ſhe by that ſecond Mariage fell from her Tutory, and by the Law was Removed therefrom, whereby the Intromiſſion had by her or her Huſband could not be aſcribed to her Tutory, but the Husbands Heirs or Executors ought to be anſwerable therefore. The *Lords* Found, that this Third Husband, now Defender, could not be conveened for any Intromiſſion had by the Wife, or her ſecond Husband, in theſe years wherein they had Intromiſſion the time of their Marriage, before that the Heirs and Executors of that ſecond Husband were called and diſcuſt, whom the *Lords* Found, that the Minor ought to purſue therefore, *primo loco*, and diſcuſs them before he could have any Action againſt the Wife, or her Third Husband for the ſame; and Found, that if it ſhould be Tryed by that Purſuit, and diſcuſſing of them, that they ſhould be found *non ſolvendo*, and that no payment might be recovered from them, that then the Minors Action againſt the Wife and her Third Huſband ſhould Revive and Convaleſce to him; alſo the *Lords* Found, that the ſaid Third Husband, and his Wife might be Conveened for the Intromiſſion had by her in theſe years which preceeded here ſecond marriage; and wherein ſhe was then Tutrix, after the deceaſe of her ſaid firſt Husband, Father to the Purſuer, and which Purſuer was her own Son, for which years the Action was found proper to the Purſuer againſt his ſaid Mother, and againſt her ſaid preſent Third Husband, and that it was not neceſſar for him to purſue the Heirs and Executors of the ſecond Husband therefore, ſeing the Action was proper againſt her ſelf, ſhe being then Tutrix in theſe years, and conſequently againſt her preſent Husband. *Actor.* Alter. *Craig. Scot* Clerk.

Gall contra *Eviot*, *Eodem die.*

ONe being purſued for a Sum adebted by the Defender, and which was referred to his Oath, and the Defender granting the Debt; but in his Oath declaring, that the Debt was not owing, in ſo far as the Purſuer had Intrometted with the *Farms* and Duties of the Lands of the *Defenders* diverſe years, which were poſſeſt by the Defender, he retaining the Duties un-payed, and which he Compenſed with the Purſuer, for ſatisfaction of his Debt now acclaimed. The *Lords* allowed of this Compenſation, and in reſpect of the Oath which proported the ſame, they aſſoilzied him from this Purſuit, which was ſo Found, albeit this was an Exception proponed by the Defender, not inſtructed, but ſworn by himſelf, it being neither Referred to his Oath, nor yet otherwiſe qualified by the Deponer, who granting the Debt, for which he was purſued, made himſelf free by affirming of another Debt, owing by the Purſuer, which was neither Inſtructed nor Liquidat; neither was it ſhown that the *Purſuer* poſſeſt theſe Lands, nor what Farms ſhould have been payed therefore, nor what were the Prices of the Farms theſe years, nor that the Deponer had Right thereto, without which there could be no Compenſation; nevertheleſs this being Deponed by the Party, it was found ſufficient to Liberat him of this liquid Sum, confeſt to be owing, and elided only by the ſaid Compenſation; and it was Found, that the Deponer by his qualified Oath, might propone and ſwear his own Exception. Actor. *Gibſon.* Alter. *Nicolſon* & *Cunninghame.* *Hay* Clerk.

Hog contra *Neving*, *June* 11. 1629.

ONe *Neving* being Executor Teſtamentar Nominat and Confirmed to umquhile *Hog* Teſtator, and in the ſame Teſtament the whole Gear being left to Mr. *Thomas Hog*, Son to the Teſtator, who was left univerſal Legatar by the Defunct, ſo that the Executor had only *nudum officium*, and the Executor having recovered Sentence againſt ſome of the Debitors, named and given up in the Teſtament; thereafter the Legatar having conveened the Executor for payment of the Debts given up in Teſtament. It was Found that the Executor having made the Legatar Aſſigney to the Decreets obtained by him, againſt the Debitors, that he was not further obliged to pay the *Debts* to the Legatar, ſeing the Executor had only a naked office, and the Legatar only the benefit, and Found that the Executor had no neceſſity to put the Decreets againſt the Debitors to Execution, either by Poynding or Horning; Neither was obliged to make the *Debts* good, albeit the Debitors had become Bankrupt, or un-anſwerable to pay thereafter, they being Reſponſal, if the Sentences had received Execution, for which the Executor was not anſwerable, nor was obliged in Diligence, he being free of all Fraud, or Colluſion with the Debitors, and he never being deſired by the Legatar, to concur with him in any Act againſt the Debitors: So that the Aſſignation made by the Executor, to the Debts and Goods contained in the Teſtament, in favours of the Legatar, with all that follows thereupon, was found ſufficient, and that the ſame extended alſo to the Decreets obtained by the Executor, before the Aſſignation, albeit the ſame bore *not to be made to the Decreets*, ſeing it bore *in and to the Debts, and all that had followed thereon*; But in this Caſe, the Aſſignation was received, and keeped a long ſpace by the Aſſigney, before he purſued the Executor, the Debitors being then deceaſed, who were living the time of the receiving and making of the Aſſignation; Likeas the *Aſſigney* had cauſed Charge the Debitors upon his own Charges, whereby he had accepted the Aſſignation; And ſo it was Found, that a naked Executor, where there was an univerſal Legatar, was not obliged *ad diligentiam.* Actor. *Aiton* & *Miller.* Alter. *Mowat.* *Gibſon* Clerk. *Vid. Decem.* 2. 1628. *Pool* contra *Moreſon.*

reſon. July 15. 1626. *Oliphant* contra *Oliphant, July* 9. 1631. *Wilſon* contra *Tinto.*

Gray contra *Campbell, June* 12. 1629.

SOme Feu Mails for diverſe Years and Terms to come, Payed and Advanced to the Heretor, or Liferentar, or anyother having Right to the Lands by the Tennents, is not allowed to liberat the Payer of theſe Terms, which were not come the time of making of the Payment, if he to whom the Payment was made, ſhall happen to be Denuded of his Right, in favours of any other, before the expyring of theſe Terms, the Duties of which Terms will pertain to him, who then ſhall have Right to the Land, notwithſtanding of the Tennents Payment making to his Maſter before hand, the Maſter then having a Right undenuded, but prejudice of the Tennents relief againſt the Maſter to whom he payed, or for whom he payed to another, there being no real deed done by the Tennent to affect the Land to him, whereby to retain the Duties for his relief. *Vid. Decem.* 13. 1628. *Huntly* contra *Hume.* & *Feb. ult.* 1628. L. *Lauchop, July* 29. 1623. *Robert Monteith.*

Inglis contra *Frazer, June* 13. 1629.

AN Executor, or Intrometter is not ſubject to pay any more to the Creditor of the Defunct, but that quantity of the Debt which was owing by the Defunct the time of his deceaſe, and wherefore he might have been Conveened himſelf at the time of his deceaſe; and the ſaid Executor or Intrometter (who repreſents only the *Defunct* in the caſe he was in when he died) was not found lyable for any running *Debt*, after the Defuncts deceaſe, as for Annualrent of Principal Sums reſting and running after the Debitors deceaſe, ay and while the payment of the principal Sum, as was done this day betwixt thir *Parties*, where the Defender being conveened, as Intromiſſatrix with the Debitors Goods, to pay the principal Sum owing by him, for the which he was denunced *Rebel*, before his deceaſe; *And* alſo the ſaid Intromiſſatrix was conveened upon the Act of *Parliament*, to pay the Annualrent therefore, of all Terms ſince the Defunct was Denunced, and ay and while the Sum was Re-payed. It was Found that the Intromiſſatrix was ſubject to pay no more than the principal *Sum*, with the Annualrent of ſo many Terms as run after the Horning, unto the time of the Defuncts deceaſe, but not of any Terms after his deceaſe, interveening before the Intenting of that Purſuit, moved againſt the Intromiſſatrix. It would appear, that the Intromiſſatrix or Executrix, after Purſuit moved againſt them, ſhould be ever lyable to the Annual thereafter, ay and while payment be made of that which was owing the time of the Defuncts deceaſe. *Gibſon* Clerk. *Vid. July* 2. 1629. *Purveyance* contra L. *Craigie. Jan.* 26. 2631. *Cloberhill. Feb.* 17. 1632. *Kinnaird* contra *Zeaman* and the other caſes there cited, *Decem.* 7. 1627. *Porteous. March* 29. 1626. *Couſton. July* 19. 1637. L. *Smeiton.*

L. *Coill* contra L. *Lochbouie, June* 16. 1629.

A High Land-Man dwelling in the *Iſles*, being holden as Confeſt upon a Summons referred to his Oath, after a Term aſſigned to produce him, and Decreet given againſt him, which being Suſpended, and the verity of the Purſuit being Deferred by the Defender (whoſe own Oath being holden as confeſt, was Found could not be taken, in reſpect of the Sentence) to the Purſuers Oath. It was Found that the Purſuer could not be compelled to give his Oath therein, neither by Commiſſion, nor yet *cum onere expenſarum*, which were both offered by the Suſpender and refuſed. Actor. Alter. *Nicolſon. Hay* Clerk.

Smeiton contra the late Minister of St. *Bothans* Relict, *Eodem die.*

THE late Minister dieing in *April*, 1628. before either *Whitsunday* or *Martinmas* that Year, and it being Controverted betwixt the *Relict*, and the new Intrant, if the Stipend of that year, wherein the late Minister died before any of the Terms were come, should pertain to his *Relict*, and Bairns, as for the Cropt, which would belong to them for the *Service* of the late *Minister*; or if they would have only Right thereto, as *Annat*, according to the Order of the Kirk. The *Lords* Found, that the late Minister dieing before any of the Terms came, no part of that years Stipend was due to him for that year; and consequently, could not be claimed by his Relict, and Bairns by any other Right, but as the Annat, by vertue whereof, only it was found to pertain to them, and no otherwise, and that they should seek nothing of that Cropt, 1629. for the Annat; for the Order of the Kirk is, that if the Minister live after *Michaelmas*, his Executors get that whole years Stipend, as due to the Minister, for his Service, seing then the Cropt is separat from the Ground, and also they will get the half of the year subsequent, for the Annat; But if the *Minister* die before any of the Terms come that year wherein he dies, the Executor will get no Annat, but that whole years Stipend, and no further. Actor. *Stuart.* Alter. *Hay* Clerk.

Dumbar contra *Turner*, *June* 18. 1629.

ONE being Tacks-man of Lands for certain years, and by vertue whereof coming in Possession, and the Setter of this Tack thereafter Sett another Tack to another person, to begin at the expiring of the first Tack; the posterior Tacks-man pursuing Removing after the expiring of the first Tack, against the first Tacks-man, the Setter being deceast before the first Tack expired; and the said prior Tacks-man Alledging, that the Setter had no Right to the Lands, and that he might maintain his Possession while he were Removed by one having Right to the Lands. It was Found, that he ought to Remove at the second Tacks-mans instance, and that he could not Alledge that the Setter had no *Right*, himself having taken a *Right* from him, and having apprehended Possession by vertue of that Right; which Possession he ought to render again to the second Tacks-man, who represented the Setter, and came in the Setters place, sicklike as he behoved to render the same to the Setters self, if he had been on life, and pursuing him therefore, whose Possession he could not invert, nor oppone to his *Right*; neither was it respected, that this Pursuers Tack took not beginning nor Entry in the lifetime of the Setter, for it was not thereby Found to be null as conferred *in tempus introitus indebitum*, seing it was a Tack Sett by a Laick person in Temporal Lands, not by an Ecclesiastick or Beneficed person wherein that holds. *Actor Nicolson.* Alter. *Belshes. Scot Clerk. Vid.* 11 *Decemb.* 1629. Sheriff of *Galloway.*

Peebles contra *Knight*, *Eodem die.*

THE Relict of a Defunct pursuing the Executor Confirmed, for her own Third of certain particular Goods belonging to the Defunct her Husband, omitted out of the Defuncts Testament, Confirmed by the said Executor, and which omitted Goods were known to the said Executor, and were purposely omitted unconfirmed by him; In respect of which Omission *scienter* done, albeit the Goods were not Intrometted with by the Executor, the Relict claimed her Third thereof from the Executor, as Debitor therein. This Action was not sustained upon that ground of Omission, it not being Libelled that the Executor had Intrometted with the saids Goods, seing the Executor could not be compelled to give them up in Testament, or Confirm them, but might Confirm or Omit them as he pleased, and the Relict might seek a Dative

tive thereto *ad omissa*, if she pleased, and thereby claim right to the same, or otherwise pursue the Intrometters for the Third thereof.

Porterfield contra *Cunninghame*, *Eodem die.*

A Tennent being Pursued for the Maills of the Land possest by him; who Alledging payment made *bona fide* by him to another, before the Intenting of this Cause, whom he offered to prove was Heretably Infeft in the Lands Libelled holden of the King, and to whom, as to his Master, he was in use to pay his Duties by the space of 5 years preceeding the year Libelled. This Exception was Repelled, because the Pursuer offered to prove that the Defender had payed two years immediatly preceeding the year contoverted, the Duties of thir Lands to the Pursuers Author of his Right; which Reply was admitted, and the Pursuer preferred therein to the Defender; albeit the Defender being a Tennent, Alledged that he ought to be preferred, tending to free himself of double payment; which was not Respected.

La. *Pitsirren* contra her Son, *June* 19. 1629.

IN a Contract of Marriage, the L. of *Pitsirren* being obliged to Infeft the Lady, then his future Spouse, in the Land therein contained; and at the time of the said Contract, some of the Lands is standing under long Tacks for many years, for small Duties, which were Sett by her Husbands Father long before the said Contract of Marriage; after the death of her Husband, and after she had remained many years in Possession of the said Tack-duty, she Charges her Son as Heir to her Husband Contracter, upon that Clause Obligator foresaid, anent the giving of a valiable Infeftment to her, to warrand the said Infeftment from the said Tacks, seing the same were an impediment to the avail and efficacy thereof. The *Lords* Found, that the Heir was not obliged to warrand from that Tack, it being Sett before the Infeftment, and the Party not being obliged to warrand the Lands from the same *specifice*; for the Clause of giving a valiable Infeftment was Found might subsist with the preceeding Tack, especially the Lady receiving the Duty many years after the Husbands decease, and she being otherwise well provided of a Conjunct-fee. Actor. *Nicolson.* Alter. *Advocatus* & *Lermonth.* *Hay* Clerk.

Gray contra *Eodem die.*

MR. *Samuel Gray* having Charged his Debitor for payment of a Sum, who Suspending, and Consigning the same, in the Suspension compeared the Mother to his Wife, and desired that the Money should be imployed to her Daughter in Liferent, for Implement of the Contract of Marriage *pro tanto*, made betwixt the Daughter and the said Mr. *Samuel*, whereby he was obliged to provide her to a yearly Annualrent greater than the Annualrent of the Sum Consigned, to be uplifted out of his Lands; which Lands seing he had sold the same, she as person Contracter in the Contract of Marriage, had interest to crave of the *Lords*, to be fulfilled to her Daughter by the employment of this Money so far as it might extend, in place of the Annualrent out of the Lands. This being considered by the *Lords*, they Found it reasonable, and albeit neither the Good-mother nor the Daughter his Spouse were Parties, nor called in this Suspension, yet the *Lords* found, that this Money should be employed to the Woman in Liferent, albeit the particular Sum was not mentioned in the Contract, and albeit the Daughter also compeared, and declared that she craved not that employment to be made by her Husband, but consented that he should take up the Money, and use the same at his pleasure; which was not respected by the *Lords*. Actor. Present. Alter. *Vid.* 9 *January* 1623. *Marshal* contra *Marshal.*

L. *Haddo* contra Mr. *Roger Mowat*, *June* 20. 1629.

AN Action for delivery of Writs was sustained at the instance of a Minor having Curators, without consent or concourse of his Curators, against an Advocat, haver of the Writs, in whose custody the same was put by the Minor and his Curators, and the Curators neither assisting the Pursuit, nor yet being conveened in the Process by the Minor, for the exoneration of the Advocat, with whom the Writs were depositat. Actor. *Burnet.* Alter. Present. *Gibson* Clerk. *Vid.* 23 *July* 1629. L. *Haddo.*

Keith contra *Ogilvie*, *Eodem die.*

SOme Lands being Wodset by the Heretor thereof, and because they were Liferented by another than the Heretor, therefore in recompence and excamb on thereof, the Heretor having Sett a Tack of other Lands to the Wodsetter, to be bruiked so long as the Liferenter of the Wodset Lands lived; which Tack contained no Duty therein insert to be payed therefore; after the decease of the Setter of this Tack, his Relict being served to the Terce of the Lands Sett in Tack, and seeking Removing therefrom; It was Found, that the Tack could not defend the Tacksman, seing it had no Duty therein contained; albeit it was granted in recompence of the foresaid Wodset, seing if it had contained any Duty, the Tercer would have had Right to her proportion of the Duty thereof, how little soever it had been. Actor. *Baird.* Alter. *Mowat.* *Gibson* Clerk. *Vid.* 5 *March* 1629. L. *Ley* contra *Kirkwood.*

Douglas contra *Toures*, *Eodem die.*

ONe being conveened as universal Intromissatrix with her Fathers Goods, to pay a Debt owing to the Pursuer by her Father, and the Defender Alledging, that there was another of the Defuncts Creditors confirmed Executor to him, so that thereby she could not be conveened as universal Intromissatrix; and the Pursuer Replying, that a Creditor confirming himself Executor *in aliquo individuo*, only to the effect his own Debt might be payed, that could not take away the Action competent to another Creditor, against the Intromettor with other Goods, by and attour that which was confirmed, and that he could not have Action against the Executor. The *Lords* Found, that there being an Executor confirmed *ante captam litem*, albeit he was only a Creditor, against whom no other Creditor could have Action in Law, yet that thereby no other could be conveened as universal Intromettor, but that the Pursuer might either seek a Dative *ad omissa*, or else insist against the Defender as Intormettor, to make the particulars which should be proven to be intrometted with by her, forth-coming to the Pursuer, or the Prices thereof, for which particulars, Sentence should only follow against the Defender, and for the which the Action was Sustained, but not to make her lyable to the Debts as universal Intromissatrix, for the which the Action was not Sustained, and Election was given to the Pursuer, either to insist against the Defender in this same Process as Intromettor to the effect foresaid, or else to seek a Dative *ad omissa*. Actor. Alter. *Mowat.*

Ross contra Baillies of *Innerness*, *June* 25. 1629.

THe Baillies being pursued for not taking of the Rebel denunced, they being charged by the Creditor by Letters of Caption to that effect, and the Baillies Alledging that no Process ought to be granted against them, seing the Rebel was not Summoned to the Pursuit, who might alledge Payment, or propone some other lawful Defence, as in Actions to make Arrested Goods forthcoming, where the principal Party Debitor is ever Summoned. This Alledgance was Repelled, and no necessity found to Summon the Rebel in this or the like Pursuit, where the Magistrat is conveened *ex sua culpa*, the Rebel being decerned

of

of before; and this Pursuit being moved against the Baillie for his disobedience, wherein the principal Debitor had no Interest, whereas in Actions to make Arrested Goods forth-coming, the principal Party is necessary to be called, because it tends directly to constitute one first to be his Debitor, and next that Debitor to pay again that Debt to the Creditor Pursuer, whereby he is a necessary Party, from whom in effect Payment is sought, and his Gear desired to be taken from him; and upon the last of *June* it was Found, that the Baillie not being powerful to take the Rebel the time of the Charge, the Baillie being then single, and the Rebel well accompanied, and escaping thereafter, before the Baillie got Assistance, that the Baillie ought not to be answerable. Actor. *Gibson*. Alter. *Mowat*. *Gibson* Clerk.

Sheriff of *Cavers* contra *Turnbul*, *Eodem die*.

IN a Removing from the Mure called *Cavers-Mure*, the Pursuer being Infeft in that Mure by the King *per expressum*, and the Defender being Infeft in his Lands *cum pascuis & pasturis, cum communi pastura, cum libero introitu & exitu, & cum omnibus libertatibus & pertinentiis dictarum terrarum*, by vertue whereof he had been in continual Possession, and his Predecessors, without interruption, of pasturing their Goods, and of casting of Fewel upon the Mure libelled without interruption, the Pursuer and his Predecessors being *praesentes scientes*, and not controlling the same past memory of Man, and that long before the Pursuers Infeftment given to him of that Mure *per expressum*. This Infeftment preceeding the Pursuers special Infeftment, and continual immemorial Possession, was not Sustained in this Possessory Judgment to defend the Excipient against the Pursuers posterior Right taken of the Mure libelled *per expressum*. Actor. *Burnet*. Alter. *Gibson* Clerk. *Vid. ult. June* 1629, betwixt these Parties.

Murray contra L. *Inchmartine*, *Eodem die*.

IN an Action of Non-entry of the Earldom of *Athol*, an Infeftment of the Lands standing by the space of 40 years, and clad with present Possession, and divers years preceeding, was Found sufficient to purge all Non-entry, albeit the Non-entry was not sought for the fault of Non-entring of any of the Predecessors of these, whose Rights were alledged to make the Lands full, but was sought upon another ground, to wit, for the Non-entry of an Heir to another Vassal who died Infeft in the Lands, and from the which Vassal the Excipients Right flowed not, but were distinct Rights flowing from several Authors and different persons; likeas it was declared, that the Non-entry was not sought, but so far as concerned that Right to the Lands, which subsisted in the person of him, by whose decease it was gifted, and whereby he craved the famine, which had no contingency with that Right, whereby the Lands were alledged to be full, and when special Declarator should be sought, then that Right would be entire, and might be used: notwithstanding whereof the said Alledgance of the Lands being full 40 years together, and Possession had conform thereto, was Sustained to purge whatsoever Non-entry, albeit craved from another cause, so long as these Infeftments, whereby the Lands were full, stood in their own strength un-reduced; but the Exception was Repelled, and Found not Relevant, seing the Defender could not Alledge that these Infeftments were clad with Possession, without which Possession, conform to the Right, the same was not found to purge the Non-entry, and to make the Lands full, against the Non-entry falling by the decease of a Vassal, who by vertue of his Right was in continual Possession, and who the time of his decease was Vassal, and an actual Possessor, whereby the Donatar to the Non-entry claimed to be in the place of the Vassal Possessing; And it being also Alledged that the

Non-entry could not be ſought by deceaſe of that Vaſſal, by whoſe deceaſe it was craved, ſeing in the principal Right made to his Predeceſſors of the Lands libelled, it was Provided, that failzieing of Heirs Male to be gotten of the Receiver of the Infeftment his Body, the Lands ſhould pertain to the King, and the laſt deceaſing having no Heirs Male, the King came in the Right thereof, who by reaſon of his Crown, needed not, nor cannot be Seaſed, and which as a Seaſin muſt purge the Non-entry. This Exception was Suſtained to purge the Non-entry, albeit the Proponer deduced no Right from the King in his perſon to the Land, and albeit the Purſuer Replyed, that though the King had a Potential Right by that Proviſion, whereby he might claim the Right to the Land, yet it was in his own will to claim that Right, which he claimed not, but by the contrary he had Repudiat the ſamine, by giving the Non-entry to the Purſuer, and never acclaiming Right to the Land by that Proviſion, nor yet Poſſeſſion ſenſine by the ſpace of 50 years ſince the Vaſſals deceaſe; likeas the Kings Advocat aſſiſted the Non-entry, whereby he being the Kings Officiar, having ſpecial Intereſt, and not claiming any Right for the King but the Non-entry, no other could obtrude that Right, notwithſtanding of which Anſwer the Exception was Suſtained, and the *Reply* not reſpected. Actor. *Advocatus, Nicolſon & Aiton.* Alter. *Stuart. Gibſon* Clerk. *Vid. infra*, and 19 *March* 1629, *Dowglas* and E. *Angus* contra E. *Lauderdale*.

In this ſame above written Cauſe of the Non-entry of *Atholl*, an Exception was ſuſtained to purge all Non-entry for other Lands, then the former Lands whereof he was Poſſeſſor, by whoſe deceaſe the Non-entry was ſought, founded upon the Excipients own Infeftment of the Lands lybelled, granted in *Anno* 1614. by the King, and continual Poſſeſſion ſince the date thereof: For that Infeftment and Poſſeſſion yet continuing, was Found enough to take away all Non-entrie, ſo long as the ſame ſtood un-reduced, the Lands being thereby full, and the King having a Vaſſal, which Vaſſal was in actual Poſſeſſion, and which Right and Poſſeſſion would have defended the Excipient againſt a *Removing*, or a *Purſuit* for *Maills* and Duties, and far more ought to *Defend* againſt the Non-entry, ſo long as it ſtood, albeit the Purſuer Replyed, that that Infeftment could not take away the Non-entry, which was Gifted, and depended upon the Right of another Vaſſal than the Excipients Author; And alſo tho he Replyed, that the ſaid Vaſſal, by whoſe deceaſe the Non-entry was Gifted, was Infeft in the Lands before the Excipients Authors Right, yet the Exception was ſuſtained, to purge all Non-entry falling by whatſomever Cauſe, ſince the date thereof, ſo long as it ſtood, being Clad with preſent, and 15 years Poſſeſſion preceeding; And ſo in this caſe, a Right with 15 years Poſſeſſion was ſuſtained, to purge all ſubſequent Non-entry, falling by the deceaſe of any other Vaſſal, or any Cauſe, after the date thereof: And it was alſo ſuſtained, to purge all preceeding Non-entry, before the date thereof, becauſe in that Infeftment, the King had diſponed the Lands excepted on with an expreſs Clauſe, *de novo damus*, diſpenſing with all preceeding Non-entries, & other faults, whereby all Non-entry preceeding the ſame, was taken away, there being no *Donatar* thereto, before his Infeftment, and this was Found to take away this Non-entry, gifted ſince the date of his Infeftment; and in reſpect of the foreſaid Exception, whereby the *Declarator* was Elided, as ſaid is, The *Lords* declared, that this Gift, and *Action* Intented, and ſo Elided, ſhould be als effectual to the Purſuer, to *Reduce* that Infeftment, whereupon the Exception is founded, or otherwiſe to purſue Removing, or for the *Mails* and *Duties* of the ſaids Lands, as if the ſaid general *Declarator* had taken effect. The admitting of which *Exception* in this *Action*, ſhould not be derogatory to him therein, without prejudice always to this Excipient,

Excipient, of all his Defences againſt theſe Purſuits, whereby he may maintain his ſaid Rights, and elide theſe Purſuits, *prout de Jure.*

Young contra *Murray, June* 26. 1629.

TWo being Confirmed Executors to a Defunct, and a Purſuit being moved in both their Names againſt the *Debitor*, one of the two not aſſiſting the Purſuit; This *Action* was ſuſtained at the Executors Inſtance, who inſiſted without concourſe of the other, for the whole *Debt* acclaimed; becauſe the Commiſſars of *Edinburgh*, who had alſo Confirmed both the two alike Executors, by their *Decreet*, after the ſaid Confirmation, had ſecluded that *Executor*, from the Office and benefit of the Executry, ſeing he had refuſed to concurr with the other, in doing *Diligence*, and making equal Charges, for recovery of the *Debts*, and Goods pertaining to the *Defunct*: but the *Decreet* which ſecluded him, was not given upon Tryal and Probation of his not concourſe, but only for not Compearance, being Summoned for that effect, and abſent, notwithſtanding whereof, it was ſuſtained, with the *Action* at the Executors Inſtance for the whole, albeit the *Decreet* which ſecluds an Executor from his Office, is ever in uſe to be given before the Confirmation, for either refuſing to accept, or to make Faith, or to find *Caution*, or ſuch like other *Cauſes*, he is debarred, and not *Confirmed Executor*, but the Intromiſſion is committed to the other, who uſes ſolly to be *Confirmed*, and uſes not to be done after they are *Confirmed*, but yet it was ſuſtained here after the *Confirmation*. *Actor.* *Alter. Aiton. Gibſon* Clerk.

K. Advocat contra ſome Excommunicants, *Eodem die.*

SEveral Perſons Excommunicat, being Purſued upon the Act of Parliament, 1609 for Payment of certain Corns growing upon the Mains, poſſeſt by themſelves, of diverſe years after the Sentence of *Excommunication*, and now bypaſt, before the Intenting of this Purſuit; And the Defenders Alledging, that the Purſuit being for the Grouth of Corns of by-paſt Cropts, which were Conſumed, and not now extant, the ſame ought not to be ſuſtained, for Reaſon could not Inforce, that they ſhould be decerned to pay that which, was *bona fide* ſpent diverſe years ſince, being Corns which could not be keeped; Likeas the ſame being ſpent in Servants Fees, and others, who Laboured the Ground, and in the Maintainance of themſelves, and their Families, which reſted out over the Seed, and Teind, which alſo ought to be deduced, therefore the ſame being ſo ſpent for maintaining of their Lives, and for their Intertainment, It ought to be allowed, as both *bona fide* Conſumed, and neceſſarily done, and therefore ought not to be Repeated, nor they ſubject to pay the the ſame. The *Lords* Found, that the Seed, and Teind, and Servants-Fees, and other Expenſſes made in Labouring of the Ground, and Mains, and winning of the Corns Growing thereon, ought to be deduced off the Corns foreſaids, growing the years Lybelled, for which the Defenders were conveened, the ſame being made ſpecial; but as for that part of the *Alledgance*, anent the Corns ſpent upon their own Intertainment, being, as they Alledged, the only means whereby they lived, and ſo neceſſarily Alledged to be conſumed. The *Lords* Repelled that Part of the Alledgance, and would not allow the ſame, but ſuſtained the Action, for the Corns foreſaid, Growing, and Intrometted with by the Defenders, as ſaid is, except only for Teind, Seed, and Servants-Fees, and expenſſes of the Labouring, and Winning thereof, for which Defalcation was made, and no further; for it was Found, that the Action was als good for the bygones, ſince the Excommunication, which took away *bona fides*, albeit they were conſumed, as it is for time coming, ſo long as they ſtand Excommunicat: for that ſame neceſſity Alledged, for Intertaining for by

gones, holds also for time to come, which if it should be admitted, it would Elide the Act of Parliament; But I think the Reason holds not, for in by-gones they are spent, and not so in years to come, whereby they are extant; And upon the 11. *December* 1629. betwixt thir same Parties. The Excommunicants and their Tennents being both conveened, each one of them *in solidum*, to pay the Farms of their Lands, being both holden as confest, Decreet was given against them, and each one of them *in solidum*, but once payment was declared, should only be taken from one of them to liberat both. Actor. *Advocatus.* Alter. *Aiton*, *Megill* & *Hope*. *Hay* Clerk. *Vid. Feb.* 13. 1628. Lady *Dumfermling*. *March* 23. 1630. *Murray* Donatar.

Robertson and *Traquair* contra *Dalmahoy*, *June* 27. 1629.

A Defunct dieing, leaving two Bairns, and his Wife behind him, which two Bairns were Intertained by the Relict their Mother, during their Lifetimes; Likeas she Intrometted with the Goods of her Husband, and such as were Heirship after the decease of the Bairns, who died never being Served, nor entered Heirs to the Defunct. The Defuncts Brother being served Heir to him, makes another Assigney to the Heirship, thereby pertaining to him; which Assigney Pursuing the Relict, as haver of the Heirship, for delivery of the same to him; It was Found that the Relicts Intertaining of the Bairns ought to be allowed to her, and Defalked off the first end of the Price of the said Heirship, which was so Found, albeit the Pursuit was moved by the Assigney to the Heir, and albeit the Bairns Intertained by her, were never Served Heirs, and so had no Right themselves to claim the Heirship, and albeit the Intertainment was made by the Mother of her own Bairns, and so thereby presumed, to have been done *ex pietate Materna*, albeit neither the Intertainment was Liquidat, nor no Action Intented therefore, notwithstanding whereof the said Exception was sustained.

Hamilton contra *Hamilton*, *Eodem die:*

A *Lison Hamilton* Sells the Lands of *Bothellhaugh* to umquhile *David Hamilton* of *Monckton-mains*, who obliged her to Infest him therein: Two or three years thereafter *David* Dispons the saids Lands again to her in Wodset, Redeemable to her upon a Sum; after *Davids* decease, his Heir having transferred the first Contract in him, he thereafter makes another *Assigney* thereto, who Charges *Alison* to Infeft him, conform to the Contract, and she Suspending, that she ought not to give him Infestment, except that he grant back again to her the Infestment of the Wodset Redeemable, conform to the second Contract, and which she *Alledged* the *Assigney* should do, and fulfill as his Cedent, seing the Cedent having denuded himself of his Right to the *Assigney*, and he being otherwise *non solvendo*, the Assigney therefore ought to fulfill. The *Lords* Found this Reason ought not to meet the Assigney, and Ordained the Suspender to Charge the Cedent, seing these were two different Contracts, whereof each one ought to have their own Execution, whereas if these conditions had been contained in the Body of one Writ, the Assigney also ought to have fulfilled the Cedents part; but here it was presumed, by great circumstances, that the last Wodset was Redeemed, and the Sums satisfied: therefore the *Lords* were the more moved to reject the Reason against the *Assigney*. *Gibson* Clerk. *Vid. March* 10. 1629. *Shaw* contra *Kinross*.

Shaw contra L. *Dunipace*, *June ult.* 1629.

A Procuratory made by the Constituent, to his Procurator, to pursue for some Debts owing to the Constituent, was sustained as a good Title to Pursue the Debitors thereupon, for payment to the Procurator, and the Action was sustained at the Procurators Instance, after the decease of the Constituent

Constituent; and the Alledgance proponed against the Action, and Procuratory, *viz. quod mortuo mandatore expirat mandatum*, was Repelled; In respect, by the Procuratory, the Constituent made him Procurator *in rem suam*, Because of payment made to him by the Procurator, of the said Sums, for which he had the Procuratory, whereby to pursue, and so it was not Revocable, even tho he had been living. *Gibson* Clerk.

Sheriff of *Cavers* contra *Turnbull*, *Eodem die.*

THe Sheriff of *Cavers*, and his Predecessors, being Infeft *per expressum*, in the Mure of *Cavers*, by the space of sixscore years since, and Pursuing Removing therefrom; And the Defender being Infeft before the time foresaid, of the Pursuers Authors Right, in his Lands, *cum Pascuis & Pasturis, & cum communi Pastura, & cum libero introitu et exitu, & omnibus aliis Libertatibus, & pertinentiis*, and conform thereto, in continual un-interrupted Possession, of Pasturing of Goods going upon the saids Lands, pertaining to him upon the said Mure, and casting of Feuel and Dovat thereon, having two several Loanings from his Lands to the said Mure, his Infeftment proceeding from the Barron of *Havick*, and his Lands being a part of that Barrony, and the Barron being Infeft in that Barrony, *cum communi Pastura* before the Pursuers Predecessors special Right, Conform whereto the Vassals of that Barrony, and in special the Defender has had the foresaid Immemorial Possession of Pasturage. This Exception in this Possessor Judgement of Removing, was not found sufficient to defend against the Pursuers special Infeftment, albeit Posterior, but the said Exception was Repelled, in respect of the said special Right of the Property, which was preferred to the Prior Infeftment of Commonty, the Infeftment bearing only *cum communi pastura*, and not designing that Priviledge to be in the Mure Lybelled; and also in respect that the Pursuer offered to prove, that he had Tilled and Laboured divers years, sundry Parts of the Mure Lybelled, and divers years had debarred the Excipients Goods off the Mure, and had Poynded the same, which was sustained; albeit the Excipient Duplyed, that that Part he had Tilled in the Mure, albeit that he Contended, that it was not *Jure* done, yet he claimed no Pasturage in that Part, but in the rest; and als oft as the Defender Poynded the Excipients Goods, yet at that same time he even Returned, and Pastured; For those Deeds being done *via facti, non Juris* by the Pursuer, who was a great & powerfull Man in the Countrey, to him who was but a simple Man, cannot prejudge his anterior Right, and cannot make an Interruption, nothing being done, or following thereupon Judicially, nor allowed by a Judge, without which it cannot be called lawfull Interruption, notwithstanding whereof the Exception was Repelled, and the Reply sustained. This Decision was once or twice Controverted and done. Actor. *Stuart* & *Belshes*. Alter. *Advocatus* & *Burnet*. *Gibson* Clerk. *Vid. June* 25. 1629. betwixt thir Parties.

La. *Dumfermling* contra the *Earl*, *Eodem die.*

IN this Case the Earl of *Dumfermling* having Suspended the Charges given him, for Infefting the Lady his Mother in the Lands conquest by her Husband, after their Marriage: It was Found, that the Lands wherein the umquhile Earl was Infeft before the Marriage, being thereafter, or before Selled to a Vassal, whose Feu was never Confirmed, and so whose Right being of Kirk Lands, was null, and would not have excluded the umquhile Earls Right. The Acquyring of this Feu by the Earl, after the Marriage, from the said Feuar, was not found to be a Conquest, whereby the Heir of her Husband might be holden in Law to give her Infeftment, or wherein the Clause of that Contract could strick, as if it had been Conquest, seing he being Infeft in the Property of that Feu, whether it preceeded, or had been after the

Earls Right not being Confirmed, took not away the Right subsisting in the Earl, before the Marriage, and that Right was not found to be of the naked Superiority, except that the Lady would say that the Feu was Confirmed; and albeit the Earl had satisfied the Feuar to the full avail of these Lands, yet that made it not to be a Conquest of any such Right, and Security of Lands, as might fall under the Clause of the Contract, in favours of the Lady: neither was that Satisfaction, or the umquhile Earl his receiving of the Feu-Dutie diverse years from the Feuar, and giving Acquittances thereon, conform to the Feu, Found to be an Approbation of that Feu, and that thereby he might not quarrel the same, the said Feu being Set by himself, when he was Abbot, and having after the Feu acquired an Heretable Right upon the Annexation, whereby the Lady Alledged, that he could never quarrel the Feu Set by himself, for not Confirmation, it being his own Deed; Likeas she Alledged, that that Supervenient Right of the Earls, who Set the Feu, *viz.* of his Erection, whereby the necessity of Confirmation ceased, behoved to accresce to the Feuar, *quia Jus venditori superveniens emptori prodest*, and therefore she Alledged that the Feuars Infeftment was good against the Setter, and his Heirs, and they could not quarrel the same for not Confirmation, both in respect of the superveniency of the Right to himself, and also in respect of the said tacit Ratification, which answer for the Lady was Repelled; for it was Found, that albeit the Earl Set the Feu, yet tho he could not quarrel it by any Deed done by himself, to the prejudice thereof, yet he might quarrel it upon the nullity of the Law and Statut of Parliament, for not Confirmation, which was the Feuars own Deed, so that as any other having received a valid Right of these Lands, might quarrel the said Feu, so might the Setter thereof, having received a Right, which another might have received, and the Acquittances of the Feu-Duties, conform to the Feu, was not found a Ratification thereof; and this was the rather so Found, against this Charger, where the Disput was not betwixt the Granter of the Feu, and the Feuar, but by the Lady claiming Conquest by the purchasing of that Feu by her Husband, as of a lawful Right of the Lands, which could not be quarrelled by him, or his Heirs, for the Causes foresaid, which was Repelled by the *Lords*. Actor. *Stuart* & *Aiton*. Alter. *Advocatus*, *Nicolson* & *Burnet*. *Hay* Clerk. *Vid.* *July* 3. 1627. and *March* 12. 1628. betwixt thir Parties.

L. *Bamff* contra *Chalmberlan* of *Boyn*, *July* 2. 1629.

IN a Suspension of a Decreet given by the Sheriff of *Aberdene* 8 days after the Head Court at *Pasch*, which fell within the time of Vacance, and so which was quarrelled, because it was done and dated in the Vacance, without Dispensation, and therefore null. The Decreet was sustained by the *Lords*, because they Found, that after holding of the Head-Court, the Sheriff might at all times thereafter, albeit the time of the head Court fell within the time of Vacance, and might sit and hold Courts without Dispensation, seing then in effect the time of Vacance ceased. Actor. *Baird*. Alter. *Gibson* Clerk.

Cunninghame contra *Montray*, *Eodem die.*

THe Defender being conveened to pay his Predecessors Debt, as Heir to him, by intromission with his Heirship Goods after his decease; It was Found, that that Intromission could not make him lyable to pay the Debt as Heir, and that he could not be repute Heir thereby, because at the time of the Defuncts decease, at which time it is Libelled that the Defender intrometted, the Defunct had then living after his decease a full Sister-German, who only might be Heir, and not this Defender, who was but half Brother to the Defunct; so that his Intromission could not be as Heir, seing he could not then have

have been Heir; neither was it respected, what the Pursuer Answered, that seing that Sister-German died without any to represent her, and that she was never Heir Served, and that there is none now nearer to the *Defunct* than the *Defender*, his continuing in the Possession of these Goods, which were Heirship in Law to the Defunct, must now make him lyable *hoc nomine* as Heir, seing there is no other that can be Heir. This was Repelled, and the Alledgance sustained, but the Process was sustained against him, to make such Goods as shall be proven to be Intrometted with by him forth-coming to the Pursuer *in ipsis corporibus*, and no further to be lyable. Actor. *Cunninghame* & *Russell*. Alter. *Hay* Clerk. *Vid.* 17 *January* 1627. L. *Monymusk*.

L. of *Wardis* contra L. *Balcomy*, *Eodem die*.

IN a Declarator for Regress again to the Lands Excambed, by reason of Eviction of Lands which were given in Excambion; It is not necessar for the Pursuer, who for Eviction of the Lands given in Exchange, Pursues to be restored to his Lands which he gave therefore, to Summon any moe Parties to that Process, but the Party or his Heirs with whom he Excambed, and the person then Heretable Proprietar, if any be Possessors of these Lands; and it is not necessar to Summon any interveening mid-persons, acquiring Right from the Excambers betwixt them & the saids last Heretable Possessors, albeit these persons interveening be Authors in his Right to the present Possessor conveened; and subject in Warrandice thereof. Actor. *Nicolson* & *Russel*. Alter. *Advocatus* & *Stuart*. *Gibson* Clerk. *Vid.* 5 *March* 1638. E. *Wigtoun* contra E. *Cassils*, & 14 *July* 1629. Betwixt these Parties.

Purveyance contra L. of *Craigie*, *Eodem die*.

A Creditor having Denounced his Debitor for payment of the Sum contained in his Obligation, and the Debitor Suspending, and Consigning the Sum, the Creditor Declared, that he Charged for the Annualrent since the time his Debitor was *Denounced* Rebel, Termly to this Term of payment of the Principal Sum, conform to the Act of Parliament 1621. And the Debitor contending that he could not be thus summarly Charged therefore: The *Lords* Found, that in this and the like cases no such summar Charges could be used, by vertue of a Declaration made by the Party at the Bar, in a Process of Suspension of the Principal Sum, which was therein touched allanerly, but Found, that the Party ought to seek the same by some other ordinary Pursuit founded upon the Act of Parliament, but if particular Charges had been raised upon this Act of Parliament, as upon other Acts of Parliament, and the Party had been Charged thereupon, it might be probably maintained, that *eo casu* the Charges might been sustained, without new pursuing therefore. Actor. *Lawtie*. *Vid.* 13 *June* 1629. *Inglis* contra *Frazer*.

L. *Langshaw* contra *Muir*, *July* 4. 1629.

A Tutor Testamentar pursuing the Mother for delivery of the Pupill to him as Tutor foresaid, and the Mother Alledging that the said Pupill being her own Daughter, ought to remain with her to be educat, seing she offered to maintain her upon her own Expences, and not upon any of the Bairns Money or Goods. Likeas she offered to find Caution, to present the Bairn again before the *Lords* at the expiring of the years of Tutory (she being then on life) a free person, to choose her Curators at her own pleasure; and so she Alledged, that the Tutor Pursuer was suspect to have the Pupill in his custody, seing he who was to succeed to the Pupill was Married to the Tutors Sister; Notwithstanding of the which Alledgance and Offer, the Tutor was preferred, and the *Bairn* ordained to be delivered to him according to the trust of the Defunct, who nominat him Tutor, and not his Wife; and which Wife if she had been Tutrix-Testamentar nominat by the Husband to the Bairn, yet she

would have tint the office and keeping of the Bairn, she having Married a second Husband, whose Wife she presently was; and the circumstance foresaid was no suspicion against the Tutor, neither was the Tutor Decerned to entertain the Pupill upon his own Expenses, except he pleased so to do voluntarly; for it was not Found necessary of the Law, albeit it be doubted, if *vitricus possit esse Tutor privigno*; for it would appear he may, if he be left by the Father in the Testament, yet *non datur a judice*: And if he were Tutor, yet he ought not to have the Education of the Minor, and consequently not his Wife, who is Mother to the Bairn, and is her self *in potestate viri*. *Gibson* Clerk. *Vid.* 6 *July* 1627. *Campbel* contra *Campbel*, and the Cases there Cited.

Corbet of *Ardill* contra his neareſt of Kin, *Eodem die.*

L. *Ardill* Compearing in a Summons, as use is, for choosing his Curators, and one of the Minors Kin Compearing, and producing Horning against two of the Curators; and these Curators Alledging that they might be Curators to the Minor, notwithstanding they were at the Horn, because if they should be thereby secluded, the Minor would sustain the prejudice, and not they; for so the Minor would want authorizing to do his affairs. The *Lords* Found, that none at the Horn being alledged and shown, could be Curators to Minors, nor suffered to Compear to do any Act to be exped in Judgment before they were Relax'd. And albeit Caution uses to be taken for Curators, yet that supplies not to make Rebels to be admitted to such Charges by Judicial Acts. Actor. *Nicolson*. Alter. *Hay* Clerk.

La. *Cathcart* contra her Tennents, *July* 7. 1629.

THe Lady being Donatar to the Ward of the Lands, by decease of her Husband, and Pursuing thereupon Removing, the Lands being holden by the Lord *Cathcart* of the Prince, and some of the Defenders who were Vassals to the Lord *Cathcart*, by a Blensh-holding of himself, Alledging there could be no Ward, because her self was Infeft conform to the Contract of Marriage in these Lands, to be holden of the Prince. Likeas her Infeftment was Confirmed by the Prince, so that there could be no Ward: And the Lady contending, that albeit that were true, yet she could not thereby be debarred from the Right of the Ward granted to her, for she might use any of the Titles, either her Liferent-Right, or the Right of the Ward, against this Excipient who had no Right to exclude the Ward, his Infeftment not being Confirmed. The *Lords* Found the Exception Relevant, for they Found, that there being an Infeftment granted to be holden of the Superior, and Confirmed by him to the Vassal, there could not be any Ward, that Vassal living, and being Infeft, holden of the Superior, and Confirmed as said is; so that the Vassal so Infeft might pursue the Sub-vassal of that Land, upon the ground of his said Right Confirmed, but had no Right to Pursue upon any Ward which was not fallen: whereas if the Ladies Right had been made to be holden of the Granter, and not of the Superior, the Superiors Confirmation would not *eo casu* have stayed the Ward. *Item*, In this Process it was Found, that a Feu being given by the Princes Vassal since the year 1606. not being Confirmed by the Prince, excluded not the Ward, seing the Prince was found *hoc casu*, ought to be repute as a Subject *in tuitu Regis*, and therefore that the Act of Parliament did militat here. Actor. *Advocatus*. Alter. *Gibson* Clerk. *Vid.* 24 *July* 1629. Betwixt thir same Parties.

La. *Rentoun* contra her Son, *Eodem die.*

THe Lady upon a Seasin of the Lands of *Horstie, cum decimis inclusis*, Pursuing her Son for Spuilzie of the saids Teinds *anno* 1628, and the Defender Alledging, that he intromett by vertue of a lawful Tack in his Person,

son, Set before the Pursuers Right, and opponing a Nullity against her Right. The *Lords* Found, seing the Pursuer alledged Possession of the Teinds in her Person divers years preceeding the year libelled, by vertue of her foresaid Right, that the Excipient could not debar her from continuing her Possession, *brevi manu* by stopping and apprehending thereof at his own hand, without order of Law; and Found, that albeit her Title had not been good, but that the Excipients had been better, yet that she had competent Action to pursue this Spuilzie, *quia spoliatus ante omnia est restituendus*, neither was it respected what the Pursuer Alledged that the Maxime, *spoiliatus est ante omnia restituendus*, holds only where there is *spolium corporis ejusdem*, which was before possest by him who seeks Restitution, which is not here, where the Pursuers Possession of other Cropts, cannot infer that she was Possessor of this Cropt libelled, whereof she never had Possession; and it was not respected where the Pursuer also Replyed, that there was no other form of interruption against her Right, and alledged Possession in matter of Teinds, but only to alledge the insufficiency of her Right, and to exclude any Pursuit founded thereupon, when the samine is drawen in Dispute, by maintaining of his own Right, for in Teinds it is not as in Lands, where the Possession is interrupted by Warning, but in Teinds, albeit Inhibition be used, yet the samine needs not to be used by him who is in Possession, so that he needed to serve no Inhibition himself, being Possessor by vertue of a sufficient Right; which Reply was Repelled, and the Spuilzie Sustained. Actor. *Stuart.* Alter. *Nicolson & Craig. Gibson* Clerk. *Vid. ult. January* 1628, *Fa. Nasmith.*

Hamilton younger of *Blair* contra his Goodsir, *Eodem die.*

THe Oye Pursuing the Goodsir and his Mother for his Intertainment by some Modification out of the Living which was possest by them; It was Found, that the Goodsir having before given to the Pursuers Father his own Son a great part of the Living, and reserving but a Portion to himself to live upon, a part of which Living so dimitted by the Goodsir being yet possest by the Sons Wife the Pursuers Mother, albeit the Son had Sold or Wodset the rest thereof, and thereby had left but a small part behind him un-annailzied, yet that the Goodsir was not holden by Law, to give any further part to the Pursuer for his Intertainment, altho the said Pursuer had nothing whereupon to live, being a young man either Major, or near Majority, but he might pursue his Mother as he pleased. *Hay* Clerk. *Vid.* 21 *July* 1636, L. *Ramorny.*

Wallace contra *Muir*, *Eodem die.*

IN a special Declarator of Bastardie, It was Found, that the Relict of the Bastard had good Right to the equal half of the Bastards Goods desired to be declared, and that the Donatar had not Right to the whole Goods, but only to the other half thereof: also the Bastard having *testamenti factionem* by Grant from the King, and having made a Testament in Writ, and having thereafter left a Legacy of 200 Merks to his Wife, whereby she claimed Right to that part, at least to 100 Pounds thereof, whereunto she retrinshed the said Legacy: It was Found, that the leaving of this Legacy after he had made Testament, might be proven by Witnesses, albeit the Legacy was of a greater quantity, seing it was restricted to 100 Pounds by the Legatar. *Gibson* Clerk. *Vid.* 1 *Dec.* 1629, Executrix of Sir *William Scot.*

Maxwell contra *Fairlie*, *Eodem die.*

IN a Reduction of a Bond of Alienation of Lands at the instance of the Heir of the Annailzier, because it was done *in lecto agritudinis*; and the Defender Alledging, that the day of the date of the said Bond, the Maker thereof came to the Church, and heard the Prayers, and thereafter came to the

Cross and Mercat place, and thereafter went and drank in two Taverns, which were of his familiar Acquaintance before, and then returned Home again, and played at the Cards with his Friends, who came to visit him divers times thereafter, and lived after the Bond a Month or thereby, so that albeit he keeped the House all this time thereafter, yet that could not be counted as a Deed done *in lecto ægritudinis*, he being then found in Mind and Knowledge, and of Health of Body, and he offered to prove that he came out as said is, being then healthful and not supported by any who led him, but done freely of himself, without help or aid of any other. This Alledgance was *Repelled*, and the Pursuer preferred to the Probation, alledging *Impedimentum*, that that day when the Defunct came out, he was upholden, and led by the Arms until that he did the Acts foresaid, being then Sick and Infirm, of the Sickness whereof he never recovered, but died within the space of twenty days or thereby thereafter; and albeit there was a preceeding Contract betwixt the Defunct and the Defender, whereby either of them made others their Heirs, yet seing the Bond had no relation, nor yet bore to be done for Implement of the said Contract, the said Bond was not Sustained as depending on that preceeding Obligation, without prejudice to pursue upon the Contract *prout de jure*. Actor. *Advocatus & Cunninghame*. Alter. *Nicolson, Aiton & Lawtie*. *Gibson* Clerk. *Vid. penult. July* 1635, Lo. *Cranston* contra *Sinclar*. 7 *January* 1624, *Shaw* contra *Gray*.

Durie contra *Kinross*, *July* 8. 1629.

A Tenement in *Burntisland* being Disponed by the Father to his Daughter, and she being Seased therein, under *Reversion* of a small Sum to the Father himself allenarly in his own Life-time, which *Reversion* was contained in the Seasin given to her, which was the only *Right*, containing the said Disposition made by the Father to her; thereafter the Father having redeemed from her, and she having granted the Lands lawfully redeemed, and the *Reversion* fulfilled, which *Renunciation* was made also by her Curators, she being then Minor, and which *Renunciation* was only subscribed by one Nottar for her, *viz.* the Town Clerk, who was Nottar also to the Seasin; after which order of *Redemption* and *Renunciation*, the Father Disponed the Lands to another, who thereafter Disponed the same again to a third person, which third person, and his Author, continues in Possession of the Lands for the space of 40 years unquarrelled: the Son of the Daughter, who was Infeft under *Reversion* as said is, claiming the benefite of his Mothers Infeftment, which he alledged now to be irredeemable to him, the *Reversion* being Personal, and the Father being dead to whom it was granted, and the *Renunciation* not being subscribed by two Nottars before four Witnesses conform to the Act of Parliament 1579, whereby he alledged the same to be null. It was Found in a Process of Adjudication, pursued by the singular Successor against the Oye of the Disponer, after he had Renounced to be Heir to him, being charged for that effect by his singular Successor, wherein it was desired, that the *Right* of that *Redemption* and *Renunciation* should be adjudged to him, and consequently that the Lands should be found orderly Redeemed, that both these Conclusions might subsist, and might be craved in one Summons, *viz.* that he might seek both the *Right* to be Adjudged to him, and also to have it declar'd that the Lands were lawfully Redeemed; likeas the *Lords* Sustained the Pursuit upon the said *Renunciation*, albeit wanting the Subscription of two Nottars before four Witnesses, as the Act of Parliament proporteth, which Act meets not in this Case seing 40 years were past since the date of the said *Renunciation*, during which space it was never quarrelled, and the Party infine has been in perpetual Possession, and it is subscribed by the Town-Clerk, who was Nottar to the Parties Seasin containing the *Reversion*; likeas there was an order of *Redemption* used by the Father, which albeit it was not so

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formal in all circumstances as it was prescribed by the Reversion, yet the Father thereby declared his mind, and the Renunciation subsequent was either an approbation, or an acknowledgment thereof by the Daughter, which all concurring, was Found sufficient to Sustain the Renunciation, notwithstanding of the Act of Parliament foresaid, against this Party, who was Heir to the Mother, who had Renunced. Actor. *Advocatus & Stuart.* Alter. *Nicolson, Mowat & Russel. Gibson* Clerk. *Vid.* 10 *March* 1629, *Shaw.* & 17 *March* 1629, *Yeaman.*

Wallace contra *Muir, July* 9. 1629.

IN this Action mentioned 7 *July* 1629, It was Found that an Heretable Bond bearing Annualrent, made by the Debitor to the Bastard, came under the general Gift of the said Bastards Gift of Bastardie gifted to the Donatar, and that there was no necessity that that Bond, or such others of the like nature should be gifted by any particular Gift of the same in special; likeas another Donatar who had a special Gift of that Heretable Bond, whereupon that Declarator was sought by this general Donatar, after general Declarator obtained and decerned upon the said Gift of before, Compearing and Alledging, that he only should be preferred to that Heretable Bond by vertue of his Gift thereof. This Alledgance was Repelled, and this Heretable Bond, and such others (whereupon no Seasin hath followed) was Found might be gifted by such general Gifts, without necessity to express the samine specially therein; and so by this Decision, it would seem that an Heretable Bond should likewise fall under simple Escheat by Horning, as it is Found here by Bastardie. *Vid.* 22 *March* 1634, L. *Ochiltrie* contra *Miller.*

Urquhart contra E. *Caithness* and *Dick, Eodem die.*

A Pensioner to the Earl of *Caithness* having the Duties of Lands assigned in his Pension to him, for satisfaction whereof, having obtained a Decreet and Letters conform against the Earl Granter thereof, and against the Tennents of the Lands assigned, and conform thereto being divers years in Possession of the Duties from the Tennents; thereafter the Lands being Comprysed from the Heretor Granter of the Pension, which Compriser was Infeft by publick Infeftment, and in Possession of the Duties of these Lands assigned, and he being conveened by the Pensioner for payment of the saids Duties to him the years intrometted with by the Compryser; It was Found, the said Compryser was not holden to restore the same, and that the said Pension being granted by a Laick, and not by an Ecclesiastical person, was not real, and did not affect the Ground against a singular Successor, but would only produce personal Action or Execution against the Granters self and his Heirs, for the years since he was denuded of his Heretable Right by Comprysing and Infeftment. Actor. *Nicolson.* Alter. *Stuart. Vid.* 26 *March* 1629, *Rollock.*

Wardlaw contra *Wardlaw, July* 10. 1629.

UMquhile *Wardlaw* of *Torrie*, being Cautioner for Mr. *David Wardlaw*, in a Sum by an Heretable Bond, and for his Relief, beside the Clause of Relief contained in the Bond, having taken Infeftment in his principal Lands, the Cautioner having payed the Sum, being distressed therefore, and after his decease the Cautioners Heir, and also his other Bairns, as Executors to him; either of them claiming this Relief to be due to them, and pursuing by two Distinct Pursuits, the Principal Party for payment of that Sum, the one as due to the Executor, and the other as due to the Heir; in respect that he Alledged, that the Bond being Heretable, the Relief ought to be of that same nature; Likeas the Infeftment given to the defunct for his Relief proved, that the same pertained to his Heir and not to his Executor; It was Found nevertheless, that the said Relief so sought against the Principal Party, by per-

ſonal Purſuit, was due to the Executor, and not to the Heir, ſeing the Heir ſought not the benefit of his Infeitment, as he might againſt the Land, if he had been diſtreſt, but only purſued perſonal Action for Payment, and that Infeftment would not have prejudged the defunct in his own time, to have miskenned the Relief, which he took by Infeftment, *ad majorem ſecuritatem*, and to have ſought the ſame by Perſonal Purſuit from his Principal, and ſo it pertained to him, as he pleaſed; and was Found Competent to his Executors, ſeing the Relief by the Infeftment is due to the Heir, for if the Heir ſought it off the Land, wherein the defunct was Inſeft, he could not be prejudged thereof, and ſo there is a great ſcruple here. *Gibſon* Clerk. *Vid. July* 10. 1628. *Edgar* contra *Cant. March* 18. 1630. *Hart* contra *Hart. Decem.* 20. 1631. *Menzies* contra L. *Caſhogill.*

L. of *Clackmannan* contra L. *Barrounie*, *Eodem die.*

IN a Reduction of a Compriſing, becauſe the Bond containing the Sum, for the which the Compriſing was Deduced, was Heretable, and not made Moveable. The Tenor of which Bond was, that the Debitor for the ſaid Sum, was Obliged to give his Creditor Infeftment in his Land Redeemable, and containing a Back-Tack yearly, for payment of Victual, for the Farm of the Land; And alſo bearing, *The Debitor to be obliged, notwithſtanding of the Heretable Diſpoſition of the Lands Redeemable, to pay the Sum at the Term therein contained, and in caſe of Failzie a Penalty* This was the Tenor thereof, and bore not that the Sum ſhould be payed, either upon Charge, or Requiſition to be made therefore, at the term of payment therein expreſt, or at any other Term, when the Creditor ſhould ſeek the ſame, but only ſimply, that the Debitor ſhould pay it at that one Term, ſpecially expreſt in the Bond, after which Term diverſe years the Money lying over un-payed, the Party Creditor receiving payment of the Duties of the Lands, or Annualrent of the Money, and thereafter Compriſing the Land, for not payment of the principal Sum and Penaltie, the Purſuer deſired the ſame to be Reduced, becauſe after the Term of payment contained in the Bond, he had received payment of his Annualrent, and ſo had taken him to his Heretable Security of the Land; And there was no Clauſe whereby he might ſeek the Sum at any other Term, and ſo it was not Compriſeable; and the rather, there never being a Charge uſed by the Creditor againſt the Debitor, before the Compriſing. The *Lords* ſuſtained the Compriſing, and Aſſoilzied from the Reaſon of Reduction; For the *Lords* Found, that albeit the Bond did not oblige the Party to pay the Sum, at any Term after that Term expreſt in the Bond, yet that was tacitly comprehended therein, otherwiſe the Debitor could not been holden to pay the Sum, if it had not been preceiſly ſought, but had lyen over that ſpecial Term, which were in Juſtice hard, and Found there needed no Charge, ſeing the Bond required not the ſame, neither did the Receipt of the Annual thereafter prejudge the Compriſing, the ſame being only Deduced, for the Principal and Penalty, and which Penalty extended not to ſo many Annualls, as the Creditor wanted unpayed to him. Actor. *Advocatus* & *Mowat.* Alter. *Nicolſon, Burnet* & *Nairn. Hay* Clerk.

Mr. *Archibald Moncrief* contra L. *Balrounie*, *July* 11. 1629.

A Purſuit being moved by a Compriſer, for the Maills and Duties of the Compriſed Lands, the Compriſing not being exped before *Martinmas* 1628. but being dated the 12 or 13 day of that Moneth, and the Purſuit being for the year 1628. whereby the Defender Alledged, that his Title being after both the Terms, the Purſuer had no Right to that years Farms thereby. The Alledgance was Repelled, for the *Lords* Found, that ſeing the Denunciation preceeded the Term of *Martinmas*, and the Compriſing was exped before Zuil, which was the Term of payment of the Farms, and that the Defenders conveened

veened for payment, were the same Persons from whom he had Compriſed, and were Conveened for payment, and that no others were Conveened, who might Alledge Intromiſſion with the Farms, or payment thereof *bona fide* to any other, beſide the Compriſer; therefore the Action was ſuſtained upon this Compryſing for the ſaid Cropt, againſt thir Defenders, from whom he had Compriſed; alſo the ſaid Compriſing being quarrelled, becauſe the Party had not ſearched and ſought before the Denunciation of the Land, the Moveable, and poyndable Goods, at the Parties Dwelling-houſe, and that the Compriſing proported not that the Officier had ſought at the Dwelling-houſe, but only bearing, *that he ſought upon the ground of the Lands Compriſed*, which he Alledged was not enough, as ſaid is, and therefore, that the Comprlſing was null, ſeing the Moveable Goods ought to be diſcuſt by Poynding before the Ground can be Compriſed, and which the Party Alledged could not be well diſcuſt, except the Moveables had been ſought at the Parties Dwelling-houſe, and that the Execution had born the ſame. The *Lords* Repelled the Alledgance, and ſuſtained the Compriſing, albeit it bore not *per expreſſum*, *that the Moveables were ſought at the* Dwelling-place, for the ſame bearing, *That the Officer ſought upon the Ground of the Lands Compriſed*, It Implyed, that he ſought all the Parts of that Land, and conſequently at the Dwelling-houſe, if any was upon that Land: And it was not Found neceſſar, at the leaſt it was Found, that it would not annull the Compriſing, for not ſeeking at the Parties Dwelling-place, which was not upon the Ground of the Lands Compriſed, and Found, that the Execution needed not proport the ſame; for if any Perſon had Land in any diſtinct corner of the Countrey, which the Creditor intended to Compriſe, and that he had diverſe Dwelling-houſes in other Corners of the Kingdom, far remote, and diſtant from the Lands Compriſed, it were iniquity to the Creditor to be compelled to go to all theſe Places, and ſearch the Moveables there, and this Action for the Mails and Duties was ſuſtained, upon this Compriſing, without Seaſin, being Purſued againſt the Debitor, againſt whom the ſame was Deduced, he being Poſſeſſor of the Lands Comprited himſelf, and no other having Right proponing the ſame, even as the Compriſer had been made Aſſigney to the Duties, the Compriſing in effect being but a Judicial Aſſignation. Actor. *Mowat.* Alter. *Nicolſon. Scot* Clerk. *Vid. Decem.* 13. 1623 L. *Ley* contra *Alexander Stuart.*

L. *Wards* contra L. *Balcomie*, *July* 14. 1629.

THe Laird of *Wards* Predeceſſor having received a Charter under the Great Seal, from King *James* the fifth of the Lands of *Wards*, which Charter proported, that the ſame were granted in Excambion of the Lands of *Balcomie*, pertaining Heretably of before, and then to the Laird of *Wards*, and which were then reſigned by *Wards* in His Majeſties hands for the ſaids other Lands therein deſign'd, in the which Charter the King had granted expreſly to the Laird of *Wards* a Regreſs, and his Heirs (not mentioning to his Aſſigneys and Succeſſors) in and to the Lands of *Balcomie*, in caſe of Eviction of the Lands of *Wards*, diſponed by the King to him, and that notwithſtanding of any Diſpoſition to be made to any perſon thereafter of the ſaids Lands of *Balcomie*; and the Lands of *Wards* being evicted from the Laird of *Wards* by the Earl of *Marr*, upon that Eviction, *Wards* ſeeking again Decreet againſt the Laird of *Balcomie* upon the ſaid Charter of Excambion, who was Heretable Proprietor of the ſaids Lands by Diſpoſition made to his Predeceſſors thereof, by *Erskine* of *Pittoddrie*, who after the Excambion had obtained the Right of the ſaids Lands from the King. It was Found, that the Purſuer had good right to purſue this Action, and to claim the benefite of the Excambion and Regreſs, albeit he was only a ſingular Succeſſor in the Lands of *Wards* to him who excambed, and albeit he was not Heir to him, altho the Proviſion of the Re-

gress contained in the Charter of Excambion was introduced only in favours of the Laird of *Wards* and his Heirs, and which Clause was Found to extend to his Successors in that Right; also it was Found, that the Pursuer needed not to cite to this Action the Laird of *Balcomies* Author of his Right, who acquired the Right from the King by the publick Infestment, the Kings Majesty and his Officers representing the King with whom he excambed, and the Laird of *Balcomie* who was Heretable Proprietor by publick Infestment, and Possessor of the Lands being Summoned, which was Found enough in a Process of this nature: Also it was Found, that the Pursuer needed not to show, where any of his Predecessors to him or himself, who is alledged to have excambed with the King, was Infeft in the Land before the Excambion as the Defender Alledged, ought to be qualified before the Pursuit could be Sustained; which was Repelled, and the Charter proporting the same, was Found sufficient to qualifie the same, albeit the Party Alledged, that such Narrations ought not to be respected as true, except the same could be made good otherways, specially against the Excipient, who, or his Author, was Infeft in the saids Lands originally by the Kings Majesty, in whose Person the Right to all the Lands in the Kingdom is presupponed to consist *plenariè*, without Relation to any Excambion, notwithstanding whereof this Charter so proporting was Sustained, without necessity to show any other Right preceeding, seing it might be presumed, that all the Excambers Rights were delivered to the Kings Officers, or to such others who thereafter acquired Right from the King at the time of the Excambion, especially after so long time since the Excambion, *ubi præsumitur, omnia bona fide fuisse gesta*, and it was not probable that the Kings Officers would have prevaricat and walked so unfaithfully, as to have ascribed the cause of the Infestment to an Excambion, if it had not been so, where there was no necessity so to do, seing the King might have otherways Disponed of the Lands at his own pleasure. Actor. *Nicolson.* Alter. *Stuart. Gibson* Clerk. *Vid.* 2 *July* 1629, betwixt these same Parties. 25 *March* 1628, Mr. *James Hume.* & 6 *February* 1630, *Muir.*

Hamilton contra his Tennents, *July* 15. 1629.

SIr *John Hamilton* of *Skirling* Pursuing his Tennents upon his Heretable Right, for the Farms of some Lands possest by them, one who was Infeft in an Annualrent of Silver out of that Land Compearing, and desiring to be preferred to the Heretor *pro tanto* out of the readiest of the saids Farms, albeit they were not yet liquidat: The Annualrentar was Preferred, his Right being before the Pursuers Right, and the Victual was ordained to be liquidat, but the Annualrentar had obtained a Decreet for Poynding of the Ground *parte non comparante*, wherein this Pursuer was called. *Gibson* Clerk. *Vid.* 24 *March* 1626, *Gray*, and the Cases there cited. 15 *March* 1637, *Guthrie. penult. Feb.* 1630, *Scarlet.*

Tailzifer contra *Wilson*, *July* 16. 1629.

A Creditor Pursuing his Debitors Executrix for payment of the Debt, and the Executrix Alledging the free Goods in the Testament to be exhausted by Sentences of other Creditors, and that she was exonered by a Decreet; and the Pursuer Replying, that she could not be freed of this Debt, because the Pursuer was not called to the Exoneration, whom she could not misken, seing she had made payment of a part of the Debt to him, long before the Exoneration, and therefore knew his Debt, and could not misken it, this being before the Sentence obtained by the other Creditors against her, whereby she was in *mala fide* not to oppone against their Pursuits, this Debt of the Pursuers, and also not to cite the Pursuer to that Sentence of Exoneration, that he might come

in

in *pro rata* for his Debt with the rest of the Creditors. The *Lords* notwithstanding of the Reply, Found the exception of Exoneration Relevant, seing they Found that he needed not to be cited to that Process of Exoneration, neither needed the Executrix to have opponed against the Creditors Pursuit the Pursuers Debt, for if she had done it, it would not have stayed their Pursuit, neither did her knowledge of the Debt libelled, and paying of a part thereof, bind the Executrix to a Citation of the Pursuer, seing her knowledge was only voluntar, and not legal, and the same never intimate to the Executrix, nor never any Action intented by the Pursuer for that Debt; And if he had been cited in a multiply-Poynding against all the Creditors, The *Lords* Found they would have preferred all the Creditors, who had done Diligence, to the Pursuer, who never had done any Diligence. Actor. *Mowat.* Alter. *Lawtie.* *Scot* Clerk. *Vid.* 8 *March* 1631, *Duff*.

Scot contra *Deans*, *Eodem die.*

A Seasin of an House in the Town of *Hawick* granted to the Pursuer by the Baillie of the Burgh, it being a Burgh of Barony, was Sustained, the same Seasin containing the Pursuers Retour therein insert, extracted out of the Chancellary to be Warrand thereto, albeit the Defender Alledged it to be null, not proceeding by vertue of Precepts out of the Chancellary, nor yet by the Superiors Precept of *Clare Constat*, without one of which, he Alledged the naked Retour could not be a Warrant to the Baillie to give Seasin in this Burgh of Barony, which he Alledged hath not that Priviledge, as the Kings Burgh Royal, whose Baillies gives Seasin usually by Hesp and Staple, and the giving of this Seasin cannot be warranded by the Retour, for that Answers not to any point of the Brieve, notwithstanding whereof the Seasin was Sustained, but here the Superior concurred with the Pursuer. *Hay* Clerk. *Vid.* 17 *March* 1629, *Yeaman* contra *Stuart*. & *penult. July* 1629, *Stuart* contra *Wilson*.

Hige contra *Plumber*, *Eodem die.*

ONe having taken Lands in Wodset, and Pursuing another Haver of the Writs of these Lands for delivery thereof, who Compearing, and Producing a Bond of borrowed Mony from the Defender by the Pursuer of the Wodset, for satisfying whereof, he Alledged that he had given these Writs in Paund and Security before the Wodset. The *Lords* Sustained the Alledgance, and Found that the Impignoration should be proven by the Writ or Oath of the Wodset Giver who impignorate the same, and not by the Oath of the Wodset Taker, who was probably ignorant thereof. *Gibson* Clerk. *Vid.* 21 *Dec.* 1626, Sir *Ja. Dundas*.

Murray contra *Ross* of *Innercharren*, *Eodem die.*

THe Defender being conveened for payment of his Fathers Debt, as behaving himself as Heir to him *hoc medio*, in so far as he being lawfully conveened to enter Heir to his said Father by another Creditor, in that Process he compeared and took a day to Renounce to be Heir, and at the Term assigned thereto having failzied to produce a Renunciation, Decreet is given against him, and the same Decreet being thereafter Suspended upon a Reason alledged by him, bearing Payment to have been made by his Father of the said Debt, wherein having succumb'd, the Letters were found orderly proceeded against him, for obedience whereof he had payed that Debt, whereby he had behaved himself as Heir; But the *Lords* Found, that this proved him not to be Heir, and that Sentence could not be given against him in any matter betwixt other Parties, besides these contained in the former Sentence against him, wherein he being only decerned as lawfully charged to enter Heir, that Decreet so given was Found would not prove in any other Process against him, but that the like Charges to enter Heir ought to be used by any person who would Pursue *super hoc medio*

neither did the succumbing in that reason of Suspension, or the preceeding Failzie to Renunce, or Payment conform to the Sentence to the Creditor, make him lyable to other Creditors, as if he had behaved himself as Heir to his Father. Actor. Alter. *Gibson. Vid 22 March* 1628, *Farquhar* contra *Ross*, and the Cases there cited. *26 January* 1631, L. *Gadgirth* contra L. *Affleck*.

Skeen and *Forbes* contra Goodwife of *Byth*, *Eodem die*.

AN Husband being obliged in his Contract of Marriage with his second Wife, to provide the Bairns of that Marriage to all Lands to be Conquish'd by him during their Marriage; after the Husbands decease the Daughter being only Bairn of that Marriage, Pursues her Fathers Mother and his appearand Heir the Son of the first Marriage, to hear it Found, that her said Father the time of the second Marriage conquish'd the Lands of and put in the Securities of that conquish'd Lands his own Mothers Name, to his own proper use, only to the prejudice and Elusion of the said Contract, and that the Money was payed for the price of the Land by himself off his own Moneys, and had only borrowed his Mothers Name, and consequently concluding that the Mother should *habili modo* denude her self of the Right of the Land in favours of the Pursuer. This Action was Sustained, albeit the other Son was called only as appearand Heir, and not as Heir, or as lawfully charged to enter Heir; albeit the Defender Alledged, that one as Heir ought to be called, for that Conclusion to denude her self in favours of the Pursuer, was not allowable against her, who was not obliged in any Deed to the Pursuer, and where it appeared to take away the Defuncts Heretage, (giving that her Name was borrowed) his Heir, or one who may represent him by some form in Law, ought to be called; which Allegdance was Repelled. Actor. *Advocatus* & *Lermonth*. Alter. *Nicolson*. *Scot* Clerk.

Executors of *Dowglas* contra L. *Ednem*, *July* 17. 1629.

UMquhile *William Dowglas* as Donatar to the Escheat and Liferent of *John Stuart*, having obtained general Declarator thereon, after his decease, his Executors pursues the Intromettors with the Teinds of *Ednem*, for payment thereof, for certain years preceeding the Donatars decease, as pertaining to the said *John Stuart*. This Action of special Declarator, for the saids by-past years, was Sustained at the instance of the Executors, and no necessity Found that they should first transfer the general Declarator in them as Executors, neither were they holden to produce *John Stuarts* Title and Right to the Teinds as the Title of this Pursuit, but it was Found enough to prove the same *cum processu*; and the Defender being conveened, as lawfully Charged to enter Heir to his Father, who was Intromettor, and he offering to Renunce, and a Term being assigned to him to produce his Renunciation, it was Found that the Pursuer might take the same Term, to prove his Summons, whereby it might have effect if the Defender Renunced not, and if he Renunced, that he might use Sentence against him therein *Cognitionis causa*. Actor. *Craig*. Alter. *Gibson* Clerk.

L. *Newliston* contra *Inglis*, *Eodem die*.

IN an Action for abstracting of Multures, as Thirled; It was Found, that some Lands of a Barony, being Feued by the Baron for a certain Duty *pro omni alio onere* expreset in the Charter, and thereafter the Miln of the Barony being Feued by the Baron *cum astrictis multuris & sequelis* diverse years thereafter; it was Found, that the foresaid Feuer, albeit his Right was before the Disposition made of the Miln, was subject in his Thirle-multures, as Thirled and Astricted to that Miln, notwithstanding of his Right preceeding the said Disposition, seing his said Right bore not *cum molendinis & multuris*, without which Clause the Priority could not liberat him. To the which Thirlage,

lage, the *Lords* Found, that he is subject as well to him who had acquired the Right of the Miln from the Baron, to be holden of himself, as if the said Miln had remained with the Superior Unannailzied, notwithstanding that the Lands were Annailzied before the Miln was Annailzied; and notwithstanding that the saids Lands Feued, nor no other Lands of that Barony was at any time before the Vassals Feu, Thirled by Act, Constitution, or any other Writ to the said Miln; for the *Lords* Found, that naturally all the Lands of any Barony, without Thirlage in Writ, are Thirled to the Miln of that Barony, and that the Thirlage is a natural Servitude, and inheres naturally in all the Lands of that Barony, so that any Tennent or Feuer of the Lands of that Barony, are naturally Thirled to the Miln of that Barony, & ought to pay Multure for any Corns growing on these Lands abstracted from that Miln; and consequently that the Feu of the Lands wanting that Clause *cum molendinis*, &c. liberats not the Feuer from the natural servitude inherent in his Land to the said Miln of the Barony; in which Thirlage he was found to stand still obliged to the Feuer of the Miln, as he was to the Baron before the Feuing of the Miln, albeit the Land was Feued before the Miln was Feued, as said is. Also the *Lords* Found, that the Feu of the Miln, with the Multures and Sequels, *&c.* extended also to the leading of the Miln-stones, and repairing of the Damm, and other Services about the Miln, whereto the Feuar of the Lands remained Subject, notwithstanding of the Feu; and albeit the same bore no such Service, yet the Tennents of the Barony remained subject in the said Service. Actor. *Advocatus* & *Stuart*. Alter. *Nicolson* & *Belshes*. *Scot* Clerk. *Vid*, 13 *July* 1632. E. *Mortoun*, &c. & 26 *Novemb.* 1631. *Oliphant*.

Caldwell contra *Stirk*, *Eodem die*.

THe Annailzier of a Tenement of Land, conform to a Contract made in *November*, four or five days before the Term of *Martinmass*, Pursuing the Buyer for the Maill of that Land, as Possessor thereof for the Term preceeding that *Martinmass*, before which the Alienation was made, the Contract neither disponing that Term to the Buyer, nor reserving the same to the Seller, nor making any mention thereof, nor of the Buyers Entry thereto; but bearing a Procuratory of Resignation therein, albeit Seasin followed not while after the *Martinmass*: It was Found nevertheless, that seing the Contract containing the said Procuratory, preceeded the Term, that the Seller was Denuded of his Right, and could not pursue for that Terms Duty, which was not compleat before the said Procuratory, nor yet reserved to him therein. *Hay* Clerk.

Nasmith contra *Nasmith*, 18 *July* 1629.

IN Tutor Compts, the Tutor or Curator is not subject to the Minor to pay Annualrent for the Annualrent received of the Minors Principal Sums, albeit the said Annualrent received extended to great Sums of Money yearly, whatever the same be. Actor. *Advocatus* & *Stuart*. Alter. *Nicolson* & *Burnet*. *Scot* Clerk.

Moreis contra *Johnstoun*, *July* 21. 1629.

A Contract being Alledged to be null, because it was Alledged more then 40 years since the date thereof, and sensyne no Action Intented thereon, and therefore that it was prescrived conform to the 28 *Act*, 5 *Par. Ja.* 3. The Alledgance was Repelled, because it was Registrat within that space, within which space also Letters of Horning were Execute against the Party, and he Denounced to the Horn; which Registration and Horning was sustained to interrupt the said Prescription, albeit the Registration was only done by consent of the Parties Procurators, and not by any Citation; and albeit no

Action was Intented thereon, nor the Party Summoned within that space; for the Contract Registrat by consent was found as good, as if it had been done by Citation of the Party, and the Horning was also found an Interruption without Action. *Vid.* 27 *Novemb.* 1630. L. *Lawder* and the other Cases there, & 17 *March* 1629. *Yeaman.*

E. Cassills contra E. *Wigton*, *July* 22. 1629.

IN a Supplication for Assessors to a Service of the Earl of *Cassills*, the *Lords* being Consulted by the Assessors in thir points, which were controverted betwixt the Parties, they declared and advised as follows, *viz.* In a general Service of the Earl of *Cassills* Fore-grand-firs Grand-fir; they Found, that the Assessors might Serve, and the Judge also put it to the Tryal of an Inquest, the Parties Claim bearing, that the Predecessor to whom he desired to be served general Heir, died at the Faith of King *Ja.* 3. or of some of his Successors, Kings Reigning for the time; which Claim the *Lords* thought to be Relevant, albeit the same bore not *specificè* in which Kings time that Predecessor died precisely, which was not probable *in facto tam antiquo*, neither necessar to be precisely proven, but was enough that it should be tryed, that he died at the Faith of the King Reigning. *Item*, they Found, that the Party desiring to be Served ought to qualifie and be special, upon the Descent and Persons interveening betwixt him and the Defunct, to whom he craved to be Served; and also that he ought to instruct and verifie the *Descent*, the instruction whereof ought to be made to the Assise, and not to the Judge; and ought to be produced before the Assisers, and also that the Party compearing against the Service, ought to see the Writs produced, to verifie the same, to the effect he may oppone what he may in Law, wherefore the same cannot verifie the Claimer to be Heir.

La. *Buchannan* contra the Laird, *July* 23. 1629.

IN an Action pursued by the Lady against her Husband, for modification of a yearly Sum to her for her Aliment, during his remaining out of the Countrey, founded upon a Contract made by him in her favours, whereby he was obliged to pay such Sums of Money to her, as the persons appointed in the Contract should modifie; which persons being most part dead, and the surviver not resident in the Countrey, the Lady desired the *Lords*, as becoming in their places, to modifie the same to her, her Husband being still out of the Countrey, and she wanting maintenance. The *Lords* sustained the Action founded upon the said Contract, albeit made betwixt the Husband and the Wife, and found it became in their hands, as in *arbitrio boni viri* to do the same, seing the Contract agreed with all Law, both Divine, Natural, and Humane, and without any Contract, ought to be allowed, that the Husband should sustain his Wife, according to the proportion and competency of his Means, and therefore modified to her yearly during his absence 2000 merks. *Hay* Clerk. *Vid.* 21 *Decemb.* 1626. Lady *Foulis.*

L. *Haddo* contra L. *Ludquharn*, *Eodem die.*

A Pursuit for delivery of Evidents, was sustained at the Minors instance, before his Majority, against one of his Curators, who was chosen *sine quo non*, without concourse of any of the rest of his Curators to assist, the Pursuit, being authorized by two Advocats, whom he then instantly choosed Curators at the Bar *ad hanc litem*, which was sustained, he having other Curators who were not Removed, nor any of them concurring in the Pursuit with him; but the same was sustained, first, only for Exhibition of Writs, and after Exhibition, the *Lords* Declared they would advise what would be done anent the delivery. Actor. *Nicolson.* Alter. *Stuart. Gibson* Clerk. *Vid.* 20 *June* 1629. L. *Haddo.* 18 *March* 1630. Betwixt the same Parties.

Lady

Lady *Cathcart* contra Tennents and Vassals, *July* 24. 1629.

THe Lady being Donatrix to the Ward, as is mentioned 7 *July* 1629. And the Vassals to her Husband, Alledging, that she was Infeft in Feu in some Lands holden of the King, which stayed all Ward; And she Replying, that that Infestment was granted without her knowledge, & that her Seasin thereon was not Registrat, conform to the Act of Parliament. The *Lords* Found, that that Infeftment was not sufficient to exclude the Ward, the Seasin not being Registrat as said is; and which nullity she might oppone against that Right made to her self, seing she clad not her self with that Right, but with the Right of Ward, and which she might als valiably take, as any other; for if a third person had obtained the Ward, that Seasin not Registrat would not have stopped the same, no more could it be obtruded against her, but she might likewise propone the said Nullity. *partibus ut illic comparentibus.*

Slewman contra *Wardlaw*, *Eodem die.*

A Minor pursuing the Factor to her Tutor for Tutor-Compts, which *Factor* by Contract betwixt the Tutor and the *Factor*, was obliged to do all to the Minor which the Tutor himself was obliged in of Law. It was Found, that the said *Factor* and his Heirs, who were here conveened (the *Factor* himself being dead) were subject to give Compt, Reckoning, and Payment to the said Minor, and that the Tutors self needed not to be conveened in this Process; but the Action was sustained against the Factor, and which Action was sustained against him, not only for his Intromission, but also for his Omission, and for payment of such particulars as the said *Factor* might have Intrometted with. *Item*, The said Action was sustained for all the years Duties of the Lands wherein the Minor was Infeft, and which pertained to her Umquhile *Father*, which preceeded her Seasin, since the decease of her *Father*; and for the which years, albeit the Minors Infestment preceeded not the same, the *Factor* was found ought to be comptable, seing the Seasin should be drawn back to the time of the *Fathers* decease, there being no other claiming the Non-entry thereof, and no other pretending Right thereto. Actor. *Belshes*. Alter. *Gibson* Clerk. *Vid.* 29 *January*, 1631. *Hume* of *Corsrig*.

Nairn contra *Boswall*, *Eodem die.*

THe Minister Charging to Remove from his Glyb, which was designed out of the Abbots Lands. It was Found, that he could not have his Glyb out of Abbots Lands, in respect of the Act of Parliament 1572. seing there was Parsons Lands, which the *Lords Found* ought first to be discust before any other Abbots Lands could be designed; and albeit the saids Parsons Lands were of old *Feued*, and that the same were all new builded Houses, and a part of the Town of *Dysert* builded thereon, so the Minister Alledged, that the same was not Arrable Land; yet the *Lords Found*, that the Minister had Right first to seek the same, and that the *Feuers* thereof should either Remove therefrom, or else obtain and buy another Glyb to him; for the *Lords Found*, that the foresaid Act of Parliament extended as well to the Glyb, as to the Parsons and Viccars Manse. *Actor. Nairn.* Alter. *Gibson* Clerk. *Vid.* 13 *July* 1636. Mr. *Andrew Lamont*. 11 *Feb.* 1631. Minister of *Innerkeithing*.

Lindsay contra *Gray*, *Eodem die.*

ONe being obliged to deliver to another a Sum of Money in *London*; and the Party obliged *Alledging*, that he had sent a Letter of Exchange to his *Factor*, Resident at *London* to do the same; this Letter of Exchange not being Answered, neither yet Protested against by the Creditor; It was *Found*, did not liberat the Debitor, but that nevertheless he ought to make payment to the Creditor. *Gibson* Clerk.

Mr. *Andrew Stivenson* contra *Job*, *July* 25. 1629.

AN Action was sustained against a Tack-man, to find Caution, or else to Remove, albiet there was not a whole years Duty unpayed of the Tack, and albeit the Ground was Laboured, and full Plenished; But this was Found, because the Duty of the Tack was a great Duty, extending to 5 Chalders of Victual yearly, and the Tack-man was a poor Man, who was yearly supplyed and helped by the Pursuer, in furnishing him of Means for sowing of the Corns, and of Money to buy Seed wherewith to sow the Ground. *Scot* Clerk.

Wilson contra *Stuart*, *Penult July*, 1629.

ONe *Wilson*, as Heir to his Father, pursuing one *Stuart* to Warrand a Tenement in *Glasgow*, Disponed by the said *Stuart* to his said Father. It was Found, that the Pursuers Seasin produced, to Instruct him Heir, being given by the Baillies of *Glasgow*, by Hesp and Staple, cognoscing him to be Heir, was sufficient to Instruct him Heir, and to produce this Action, albeit he was not Heir Served and Retoured, the same being within Burgh, and the Pursuer being conveened as Heir, to pay to this Defender the Price of the Land Annailzied, in another Process pursued against him, as Heir *passivè* of before; For it was Found, that this Party could not oppone, nor quarrel the Right whereof she was Author her self to the Pursuers Father, and for which she conveened the Pursuer as Heir, and so the Seasin was sustained; but it might have been more doubted, if this Seasin would have produced Action against any Third Person, or any Stranger pretending Right to the Land, albeit it will ever produce Action against the Tennents of the Lands, or any not having Right, either for Removing therefrom, or for the Mails and Duties thereof. *Scot* Clerk. *Vid. March* 17. 1629. *Zeaman* contra *Stuart*, & *July* 16. 1629. *Scot* contra *Deans*.

Lundie contra *Lundie* and *Kinnadie*, *Novem.* 20. 1629.

IN a special Declarator after a general, another Donatar desiring, and Compearing to be admitted for his Interest, by vertue of a Gift of that same Rebels Escheat: It was Found, that the Gift and Horning whereupon it proceeded, being produced, gave him Interest to propone, and Disput against the special Declarator, albeit no Declarator was obtained on that Gift, but the Gift without Horning gave the Donatar no Interest. *Item* it was Found, that after General Declarator, in the Pursuit of special Declarator, there was no necessity to produce the Horning. Actor. *Advocatus* & *Gilmor*. Alter. *Aiton* & *Stuart*. *Gibson* Clerk.

contra *Eodem die.*

THe Defender being pursued by the Creditor to his Father, wherein he was called as Executor, or Intromettor with his Fathers Goods, and for proving thereof, a Decreet being produced, at the same Pursuers Instance, against this same Defender, for another Debt of his Fathers, wherein he was conveened *iisdem nominibus*, which being referred to his Oath in that Process, and he holden as confest for not Compearance, the Decreet of Certification, upon Contumacie in that Process, was not found to prove in this Process; But that he ought to prove otherwise, albeit it was given betwixt thir same Parties. *Gibson* Clerk. *Vid. March* 22. 1628. *Farquhar* contra *Campbell*, and the Cases there cited, *Jan.* 26. 1631. L. *Gadgirth* contra L. *Affleck*.

Dounie contra *Broun*, *Novem.* 24. 1629.

IN a Spulzie, an Exception of Poynding being proponed to Elide the same, which Poynding was quarrelled, because it proceeded upon a Sentence for Conviction of Blood, tryed in a Barrons Court by the Assyses, and in the Sentence

Sentence neither the Names, nor Numbers of the Assysers were expreſt therein, as it ought to proport; and also the Poynding had no Warrand in Writ, therefore there was no Precept Direct by the Barron-Baillie, after the Sentence to Poynd for the Un-law, whithout which the Decreet could be no Warrand to Poynd; Likeas the Poynding was Execut upon the Morn after the Sentence, whereas there ought to have been 15 days Interjected betwixt the Poynding, and the Decreet; for after the Sentence, the Party ought to have been Charged to pay the Penalty and fine upon 15 days, as Term of Law, before he could have been Poynded, which not being done, the Poynding was null. Thir objections againſt the Poynding were Repelled, and the same sustained, seing the Sentence bore, *that it was tryed by a condign Inqueſt*, and the Persons Names needed not to be expreſt, and there needed no Precept in Writ to Poynd, but the Decreet of the Bailly, or Barron in Court was enough, and there needed no Charge on 15 days to have preceeded, the Poynding being for a fine, in a fact tryed by an Assyse, for the which the Party might be instantly put in Waird after the Sentence, albeit in Civil Matters, as for Farms, or sicklike decerned in Barron-Courts, the Officers cannot Poynd, before the Charges to pay be Execut upon 15 days, which is not needful in Criminals, and such like punishable Acts. Actor. *Gilmor.* Alter. *Hay. Vid. Decem.* 7. 1630. *Lands* contra *Dycks.*

Lindsay contra L. *Lauriſton*, *Eodem die.*

SEveral Sums owing by the Laird of *Lauriſton* to one *Fairweather*, being Arrested by *Lindsay*, Creditor to *Fairweather*, and *Lauriſton* pursued to make the Sum forth-coming, and he Alledging, that he could not be found Debitor therein by the Contract produced, which was a Tack Set by him to *Fairweather* of Lands for payment of a yearly Duty, which Duty the Contract bore, *That the* L. *Lauriſton allowed to Fairweather, and that for satisfaction of the Annual of* 1000 *pounds owing by him to Fairweather, and that for the space to come, while Candleſmas after the Contract, which* Fairweather *accepted*; and before the *Candlemas* the Arrestment was laid on, which Contract *Lauriſton* Alledged could not make him Debitor, at the time of the Arrestment; for albeit it might been, that he was Debitor the time of the Contract, yet it would not follow, that he still continued Debitor at the time of the Arrrestment, and the paying of Annual at a Term which was not expired, at the time of the Arrestment, will not inforce, that he remained Debitor of the Principal Sum: therefore he ought to prove that he was Debitor otherwise at the Arrestment of the Sum, seing he might Transact with the Party therefore: And further Alledged, that the Sum was not Arrestable, being Heretable, by the same Contract, which appointed Annual to be payed therefore. This Alledgance was Repelled, for this Confession emitted in the Contract, subscribed by the Parties, was Found enough to make him Debitor, at the time of the Contract, which behoved still to burthen him, except he would prove it were payed before the Arrestment, and it was Found not to be an Heretable Sum, for the Victual allowed to the Creditor for his Annual to such a time, made not the Sum Heretable, except it were proven by the Tenor, and Conception of the Bond, that it was Heretable. Actor. Alter. *Mowat.*

Dickson contra *Ker* and *Young*, *Novem.* 25. 1629.

A Creditor Comprising from his Debitor, Land pertaining to him, and contending to be preferred to another Creditor, who had also Comprised, but after him; and the Second Comprisser Alledging, albeit he was last in Comprising, yet he ought to be preferred, seing the first Comprising was deduced againſt one as Infeft, who was never Infeft, and he ought to

have Compriſed againſt him, as charged to enter Heir to his Predeceſſor laſt Infeft, whereas he had not ſo Charged his Debitor to enter Heir, before the Compriſing, as is appointed by Act of Parliament, 1621. whereas the ſecond Compriſer had charged his Debtor to enter Heir, and thereafter had Deduced his Compriſing, and ſo the ſaid Compriſing was null; and the other anſwering, that there needed no charge to preceed his Compriſing, ſeing the Debitor was Retoured Heir, and charged the Superior to enter him, who had Suſpended; Likeas this firſt Compriſer had charged the Superior to receive him, upon his Compriſing, who had alſo Suſpended againſt him, that he could not Infeft him, the Debitor not being Infeft; and there it was *Found* in that Suſpenſion, that the Superiour could not *Alledge*, that which was his own fault; which being conſidered. The *Lords Found*, that the firſt Compriſer ſhould be preferred, albeit the Debitor was not Infeft in the Lands Compriſed, and albeit no ſpecial Charge was uſed before the Compriſing, which the *Lords Found* to be Supplyed by the Debitors Retour, and Charge againſt the Superiour, which was *Found* to be equivalent to a Seaſin, albeit that Suſpenſion ſtood undiſcuſt, and that another Creditor opponed againſt the Compriſing, and not the Superiour, nor the common Debitor (to either of whom it was not competent) and it was *Found* to Militat againſt the ſaid other Compriſer, It being Alledged, that the Compriſer was payed of a part of the Sums for which he Compriſed, before the Compriſing, and ſo it was null; alſo that he was payed of a Part, ſince the Compriſing, and ſo could not have the whole Lands Compriſed. This was *Found* Relevant, and *Found* admiſſable by way of Exception, without neceſſity to *Reduce* thereupon. Actor. *Stuart* & *Aiton*, Alter. *Nicolſon* & *Craig*. *Scot* Clerk. *Vid. Decemb.* 23. 1629. betwixt thir Parties.

Lady *Dumfermling* contra her Son, *Novem.* 26. 1629.

IN this Action, whereof mention is made, *March* 12. 1628. The Clauſe of the Contract whereby the Huſband is bound to Infeſt the Wife, in all Lands to be Conqueſt, during the Marriage, will not Aſtrict the Heir to fulfill the ſame to the Relict, for ſuch Lands as were Conqueſt by the Huſband, and after the Conqueſt were ſold by him, before his deceaſe: for that Clauſe ought only to be effectual to her, for ſuch Lands and Conqueſt as remained, and continued in that Eſtate, the time of the Husbands deceaſe, and the Right whereof remained with him; And it was alſo Found, that Lands being acquired by the Husband, from the Feuar of the Lands, and thereafter Diſponed again in Feu to the ſame Feuar, for a geater Feu-Dutie to be payed, than was contained in the Feuars Prior Rights, that Augmentation of the Feu-Dutie by the Husband, could not be reput a Conqueſt, whereof the Relict might claim a Liferent, as coming under the foreſaid Clauſe in the Contract, *Partibus Comparentibus, ut ſupra.*

John Ramſay of *Edington* contra *Hume*, *Novem.* 27. 1629.

IN a Removing purſued by *John Ramſay*, upon a Warning made by the Purſuer, and the Lo. *Ramſay*, who was Liferentar of the Lands, whereof this Purſuer was then Fiar: It was Alledged, that no Proceſs could be upon the ſaid Warning, becauſe it was made by the Liferentar, the time of his Liferent ſtanding, the Heretor now purſuing, having no Right then to Warn, and now the Liferentar being dead, to whom the Intereſt to proſecut that Warning belonged, this Purſuer therefore cannot ſeek Removing thereon: this Alledgance was Repelled, ſeing the Liferentar and Fiar concurring in the making of the Warning, the ſurviver might purſue Removing thereon. Actor. *Lawty*. Alter. *Sandilands*.

Paterſon

Paterſon contra *Edward*, *Eodem die.*

John M'cubbie being Debitor to diverſe of his Creditors, for ſatisfying of Debts owing to *Nicoll Edward*, Mr. *Robert Balcanquhel*, and others, he makes them a Diſpoſition of the Merchand-Wairs, which he had in his Merchand-Booth, valued to a Sum expreſt in the Diſpoſition, whereby alſo all other his Goods are Diſponed to them, for their Relief; And about 20. days after the ſaid Diſpoſition, he on the night delivers the ſaids Goods in the Merchant-Booth, and on the Morrow becomes Fugitive; and on that Morrow *Thomas Paterſon* Arreſts the ſame Wairs in the ſaid *Nicoll Edwards* hands, and purſues to make them forth-coming: and they Defending them with the ſaid Diſpoſition, and Tradition before the Arreſtment, as being done for an onerous Cauſe, for a True and Juſt Debt, which they Inſtructed. The *Lords* Found, that they had Right, and not the Arreſter, to the ſaids Goods, in reſpect of the ſaid Diſpoſition, and delivery to them, all done before the Arreſtment, and done to a true Creditor, for a Juſt and preceeding Debt, which was greater than the Goods delivered in Price, and Value extended to; neither was it reſpected, where the Purſuer Replyed, that it was a Diſpoſition *omnium bonorum*, done to a Conjunct Perſon, betwixt a Brother in Law, and the Diſponer retaining Poſſeſſion thereof, while the night before he fled, and done *in meditatione fugæ*, and voluntarly without Diligence or Compulſion, and done to the prejudice of all other Creditors, who were abuſed by the Fraud of their Debitor, keeping ſtill his Wairs in his Publick Booth, whereby they were put in Security, while that mid-night before the day immediately wherein he fled, he delivered the ſaid Goods, which abuſe, and Clandeſtine doing was not at any time lawful; for ſuch Acts ought not to be uſeful to the Receiver, by the Common Debitors preferring of him voluntarly to the reſt, who were deceived by the ſaid Clandeſtine Deed, the Diſpoſition never being Regiſtrat, nor Poſſeſſion apprehended, by Inſtrument, or Order of Law, nor in due time Convenient thereto, the Purſuer by the Contrare having done Diligence by Arreſtment, upon the firſt day following the night of Tradition, and that ſame day when the Debitor fled: which Reply was Repelled, and the Exception ſuſtained, ſeing neither before the Diſpoſition, nor Tradition, the Purſuer, nor no other Creditor had done any Diligence againſt the Common Debitor, in any manner of way; and the Common Debitor was never Charged, nor Rebel at the Diſponing, or Tradition foreſaid, without which preceeding Diligence, the Act of Divory met not the caſe. Actor. *Advocatus* & *Nicolſon*. Alter. *Stuart* & *Mowat*. *Gibſon* Clerk. *Vid. Jan.* 27. 1630. *Roſs. March* 6. 1632. L. *Garthland.*

L. *Balmanno* contra *Oliphant*, *Eodem die.*

A Decreet of Poynding of the Ground for an Annualrent, being deſired to be Transferred in the Executor of the Obtainer; in which Transferring the Heir of him, againſt whom the Sentence of Poynding was obtained, and alſo another Heretor of the Land, who had acquired the Right thereof ſince that Decreet, but not from any of the Defenders in that Sentence, were called in this Transferring; and this Heretor Alledging, that the Transferring could not be Suſtained againſt him, ſeing he was not a Party in the firſt Sentence, and therefore the Transferring cannot be againſt him, which cannot be craved againſt any but theſe who were then called; which Alledgance was Repelled, and the Action of Transferring Suſtained, ſeing he was called only for his Intereſt, and nothing concluded Perſonally againſt him, and that the Transferring was craved *activè* in the Purſuer only. Actor. *Mowat*. Alter. *Gibſon* Clerk. *Vid*, 18 *Dec.* 1629, L. *Rentoun* contra La. *Rentoun.*

Kincaid contra Sir *Lewis Lawder*, *Decemb.* 1. 1629.

AN Horning being Execute by *Lawder* against *Kincaid* for not payment of the Feu-duty of his Lands, the Horning being designed to be Reduced at the Vassals instance against the Superior, upon this Reason, because immediatly, *viz.* upon the second day immediatly following the Denunciation, he had fully payed the said Duty, for the which he was Charged and Denunced, to the Superiors self, who then received the same, whereby he was satisfied, and the Vassal put *in tuto*, no Contempt thereby being done by him against the Superior, and the Superior concealing that he had Denunced the Vassal, to whom it was never imparted by him, nor otherways knowing that he was at the Horn, that the concealing it at the payment making was a vehement presumption of Fraud, which ought not to give so unjust advantage against the Vassal, the payment being made before he was at the Horn year and day, and whereby the Liferent might fall, and the Superior having no prejudice at all. This Reason was Found Relevant, so far as might Reduce the Horning against the Superior only, but prejudice of the said Horning, so far as the Kings Majesty or any other Party might have interest therein *prout de jure*, and also against the Superiors Donatar constitute by him to the Vassals Liferent. Actor. *Nicolson* & *Craig*. Alter. *Lermonth*. *Gibson* Clerk.

Vaus contra *Butler*, *Eodem die*.

IN a Reduction of a Decreet of Removing, wherein the Horning execute upon that Sentence was called to be Reduced *in consequentiam* particularly, which falling the Decreet should fall. The *Lords* Found to this Reduction of the Horning, which was but sought in consequence, as depending upon the Decreet of Removing, that the Kings Thesaurer and Advocat needed not to be called as in other Reductions, where the Horning is principally called to be Reduced, and where there is no special Reasons libelled to Reduce the Horning, whereas there was no Reasons libelled against the same, but only desired to fall in consequence, and which would ensue in Law by the general inference, if the Decreet should be Reduced, that all following thereon would fall, which general would be als effectual, albeit the Horning was not specially craved to fall in consequence, to make the same to fall, as it is now when it is specially desired, and as to the general Inference, the Kings Officers needs not to be called, so no more needed they to be called to the special. Actor. *Nicolson* & *Mowat*. Alter. *Aiton* & *Stuart*. *Gibson* Clerk.

Executrix of *Scot* contra *Rae*'s Legatars, *Eodem die*.

THE Executrix of Sir *William Scot* is pursued by *Arthur Rae*'s Legatars for the Legacy left to them by particular Tickets of the Testators, done after making of the Testament, albeit the same was not contained in the body of the Testament, and albeit these Legacies be not confirmed in Testament. *Vid.* 7 *January* 1629, *Wallace* contra *Muir*.

Oliphant contra *Peebles*, *Decemb.* 4. 1629.

IN a Spuilzie of Teinds at the instance of a Tacksman, the Tack bearing the Duty to be in the year 1617, and that year being delet, and the year written on the Margine to be in *anno* 1616, which Margine was not subscribed by the Setter of the Tack: Whereunto the Defender Alledged, that it could not produce Spuilzie, being so vitiat in the Duty; notwithstanding whereof the Tack was Sustained, for it was Found, that albeit it had no Entry appointed therein at all, yet it might be Sustained, for the Tack was Set by a Parson of a Kirk for many nineteen years, with consent of the Patron, and Tacks Set during Lifetime needed not to bear any time of Entry, seing it behoved to be understood, that the Entry should be presently at the date thereof,

except

except it were otherways evident that any other Entry was appointed, specially both Setter and Receiver living. Actor. Present. Alter. *Hay* Clerk.

Winrham contra Relict of *Winrham*, *Eodem die*.

ONe *Winrham* pursues the Relict of Mr. *Robert Winrham* for improving of their Contract of Marriage; The *Lords* Found, that albeit the Contract was subscribed by the Husband, and a Cautioner for him, and bore only one Date, and before the same Witnesses, yet that the Relict who was pursued for Improbation by her Husbands Heir, and the Cautioners might declare, that she would not abide, that the Contract was subscribed by the Principal and the Cautioner at the day therein insert, and subscribed before these Witnesses, but declared she abode thereat as truly subscribed by her Husband, and written all in the Body with his own Hand, there being no Witnesses present at his Subscription, and that the Cautioner subscribed thereafter before these Witnesses insert; whereby she Alledged, that except the Pursuer would improve the Contract, otherways then because it was not subscribed at the Date therein, and before these Witnesses, as Witnesses to both Parties Subscriptions, they could not improve the same. The *Lords* Found, that the Party might make the foresaid Declaration, and Found, that except the Pursuers would improve the same Contract otherways than in the Date, because it was not subscribed on that Day, and before these Witnesses (which they Found to be no arguments against the Contract of Marriage, whereon Marriage had followed, and Bairns Procreat) that it ought not to improve the same. Actor. *Stuart* & *Craig*. Alter. *Nicolson* & *Lawtie*. *Hay* Clerk. *Vid.* 29 *March* 1626, *Keith* contra *Robertson*.

L. *Cokpull* contra *Johnston*, *Eodem die*.

THe Principal is found obliged to pay his Cautioner, who was distrest, and payed for him the Principal Sum, and all the Annualrents, since the Term of his payment, albeit the Bond bore only (the same being only Moveable) *That the Principal bound him to relieve his Cautioner of the Premisses in the Bond*, which was only Principal Sum, and Penalty, and that it did not Relieve him of all Cost, Skaith, Damage and Expenses, which the Cautioner might incur, by his becoming Cautioner. Actor. *Hope* & *Nicolson*. Alter. *Stuart*. *Hay* Clerk.

Gordon of *Butle* contra E. *Galloway*, *Decem.* 11. 1629.

IN an Action *Gordon* of *Butle* contra Earl of *Galloway*, for payment of a Sum contained in the Earl of *Galloways* Obligation, which he Alledged to be null, being made in his Minority, having then Curators, without their consent. The *Lords* sustained the Obligation, because it was Alledged and Replyed, that the Money was actually delivered, and received by the said Defender, and was converted by him to his Utility and Profit, which was admitted to sustain the Obligation. Actor. *Nicolson* & *Hope*. Alter. *Neilson*. *Gibson* Clerk. *Vid. Jan.* 25. 1631. *Houston* contra *Maxwell*.

Sheriff of *Galloway* contra L. *Cragcastle*, *Eodem die*.

THe Sheriff Pursuing his own Tacksman, to find Caution to pay the Tack-Duty, or els to Remove; And in this Process *Cragcastle* Compearing, who had Compriſed the Lands, and was Infeft, or done Diligence, which was equivalent; And Alledging thereby, the Lands to be his, and that the Pursuer could not be entered to the Land, tho the Alledged Tacksman should not find Caution, the Pursuers self having no Right to the Land, and nothing being produced for him; for his Setting of a Tack of that which he had no Right to, could not furnish him any Interest to the Land, against him who had Right, seing he was now a Partie, and the Cause ought not to be

considered, as betwixt the Setter and the Tacksman only. The Alledgance was Repelled, and but Production of any Right to the Land in the Pursuers Person, the Action was sustained against his own Tacksman, albeit the Alledgance was not proponed for him, but for another clad with a Right. Actor. *Mcgill.* Alter. *Neilson.* Scot Clerk. *Vid. June* 18. 1629. *Dumbar* contra *Turner.*

Young contra *Baillies* of *Montross, Decem.* 15. 1629.

David Young being obliged to pay a Sum, and in case of Failzie to Infeft him in an Annualrent therefore, out of his Tenement in *Montross*, and being Charged, and Denunced, for not fulfilling of the Bond: thereafter the Creditor pursues the said Debitor, and the Baillies of *Montross*, *viz.* the Debitor to give him Infeftment, and if he do not, the Baillies to Infeft him, and the Party being absent in the Process, It was Found, that the Order could not be sustained against the Baillies, and that the Act of Parliament of Tinsel of Superiority of these who Enters not thereto, being Charged to that effect by Vassals, as the Act Prescribes, militats not to produce this Action. *Gibson* Clerk. *Vid. Decem.* 18. 1630. *Stark* contra Sir *James Cleland. July* 2. 1634. *Hay* of *Cremongogat* *

Cornelius Paterson contra Captain *Alexander, Eodem die.*

A Decreet given before the Admira against a Stranger, being desired to be Reduced, at the Strangers Instance, albeit he was neither present within the Countrey assisting the Pursuit, nor no Procuratory given by him to Pursue, yet this Action was sustained, seing the same Advocats compeared for him, and insisted in this Reduction, (who were Ordinar Advocats in the Session) who Compeared for him, and Defended in the Decreet obtained against him, before the Admiral, desired now to be Reduced; But it was Ordained, that he should produce a Procuratory Authorizing the Pursuit, before Litiscontestation, and Caution should be Found to that effect. Actor. *Lawtie* & *Paip.* Alter.

Hume contra her Tennents, *Decem.* 16. 1629.

AGainst a Removing the Defender Alledging a Tack Set by the Pursuers Husband, and her self; and the Pursuer Replying, that it bore a Condition, *That if the Defenders Daughter Married without her Husbands Consent, the Tack should be null.* This Reply was received *hoc ordine* without Declarator, which was not found necessar to preceed, as the Defender Alledged; neither was it Found necessar, that the Pursuer should qualifie, that he dissassented from the Marriage of the Daughter to her Husband, with whom she was Married, but to purge the Condition, and for maintaining of the Tack, the Defender was holden to prove that he gave his Consent, which if he could not qualifie, the Tack could not subsist, being Set with that Provision; and it was not sustained as sufficient, that the Person whose Consent was required, was now dead, and that he lived many years after the Marriage, and never expreft his dislike and dissent, and their Bonds were publickly proclaimed, and not Opponed by him, and that after the Marriage, he Contracted with them in sundry Bargains, which all the Defenders Alledged, ought now to be found as good, as an expres Consent, after interveening of 25 years and more, and that long Possession by the Tack sensine, during which space it was never quarrelled by the Husband of this Pursuer, which Alledgance was Repelled, and the expres Consent required. Actor. *Craig.* Alter. *Belshes. Gibson* Clerk.. *Vid. Jan.* 27. 1630. betwixt thir Parties.

Hunter contra his Tennents, *Eodem die.*

IN a Removing, the Defender defending with a Contract of Wodset, and Actual Possession by the Pursuers Author, the same was Repelled against this

this Removing pursued by a Singular Successor. *Item*, the said Contract providing, that the Defender shall be kindly Tennent for the old Duty, after the Redemption. This also was Found not to defend him against this Pursuer; because it was conceived in Terms of an Obligation, to receive him a kindly Tennent, and was not by Words of the present time. Actor. Alter. *Hart*, Hay Clerk. *Vid. November* 25. 1628. *Mitchell* contra *Wright*. *Jan.* 14. 1630. betwixt thir Parties

Earl of *Galloway* contra *Maxwell*, *Eodem die.*

IN a Reduction and Improbation in one Summons, as use is, the Defender craving the Pursuers Oath, if he had Just Cause to Pursue Improbation of the Writs called for, without which he Alledged he could not be Compelled to produce to satisfie the Reduction, seing he was content the same should be Reduced, for none Production; But if he could give his Oath, that he had Just Cause to Improve, he was content that his Production should remain. The *Lords* Found, that the Pursuer could not be Compelled to give his Oath particularly, upon that part of the Summons, if he had Just Cause to pursue, the Improbation and Reduction being both in one Summons, and that he ought only to give his Oath *de calumnia*, upon the whole Summons, as it stands, if he had Just Cause to Pursue the same. Actor. *Stuart* & *Neilson*. Alter. *Cunninghame*: *Scot* Clerk.

White contra the Relict of the Minister of *Jedburgh*, *Eodem die.*

ONe being pursued as Executrix by the Defuncts Creditor, she defending that the Goods, were exhausted by Decreets obtained by other Creditors for Just Debts, the Party Pursuer quarrelling no part of the Alledgance, but only that the Defender ought to Alledge, that the Decreet was obtained before the Intenting of this Pursuit. The *Lords* Found not the Alledgance Relevant, except he Alledged, that the Debt was before the Intenting of this pursuit, but in such cases thir Alledgances are not received, except the Executors should also Alledge payment before the Pursuit, whereby the Goods were exhausted: but this was not quarrelled by the Pursuer, as he might in Law, for albeit Sentence was obtained by another Creditor, yet as long as the Executor had not payed the whole quantity of the Inventar, other Creditors ought not to be stayed of their Sentences, and then the Executor must Suspend against all the Creditors, and then it would be tryed, who had the best Right, and whose Debt and Diligence ought to be preferred, but the Defender quarrelled not that part of the Alledgance. Actor. *Stuart*. Alter. *Cunninghame*. *Scot* Clerk.

L. of *Lamington* contra *Bailzie*, *Decem.* 17. 1629.

A Decreet being given by the Laird of *Lamington* in his Barron-Court, against one of his Tennents, for a Blood-wed, wherein he was convicted, and decerned in 50 pounds of Unlaw, which being Suspended, and the Unlaw desired to be modified, Alledging that a Barron could not in his Barron-Court, decern so great an Un-law. The *Lords* Found, that they could not modifie that Un-law, being decerned for Blood, which was tryed, and wherein he was Convicted, and which was not an Un-law of Contumacy for absence, and Found that by Consuetude, Barrons might decern such Unlaws for Blood committed. Actor. *Cunninghame*, Alter. *Gibson* Clerk. *Vid. Penult Jan.* 1622. *Johnston* contra L. *Westnisbet*.

L. *Cairnoussie* contra L. *Techmurie*, *Eodem die.*

Cairnoussie after Compriseing of Lands from L. *Philorth*, the Legal being expired, pursuing a Declarator of Redemption against *Techmurie*, to whom the Lands were Wodset before the Compriseing, by the Fore-bears of him from

whom the same was Compriſed, under Reverſion. It was Found, that the Heir of him from whom it was Compriſed, being publickly Inſeſt in the ſame Lands, needed not to be Summoned in this Redemption, ſeing in effect he was Author to the Compriſer, for having the Right of his Conventional Reverſion eſtabliſhed in his Perſon, by which being a Judicial *Aſſignation*, it behoved to be alike, as if the Debitor had made him Aſſigney to that Reverſion, *quo caſu* he needed not to have Summoned his Cedent. *Item*, it was Found, that the Redemption being againſt a Minor, the Tutors and Curators needed not generally to be Warned in the Inſtrument of Premonition, his Tutors being ſpecially Warned *nominatim*; but it was Found, that the Purſuer ought to Inſtruct, that he was Tutor, and prove the ſame *cum proceſſu*. Actor. *Lautie*, *Davidſon* & *Baird*. Alter. *Nicolſon* & *Hay*. *Gibſon* Clerk. *Vid. December* 19 1629. *Laurie*.

L. *Renton* contra *Renton*, 18. *Decem.* 1629.

AN Action being Intented, & afterwards Transferred in the Heirs of the Defenders Principally called, and deceaſed, & ſince the Intenting thereof, and after Transferring, the Principal Cauſe being wakened, in the which wakening, ſome other Parties were called, who were neither Parties in the Principal Cauſe, nor yet in the Transferring, but were called for their Entereſt, who having acquired Right from the Defenders, after the Intenting of the Cauſe: It was Found, that no Proceſs could be granted againſt them. Actor. *Craig*. Alter. *Stuart*. *Hay* Clerk. *Vid. Novem.* 27. 1629. L. *Balmanno* contra *Oliphant*.

Lauſon and *Reid* contra the Earl of *Louthians* Heirs, *Eodem die*.

AN Action to hear and ſee a Cancelled Contract made up, and reſtored again to its integrity, and alſo concluding a Reduction and Improbation, was ſuſtained, being purſued in one Summons, to Infer both Concluſions. Actor. *Foulis*. Alter. *Scot* Clerk. *Vid. March* 19. 1629. *Harries* contra Lo. *Harries*.

L. of *Caprington* contra *Cunninghame*, and others, *Eodem die*.

IN a Spulzie purſued by *Caprington*, as Donatar to the Eſcheat, and Liferent of the Lo. *Ochiltrie*, who had Right to the Lands of whoſe Liferent being Gifted and Declared, he by vertue thereof purſues a Spulzie, wherein the Defender Clothing him with the Right of the ſame Teinds from the Lo. *Ochiltrie*, and continual Poſſeſſion theſe 9 or 10 years by-paſt, he Alledged the ſame being purchaſed for great Sums of Money, ought to Defend him, albeit his Right was made after the Maker was Rebel, which notwithſtanding ought to be maintained, being purchaſt before the Declarator, and ſo *bona fide* acquired, the Rebellion never being Intimate, nor made known to the Excipient. The Alledganee was Repelled, and the Right made to the Party by the Rebel, being at the Horn at that time, albeit not then declared, was not ſuſtained to defend him, ſpecially ſeing alſo the Action was for Spulzie of years after Declarator, obtained upon the Rebels Eſcheat and Liferent. Actor. *Advocatus* & *Cunninghame*. Alter. *Nicolſon* & *Millar*. *Scot* Clerk. *Vid. December* 6. 1631. L. *Conhayt* contra L. *Earleſton*.

Elliot contra *Mortoun*, *Decemb.* 19. 1629.

IN a Suſpenſion of Charges upon a Bond of 100 pounds of Principal Sum, and 24 pounds of Penalty, becauſe the Bond was ſubſcribed by the alledged Debitor, only by one Nottar ſubſcribing for him, and three Witneſſes inſert, and ſo being null, being a matter of importance, againſt the Act of Parliament, and Act of Seſſion; and the Charger retrinſhing the Sum to 100 pounds, and paſſing from the reſt, he Alledged the Bond ſo retrinſhed was ſufficient. The *Lords* Suſtained the Bond being ſo retrinſhed, albeit it was ſubſcribed by one Nottar,

tar, and before three Witnesses, for an Obligation of that Sum might be made effectually, being so subscribed; and so it was Found it might be retrinshed, albeit the Party contended that it could not be retrinshed, no more than if it had been once of 1000 pounds, and retrinshed to a lesser Sum to make it subsist, which was not Respected, but allowed the Bond, and Found no necessity to take the Debitors Oath thereon who was living. *Vid.* 13 *Nov.* 1623, *Marshel*.

This Action being called 13 *January* 1630, This Decision was ordained to stand, notwithstanding of the Act of Session declaring Bonds above 100 pounds to be Matters of Importance, and Found that the Party might retrinsh the Sum, and that they would permit in the like Cases the Parties to retrinsh Bonds in time coming, when such Questions occurred; and here this was the rather done, because the Debitor was obliged in the Bond to pay the Sum at two Terms, so that it was respected as if the Sum had been owing by two Obligations. *Item*, It needed not to be retrinshed within 100 pounds. Actor, *Craig*. Alter. *Baird*. *Gibson* Clerk.

Lawrie contra *Miller*, *Eodem die*.

A Pursuit made by the Assigney constitute to the Order of Redemption by the Father, against *Graham* of *Panholls* the Cedent, User of the Order of Redemption, and also the Party from whom the Lands should have been Redeemed, and the Depositar in whose Hands the Money was consigned, whereupon the Lands was Redeemable: after all their Deceases the Assigney pursues the Heir of the Depositar, for delivery of the Money to him, in the which Action no other Party being called, the *Lords* Sustained the Pursuit, and Found no necessity to call the Heir or Executor of the person against whom the Order was used, albeit the Money was consigned to his use, in respect the Pursuer past from that Order, and Renunced all Right which he had to the Land, and all Right of Reversion *simpliciter*, and was content that the Party should bruik the Land irredeemably, and pursued only for delivery of the consigned Money. *Gibson* Clerk. *Vid.* 14 *January* 1630, betwixt these same Parties. & 17 *Dec.* 1629, L. *Carnowsie*.

Cunninghame and *Clerk* contra *Borthwick*, *Decemb.* 21. 1629.

A Bond made by umquhile *James Borthwick* to *David Clerk* being Registrat, and after the decease of *James Borthwick* transferred in one representing him, and thereupon Compryfing being Deduced, thereafter the Bond and Compryfing is Reduced for not Production; *Cunninghame* Assigney to *Clerk* the Creditor, after this Reduction Pursues Transferring of that Registrat Bond, and of the said Decreet of Transferring, obtained by his Cedent; wherein the Defender Alledged, while that Decreet Reductive were taken away, whereby the Bond was Reduced, that the Bond could not be desired to be transferred; which Alledgance was Repelled, for notwithstanding of the Decreet Reductive, the *Lords* Found the Transferring ought to proceed, without necessity to Reduce the Decreet Reductive, seing the Bond was Registrat, and which was known to the Party, seing he had Deduced Compryfing thereon, and so could not be Reduced for not Production; and in that Sentence Reductive, the Bond was not called for to be Reduced, but only the Compryfing, neither was there any reason libelled against the Bond, but only against the Compryfing, and therefore the Transferring was Sustained as said is. *Hay* Clerk. *Vid.* 24 *Novemb.* 1632, L. *Wedderburn*. & 21 *Decemb.* 1630, L. *Corsbie*.

Mr. *David Aiton* contra L. *Halkertoun*, *Eodem die*.

THe Laird of *Halkertoun* consigning a Sum, modified to his Wife for her Intertainment, which was claimed by the said Mr. *David*, as Arrested for satisfaction of a Debt of 300 merks owing to him by the Lady, conform

to her Bond, and which Sum he Alledged he had furnished to her for her Aliment in her great necessity, and which he referred to her Oath; and she contending, that that Sum was in Law due to be payed by her Husband, who in Law was bound to intertain her, and that a Bond made by her having an Husband was null wanting his consent, and could not be obligator against her; and the other answering, that he had no Action upon that Bond against the Husband, not being made by him, neither could he prove that the Money was furnished for his Wifes use, because that Probation which in Law is good against her self, *viz.* her Oath, is not relevant, and will not be admitted to prove against him, and he has no other Probation, and so he cannot prevail against the Husband, whereas she may prevail against him in pursuing him for her Intertainment, for she wanting the same, and not being furnished by her Husband, the Judge in Law will modifie and decern the Husband to pay; and albeit he might quarrel the Bond for want of his Consent and Subscription, yet it is not proper to alledge and oppone her own Deed for a Sum, so profitably converted to her use; notwithstanding whereof the *Lords* Ordained the Wife to be answered of the Money consigned, and Found that the Creditor upon that Bond could not Pursue the Lady, until he had Pursued the Husband, and after the discussing of the Husband, they would find what was due to be done to the Creditor by either of them, and in the mean time Found no Process against the Wife upon the foresaid Bond. Actor. *Aiton.* Alter. *Lermonth* & *Gilmor. Gibson* Clerk.

Jo. Dickson contra *Young, Decemb.* 23. 1629.

TWo Compryfers contending, which of them should be answered of the Money and Tacks after the Redemption of the Lands Compryfed by them, (for the Lands Compryfed were under Reversion, and were Redeemed, and the Sum whereupon the same was Redeemable, was Found to come in place of the Lands to them, who should be Found to have best Right by Compryfing) the first Compryser being in Possession of the Lands before they were Redeemed, and the second Alledging, that the first Compryfing was extinct by Intromission with the Duties of the Lands, which satisfied the first Compryfers Sum, which was referred to his Oath, and he Deponing that the first year of his Entry to the Lands, the same was waste, and he Plenished the same, and reaped no Profite at all of the Land, but was a Loser of a part of his own Stock by the evil Season, and the Neighbours Goods which eated his Corns and Grass, and that he Set the same thereafter for a yearly Duty payed by his Tennents, to whom he Set the same therefore; The other Compryser Alledging, that the first year should be allowed according to the Farm which he received, and for the which he Set the Lands the years thereafter, seing it was but a Casuality, to make Gain or Disadvantage to any, in the first year of his Plenishing. The *Lords* would not allow any thing to the first Compryser for the first year, wherein he declared that he was Plenisher, and was a Loser. Actor. *Stuart* & *Cheap.* Alter. *Nicolson* & *Craig. Scot* Clerk. *Vid.* 25 *Novemb.* 1629, betwixt these Parties.

Adamson contra *Foreland, January* 12. 1630.

THe Relict pursuing the Heir of her Father-in-Law, to imploy 2000 merks to her in Liferent, whereto he was obliged by her Contract of Marriage; And the Heir Alledging payment made to her umquhile Husband of that Sum, conform to his Discharge; and the Pursuer Replying, that that Discharge not being Subscribed by her, could not prejudge her: And the Defender Duplying, that she was universal Intromissatrix with her umquhile Husbands Goods, and so should warrand the Discharge. And the Pursuer Alledging,

ledging, that the Defender should condescend upon the particulars of her Intromission, which being declared, she should purge the same: And the other Alledging no necessity to be special, seing he Alledged that she was universal Intromissatrix, and which was Relevant in Law against her, without condescending, and if she would purge her Intromission with any particulars, it was her own part to be special thereon, and he should answer thereto. The *Lords* Found, that the Defender Alledging the Pursuer to be universal Intromissatrix, needed not to be special, and could not be compelled to condescend upon the particulars of her Intromission; but if she would purge her Intromission, she ought to do the same, and be special thereon, as she best might, being her own deed, *vide quod sequitur*. Actor. *Stuart*. Alter. *Aiton*, *Hay* Clerk.

And in this same Cause upon the 13 of *January* 1630. the Relict producing a Ticket of the particulars of her necessar Intromission, and the Party offering to prove further Intromission; whereon the Relict Alledged that the Party ought to condescend in special, that she might Eleid the same. The *Lords* Found, that the Party Replying, that the Relict was further Intromissatrix with the Defuncts Goods, *viz.* Corns, Cattel, and all others his Goods, besides the particulars which were purged as necessar; and that she was universal Intromissatrix, therefore that he needed not further to be more special; for if she would purge any more Intromission had by her, she ought to give the same up her self; but where the Party Alledged, that she was universal Intromissatrix, besides the particulars which she purged, he needed not be more special: But the *Lords* Declared, that they would consider after Probation was Renounced, at the Advising of the Cause, if as much should be proven as would make her lyable as universal Intromissatrix.

L. *Essills* contra *Wallace*, *January* 13. 1630.

A Compriſing Deduced before the Act of Parliament 1621. not expired the time of the Act, the Compriser is subject at all times after the expiring of the 7 years, to Compt for his Intromission of all the years Duties of the Lands Intrometted with by him, of all years before expiring thereof; and which Compt he is obliged to make at all times after the expiring of the Compriſing, to any Party having interest to seek the same, whether he be Major or Minor that Alledges the Compriſing to be extinct, and against whom the same was Deduced. *Vid.* 15 *January* 1624, Viscount *Annand*.

Lawrie contra *Miller*, *January* 14. 1630.

MEntion being made hereof 19 *December* 1629. The *Lords* Found, that an Instrument of Consignation, bearing Money to be Consigned for using an Order of Redemption, Subscribed as use is, by the Nottar, and not by the Depositar, was not sufficient to prove against the Depositars self, if he were living and Pursued, and so not against his Heirs to make him answerable for the Money contained in that Instrument; for albeit it was Alledged that the Instrument of a Nottar ought to have Faith in these Acts, which he does *in officio* as Nottar, and which is proper to his Calling, as this Act of Consignation, & taking Instruments thereupon is, and which requires no other Solemnity nor perfection thereto, nor no Subscription either to the lawfulness, or to the verity thereof, but only the Nottars own; yet it was not found good to burden the Depositar without his own Subscription, or some other lawful Deed done by the Depositars self; for the Instrument, albeit it was not enough to burden the Depositar with the Sum, yet it was good and lawful to prosecute Redemption thereon, and to shew that the Alledged Consigner had prosecute the Order of Redemption; and the same was respected as an Act done by the Nottar in his Office *hoc modo*, and to that effect, and was done to make the Depositar

lyable for the Money, which is not the scope thereof; for after the Instrument it is usual to the Redeemer, to take up the Money again; neither was it sustained as an *Adminicle*, to prove by the Witnesses insert in the Instrument that the Money was Consigned, as the Party offered to do for supply of the Instrument, which was not admitted, albeit the same was only 100 pounds, for the Pursuit was 30 years Intented after the Consigning. *Vid.* 21 *January* 1632. *Grierson* contra *Gordon*.

Hunter contra his Tennents, *Eodem die.*

IN this Action mentioned 16 *December* 1629. the Pursuers Infeftment being publick, the Defender Alledging a base Infeftment of Lands, whereof the Lands Libelled were acknowledged to be a part by both Parties; which base Right was anterior to the Pursuers publick Right, and by vertue whereof he was in Possession many years, of a part of the Lands contained in his Infeftment (for the Infeftment was of a quarter of the Lands of *Cadistle*) and the rest which he posseſt not, *viz.* the Lands Libelled, he Alledged pertained to him by that same Right of his prior Infeftment; and the Tennents Possessors, now Defenders, ought not to be decerned to Remove at this Pursuers instance, seing he allowed that Possession: And the Pursuer Replying, that albeit the Defenders base Right was anterior to him, and clad with Possession of a part of the Lands, yet the same ought not to defend against his publick Infeftment for thir Lands now Libelled, whereof he was never in Possession. The *Lords* Found, that the base Right being prior, and clad with Possession of a part of the Lands therein contained, the Possession being of more than the half of the Lands, was sufficient to defend against the Pursuers publick Right, for these Lands Libelled, whereof the Defender was never in Possession, as well for the Lands whereof he was in possession, and sustained the same to assoilzie the Defenders, albeit they had never been the Defenders Tennents, nor never had acknowledged him before the Warning, nor never had payed him any Duty, seing he now allowed their Possession; and found that Possession of the most part of the Land contained in his Infeftment, was sufficient to sustain the same for the whole therein contained, the same being all only of one quarter of the Land, and not of diverse Tenements, and Found that the same was enough to sustain the Infeftment, which was not divisible. Actor. *Baird*, Alter. *Belshes* & *Hart*. *Hay* Clerk. *Vid.* 17 *December* 1628. *Chalmer*.

Baird and *Forrest* contra Mr. *William Chalmer*, *Eodem die.*

THe Relict as Tutrix to her Bairns, pursuing two other Tutors Testamentars, to accept the Office, or to Renounce; and they Compearing, and offering to Renounce; and it being Answered, that *res non erant integra*, because there was sundry Pursuits moved at their Instance, as Tutors to these Minors against their Debitors, wherein Sentence was given at their Instance, whereby they had accepted the Office. The *Lords* notwithstanding of these Sentences Found, that they might Renounce the Office, seing they had never accepted the Office, nor made Faith, nor Compeared in Judgment, nor medled with any of the Minors Goods, nor knew of these Pursuits, nor gave any Warrand, either by Word or Writ, to any Advocat to Compear for them. And it was Found, that the inserting of their names in these Pursuits being done without their knowledge, was not an acceptation of the Office, but that notwithstanding thereof they might Renounce. Actor. *Baird*. Alter. *Hay* Clerk. *Vid.* 6 *July* 1627. *Campbel* contra *Campbel*, and the Cases there.

Mr. *Robert Bruce* contra *Ja. Wardlaw*, *Eodem die.*

IN a double Poynding, the Tennents Suspenders having past, by a Warrand Subscribed by them, from that double Poynding, and thereafter giving warrand

rand to inſiſt therein, and at laſt paſſing therefrom, The *Lords* Found nevertheleſs that they would ſuſtain Proceſs in the Cauſe betwixt the two Parties anent their Rights, ſeing they had both Compeared, and produced, and ſeen others Rights; After which, albeit the Suſpenders in a double Poynding ſhould not inſiſt, but paſs from their inſtance, yet the Parties Right ought to be diſcuſt, and if the one Party would not diſpute, that the other Party ſhould have ſentence upon his Right, even as if the Suſpender had inſiſted for declaring his preference in his Right. Actor. *Nicolſon*, Alter. *Gibſon* Clerk.

The like done *December* 20. 1642. in a double Poynding betwixt Lady *Cowfield* and the Lady *Bancreif*, where *Stuart* was for the one Party, and *Oliphant* for the other. *Hay* Clerk.

Cleghorn contra *Fairlie*, *January* 15. 1630.

Cleghorn as Aſſigney to a Bond of 100 pounds made to *Katharine Scowler* by umquhile *James Fairlie*, purſues the Daughter of the elder Brother of the ſaid umquhile *James Fairlie*, as Heir of Conquiſh, and *Maxwell* her Spouſe for his intereſt, and *William Fairlie* younger Brother to the ſaid umquhile *James*, as Heir of Line, for Regiſtration of the ſaid Bond; and the younger Brother Heir of Line offering to Renounce, the Heir of Conquiſh Alledging, that he could not be heard to Renounce, becauſe he had intrometted with the Heirſhip Goods of the Deſunct, ſtanding in the Houſe where he died, and remained ſtill in Poſſeſſion of the Houſe, and had lyen in his Bed, and Bed-cloaths which were ſtanding in the ſaid Houſe; Likeas he medled with a Maſer which was in the Deſuncts Poſſeſſion, and drank therein, and uſed it at his pleaſure, and did wear his green Silk Shanks: This Alledgance was ſuſtained to make him Heir, and that he could not Renounce; albeit he Alledged, that ſuch Intromiſſion was no Intromiſſion which could burden him, the Bed and Maſer being yet undiſponed upon by him, and that the ſame pertained not to the Deſunct, but pertained to their Mother, who gave her umquhile Son the uſe thereof; & after his deceaſe ſhe medled with the ſame, her ſaid umquhile Son remaining in a Chamber within that ſame Turnpike where the Mother dwelt, pertaining to her, and where he was entertained and ſupplied by her; Likeas her name was engraven upon the Maſer, and ſhe intrometted with the ſame; notwithſtanding all which, the Alledgance was ſuſtained to make him Heir, ſpecially ſeing that he dwelling in an Houſe of his own when the Brother died, he after his deceaſe left his own Houſe, and entered and dwelt in that Houſe where his Brother died, which was ſuſtained; albeit he Alledged, that it was done by his Mothers Warrand, to whom that Houſe where his Brother died pertained, and where ſhe received him: But it was Alledged, that this Heir of Line after his Brothers deceaſe, Locked the Door of the Houſe, and kept the Keys thereof, and ſuffered none to enter while he entered himſelf. Actor. *Cunninghame*. Alter. *Herriot*. *Scot Clerk*, *Vid.* 25 *January* 1632. *Scarlet* contra *Paterſon*.

Aldcorn contra *Ker*, *Eodem die*.

A Decreet before the Commiſſar of *Peebles* for the Sum of 60 pounds, being quarrelled by Suſpenſion as null, becauſe albeit it proceeded upon the Defenders being holden as confeſt, yet the inferior Commiſſars were not Judges in matters referred to Oaths above the Sum of 40 pounds, and the Commiſſars of *Edinburgh* in matters exceeding 100 merks, conform to their Injunctions, notwithſtanding whereof the Decreet was ſuſtained.

Thomſon contra *Merk-land*, *Eodem die*.

THe Relict having Charged for a Third of a Moveable Sum, appointed by the Bond to be payed at a Term to the Creditor her Husband, and in caſe

of his deceaſe to a perſon who was his Son therein named, ſpecially the Huſband Creditor having deceaſt before the Term. It was Found that this and the like Subſcriptions and Proviſions to Bairns by Bonds, in caſe of the Creditors deceaſe, doing nothing in his Lifetime to change the Bond, ſhould ſtand, and that the Sum pertained to the perſon ſubſtitute, and that the Relict had no part in ſuch Sums, nor yet the Defuncts Executors; and if at any time Sums be owing by ſuch Bonds, & ſhould be ignorantly Confirmed (as this is Confirmed) yet the Confirmation thereof, where nothing was altered by the Defunct, nor nothing mentioned by the Defuncts ſelf in Teſtament to declare the change of his mind, ſhould no wayes prejudge the perſon ſubſtitute; but here the Creditor died before the Term. Actor. *Lermonth.* Alter. *Scot* Clerk. *Vid.* 18 *January* 1625. *Watt* contra *Dobie.* 26 *June* 1634. *Keith* contra *Innes.*

Bruce contra *Wardlaw*, *January* 19. 1630.

MEntioned 14 *January*, the Queſtion being betwixt two Parties, which of them had Right to hold Courts within the Lands of *Torrie*, which Lands are holden of the Biſhop of St. *Andrews*; which Right was claimed by *Bruce*, as Baillie-Deput to the Lo. *Lindſay*, who had an Heretable Right and Seaſin thereof from the Biſhop, to whom he was Heretable Baillie within his Regality of his Lands in *Fife*; and the other claimed the ſame as Infeft by the Biſhop in the Lands of *Torrie cum curiis*, and Alledged, that the Lord *Lindſays* Seaſin was null, being appointed by the Biſhops Precept inſert therein, to be taken at the Caſtle of St. *Andrews*, for all the Lands within that Bailliary, albeit the Lands lyes far diſcontigue; and that the Biſhop, nor no Subject can make an Union, but by the Kings Confirmation. This Alledgance was Repelled, and the Seaſin ſuſtained, ſeing the *Lords* Found, that this was not an Union of Lands, which indeed no Subject can make, but only a place deſigned for taking of Seaſin of a Juriſdiction granted by the Biſhop, and which the Biſhop might appoint; and many thought that no Seaſin in ſuch caſes is requiſite. *Vid.* 10 *February* 1631. E. *Galloway.*

Stuart contra Sheriff-Clerk of *Bamff*, *Eodem die.*

IN an Action purſued againſt the Clerk, for delivery to a Party of Letters and Executions of Relaxation of him from the Horn, which were given in to be Regiſtrat, conform to the Act of Parliament; and the Clerk exhibiting the Letters, and denying that ever any Execution, or Relaxation was given in to him; and he contending, that no other Probation by Witneſs could be received againſt him, upon that Summons, but his Oath only, and that it ought not otherwiſe to be admitted to be proven, in reſpect of the dangerous conſequence, which might otherwiſe enſue againſt publick Officers, if the like Purſuits were ſuſtained to be proven, otherwiſe then by Oath: for *contra Notarios negantes* no Probation is admiſſable, but their own Oaths, and their Prothocals, therefore the like ought to be in this caſe, ſpecially where there are three full years Interveened, betwixt the Alledged time of the delivery of the Letters, and the Intenting of this Purſuit, during the whole Interveening time, the Party never ſeeking his Letters, nor requiring therefore, as he ought to have done. The *Lords* Found, that they would examine the Clerk, he being preſent *ex officio*, in preſence of the Witneſs, whom the Purſuer intended to uſe in this matter, before they would determine, whether it was probable by Witneſſes, or not. Actor. *Hay.* Alter. *Baird*, *Hay* Clerk.

L. *Vry* contra *Sheen*, *Jan.* 20. 1630.

TWo Perſons by their Bond granting the borrowing of a Poulder-Miln, and the Furniture thereof, and obliging them and their Heirs, to Re-deliver the ſame, when they ſhould be required upon ſo many days warning preceeding,

and

and if they did not, to pay a certain Sum therefore, specified in their Bond, and it being questioned, if every one of thir two Borrowers were subject in the whole Sum conditioned in the Failzie foresaid, or if the same should divide betwixt the two obliged, for the Bond bore not, *That they were obliged conjunctly and severally.* And therefore the one of the two Persons conveened, Alledged, that he could not be Found adebted in the whole, but for his own half, for which half he Alledged, that Compensation should be only received (for this Cause was a Suspension of a Decreet obtained by this Person, one of the two Borrowers of the Miln, against the Suspender Lender thereof, wherein the Suspender offered to compense the Charge with this Sum liquidat, for not delivery thereof) And which Compensation, he Alledged was not Relevant against him for the whole Sum, and ought not to be divided, albeit they were not bound conjunctly and severally, seing *unicum & individuum corpus, viz.* the Poulder-Miln was principally deduced in the Obligation, which not being divisible, but as the Party stands Debitor therein for delivery, without Partition, so the Price which is liquid, in place thereof, should be also indivisible, notwithstanding whereof the *Lords* Found the Price should divide betwixt the Persons bound; for albeit the Miln was not divisible, yet the Worth and Price was divisible; and as he could not seek the Miln from one of them, by vertue of that Bond, no more could he seek the Price, except one had been tryed to have the same, or for some such other Cause, but not by the conception of the Bond, no more than if any had been Debitor of one Bond to two Persons, as when one leaves a Legacy, a Horse, or such like, to two Persons, the Debitor cannot be compelled to give the same, or in case that be not prestable, the avail thereof is, to any one of the Legatars, *& quod tenet in Creditoribus, idem tenendum in duobus debitoribus.* *Gibson* Clerk.

Earl of *Murray* contra *Dumbar* of *Burgy*, *Jan.* 21. 1630.

A Bond of 10000 pounds granted by *Burgy*, to the Earl of *Murray*, for desisting and quyting a Criminal Pursuit of Slaughter and Adultery, moved against *Burgy*, before the Justice, at the King's Advocats Instance, and at the Instance of the neareſt of Kin, to the Party Slain (The Earl of *Murray* not being Pursuer of the Criminal Pursuit himself, and the only Doer, but the Assister, and prosecutor thereof) This Bond being desired to be Reduced at *Burgys* Instance, because it was Alledged to be given at the Intercession of their Noble Friends, who Interponed themselves to Mediat and Accord betwixt this Pursuer and the Earl of *Murray*, only for *Shaw*, and to be a mean to preserve the Earl in his Honour, and for his Contentment, but not with any intent of Exaction, which was offered to be Proven by the Oaths of the Friends, who Interceeded, being all Noble-men of Eminent Quality, and of Dignity, against whom no Exception in Law could be taken, *viz.* The Lord *Lorn*, the Lord *Gordon*, the Earl of *Winton*, *Linlithgow*, and *Galloway*. This Reason was not Found Relevant to be Proven by their Oaths, neither would the *Lords* take their Oaths *ex officio*, for they Found, that Witnesses, how Honourable and Noble soever they were, could not be received to destroy the Bond; and the Bond being also desired to be Reduced, because it was granted for desisting from a Criminal Cause against the Law, which prohibits Parties to make such Transactions upon Criminal Pursuits, and appoints the Accusers making such Transactions to be punished, as is Statut *per Senatus-Consultum Turpillianum ff. & C.* for albeit Transactions *per L. 16. transigere, C. de Transact.* be permitted, which are made *super crimine, sanguinis panam ingerente*, as the Defender Proponed, and Alledged, that the Reason Founded upon *Senatus-consult, Turpill.* Specially where there's impetrat *absolutio Principis*

cipis, it *Liberats à Pœna*, yet the Pursuer Replyed, that the Law permitting such Transactions, it is *a parte Rei, sed non à parte Accusatoris*, *nam Accusator turpiter transigit*, specially where he is not Party neareſt in the Accusation, and where the Party accused neither has Remission, nor declines the Tryal, but offers himself to the Justice, notwithstanding whereof the Transaction was sustained, and Absolvitor granted to the Defender; For the *Lords* Found, that any Bargain, or Bond given by the Party Accused to him, who urged the Accusation, and whereupon the Accusation deserted (albeit he to whom the Bond was made, was not the Party Interested) the same could not be Retreated upon that ground, specially by him who made the Bond: but in this Cause the King had allowed of this Transaction, by His *Majesties* Warrand; and also had granted Remission to the Party, which His *Majesty* willed not to be exped, while the Bond and Transaction were performed to the Earl of *Murray*. Actor, *Nicolson* & *Aiton*. Alter, *Advocatus* & *Stuart*. *Gibson* Clerk.

Hopringle contra *Ker*, *Jan.* 22. 1630.

IN a Reduction of a Bond of 40000 merks granted by the Lo. *Borthwick* to *Mark Ker*, and whereupon *Mark* had Compriſed, at the Inſtance of the ſaid *Hoppringles* prior Creditors to the Lo. *Borthwick*, founded upon the Statute of Dyvory, *viz.* Becauſe the ſaid Bond was made to a confident Perſon, without any true, Juſt or neceſſary Cauſe; and in the prejudice of the Purſuer, his anterior Creditor, ſubſuming *in terminis*, as the Act bears. The *Lords* Found, that the Purſuer ought to prove that Part of the Reaſon, *viz.* that the Bond was made without any Juſt or neceſſary Cauſe, either by Writ, or by the Oath of the Party Receiver of the Bond, and that they would not reſpect it as a negative, which proved its ſelf; neither Found it neceſſar that the Creditor, Receiver of the Bond ſhould be holden to prove any Cauſe of the Debt anterior to the Bond, or by any other manner of way, but by the Bond confeſſing the Debt, which was ſuſtained: for when Parties borrows Moneys, or Contracts mutually, there is no other way to prove the borrowing or contracting, but by the Writ then made at the time when the ſame is done, for there can be no other thing Extant therefore, before the Writ then made, as is dayly ſeen in all Bargains and Obligations betwixt Parties; And therefore the *Lords* Found, that the Reducer of any ſuch Bond, upon that Act, ought to Prove that Negative, and that the ſaid Act Required and Ordained the ſame to be proven, either by Writ or Oath, as ſaid is, and that no other Probation ought to be admitted thereupon. Actor. *Advocatus* & *Cunninghame*. Alter. *Nicolſon*. & *Craig*. *Gibſon* Clerk. *Vid. Jan.* 29. 1629. *Auld* contra *Smith*. *Jan.* 17. 1632. *Skeen* contra *Betſon*. *Feb.* 21. 1623. *Craw*, and the caſes there. *Jan.* 28. 1625. *Livingſton*. *Novem.* 24. 1626. *Glen*. *March* 9. 1639. *Riddoch*. *Feb.* 12. 1622. *Denniſton*. *June* 22. 1642. *Nisbet*.

contra *Eodem die.*

IN a double Poynding, betwixt two Creditors, for a Sum owing to their Common Debitor, by his Debitor; And whereto the ſaid Debitor had made the one Aſſigney, and which was Arreſted thereafter by the other Creditor, who craved to be preferred to the ſaid Aſſigney, ſeing he had affected the Sum by his Arreſtment, and the Aſſignation to the other Party, albeit before the Arreſtment, yet it was not Intimat; and the Aſſigney anſwering, that he had done equivalent to an Intimation, in ſo far as he had Written to the Common Debitors Debtor, acquainting him with his Aſſignation, and deſiring him to make payment to him, who had written back to him his Miſſive, wherein he promiſed to make him payment, and which *Miſſive* was before the Arreſtment; And the other *Anſwering*, that that Miſſive was not a Legal Intimation, and could not be *Reſpected* againſt him, who was a Co-creditor, and had

had done Lawful Diligence to affect the Money, for the said Missive being a privat *Deed*, and which betwixt them might be of any date they pleased, seing there is no means to Improve the same, wanting Witnesses, it may have what Effect it can against the Writer, but ought not to Work against him, who cannot be prejudged thereby. The *Lords* Found, that this Missive dated before the Arrestment was als sufficient, as any Intimation; Therefore preferred him to the Arrester; For if the Writer of the Missive had at that time given Bond to that *Assigney*, to pay him that Sum, the Arrestment thereafter would not have prejudged the *Assigney*, and the Missive was alike, wherein he had promised to pay him; But it appears not alike, for the Bond behoved to have Witnesses, whereby the manner of Improbation was Extant, which was not so in the Letter. *Hay* Clerk. *Vid. Feb.* 12. 1629. Lo. *Lesly*.

Peebles contra Lo. *Ross*. *Jan.* 23. 1630.

IN a Suspension at the Lo. *Ross* Instance, of Charges at *Marion Peebles* Instance, upon a Precept out of the Chancellary, upon her Retour as Heir to her Father, to Infeft her. The *Lords* Found, that the saids Charges, and her Infeftment by the Superiour, ought not to be stayed, upon the not payment of the Duties of the Lands, during the Terms, that they were in Non-entry, being the Three Terms subsequent to the Ward (the Land holding Ward) and the same were not Liquidat; For if the Superior had been in Possession of the Lands, by vertue of the Ward, he might have continued that same Possession, during the Non-entry; But he not being in Possession, he had his Action therefore, and in the mean time the Vassal ought to be received, but prejudice of his Right *pront de jure*, and sick-like the *Lords* Found the Reason not Relevant to stay the Non-entry, bearing, *That the Lands peratined to him by Recognition, by the Alienation of the same, made by her Father*, seing the Recognition was not declared; but the *Lords* Found, that the Decreet finding the Charges orderly proceeded, ought to bear a Reservation of whatsomever was the Superiours Right, which he had, *pront de jure*, wherein he should not be prejudged by this his necessar obedience, in entering of the Vassal. *Gibson* Clerk. *Vid. March* 12. 1630. *Somervell* and the cases there, *July* 1. 1623. Captain *Cranford*, and the cases there: *July* 29. 1624. Lo. *Caprington* contra *Keir* *.

Ross contra *January* 26. 1630.

AN Incident Diligence, for proving of an Exception, being Received & Admitted to Probation, and in the Second Term, the Pursuer thereof having cited Witnesses out of the Countrey upon 60 days, and offering to make Faith, that they were necessar Witnesses to him, and craving further Diligence against them upon the like space, because they were still out of the Countrey, the *Lords* refused to grant further Diligence against them, upon 60 days, because they were out of the Countrey, before the first Term, when the Incident was admitted, but the Pursuer thereof then did not condescend, nor Protest for an Incident against them at that time, nor Summoned he them at the first Term, albeit he Summoned others, who were then out of the Countrey, against whom he then Protested for an Incident upon 60 days, at which time he made no mention of these, who were thereafter Summoned after the Second Term. Actor. *Gibson*. Alter. *Baird*. *Gibson* Clerk.

Ross contra *Hume*, *Jan.* 27. 1630.

IN a Removing pursued by a Compriser, Deduced against the Liferenter, and Fiar of the Lands Comprised, one of the Defenders, in the Removing, Defending with a Disposition of the Liferent, made to him of that Land, before the Decreet, whereupon the Comprising was Deduced; This Disposi-

tion anterior to the Decreet was sustained, albeit it was not subscribed by two Nottars, and before four Witnesses; For albeit it was Constitute by Infeftment, yet it was not found to be a Matter of Importance falling under the *Act* of Parliament, seing it was only the Liferent of an House, which was Valued not to be Worth of yearly Mail, Three or Four Pound, being in *North-Berwick*: And sicklike it was sustained, albeit it was quarrelled, as falling under the Act of Dyvory, because it was Disponed to a conjunct Person, *viz.* the Disponers Sisters Son, for no just, nor competent Price, but only bearing to be done for satisfaction of Fourty pounds, owing by the Disponer to the Excipient, for Malt Silver, which is not the full Price of the Liferent, and is done long after the Bond of the Debt owing to the Pursuer, whereupon he obtained Sentence, and whereon he Compriled; For albeit his Diligence be after the Disposition, yet the Debt and Bond preceeded the same, and after that Bond no Deed could be done by the Debitor to prejudge his Debt. This Alledgeance was also Repelled, and the Disposition sustained. *Vid. Novem.* 27. 1629. *Paterson*, *Feb.* 1. 1622. *Robison. March ult.* 1624. *Rattray*.*

Hume contra *Hume*, *Eodem die.*

IN a Removing, the Father who was Warned being dead before that Summons was raised upon that Warning, and his Son being Summoned to Remove by the Summons, which was raised upon that Warning against the rest of the Possessors, who were Warned also with his Father. The *Lords* Found no necessity to Warn the Son of new again to Remove at another *Whitsunday*, but sustained Proces against him, upon the Warning made to his umquhile Father, his Son being cited in this Summons with the rest of the Defenders, who were Warned when his Father was Warned, albeit the Son was not Warned. *Partibus comparentibus ut est notatum.* 16 *Decemb.* 1629. betwixt thir same Parties.

Turnbull contra *Colmeslie*, *Eodem die.*

BY Contract of Marriage betwixt *Turnbull* of *Barnhills* and *Colmeslies* Daughter; *Turnbull* being obliged, in case his Wife deceased without Heirs on life procreat betwixt them, to succeed to his Lands of *Barnhills*, in that case to repay 4000 merks which he had received in Tocher, at the next Term after his Spouse decease; and there being a Son procreat betwixt them, who survived after the Mother seven years, and lived that space after her, her Husband being also dead, the Bairn being dead and never served Heir to his Father, nor Entered to the Lands foresaids. It being questioned in the Suspension betwixt the Parties (that Contract being Registrat by *Colmeslies* Assigney) if the Money was due to be re-payed by the Heir of the umquhile Husband, against whom the Contract was Registrat, seing he Alledged, that the case of the Contract had not fallen out, in so far as there was a Bairn procreat on life the time of the Wifes decease, and who lived after her many years. The *Lords* Suspended the Letters *simpliciter*, it being proven that there was a Bairn on life, procreat of that Marriage the time when the Mother died, and who lived diverse years after her; For the *Lords* Found, that albeit that Bairn was not served Heir to his Father of that Marriage, nor entered to the Lands contained in the Contract, and so had not succeeded thereto; yet he being the Bairn of that Marriage, who might have been Heir, and was so in Blood, that failzie of the Contract was purged thereby, seing these words in the Contract, mentionating the Heirs of the Marriage, and not bearing Heirs Served and Retoured of that Marriage, is not to be understood but of Bairns of that Marriage; for the words, *viz. Heirs procreat*, ought to be so understood, seing none can be procreat Heirs but they that are procreat Bairns, and thereafter served Heirs; and the Contract

Contract obliging the Son in Law to refound the Sum at the next Term after his Wifes decease, could not take effect, seing the Bairn lived seven years after her, and so the Charges were Suspended. *Vid.* 16. *Decemb.* 1628. L. *Collingtoun.* 4 *Feb.* 1642. *Lutesoot.*

Upon the 16 of *June*, 1630. This Cause being of new heard again, this Decision was followed, and the words of the Contract, *viz. Of an Heir to succeed to the Lands*, was understood of a Bairn surviving, who had possibility to succeed, albeit he had never succeeded; for the Father might have sold the Lands, albeit the Son were living, and so he could not succeed. *Actor. Mowat* & *Stuart.* Alter. *Nicolson* & *Craig. Gibson* Clerk.

Lawrie contra *Kier*, *January* 29. 1630.

IN a Reduction of a Decreet recovered before the Town of *Stirling*, by *Lawrie* contra *Kier*, whereby *Kier* was Decerned to Subscribe a Contract conform to a Verbal Paction, whereby *Lawrie* Sett to him some Acres of Land for seven years, for payment of the Duty conveened on, and according whereto *Kier* had possessed the Lands a year. The Reason of Reduction was, because it was found proven by Witnesses, albeit such Pactions could not be proven but by Writ, or Oath of Party. Which Reason was found Relevant, and the Reducers Oath Ordained to be taken, and the Decreet Reduced; albeit also the Party Reducer was holden as confest by his Oath *de calumnia* in that Process, and the Decreet bore the same. *Vid.* 15 *July* 1637. Mr. *Andrew Skeen*, and the Cases there.

Scot contra Feuars of *Kings-barns*, *Eodem die.*

SIr *James Scot* having a Pension from the King, of the Victual payed by the Feuars of *Kings-barns*, and Charging therefore; and the Feuars Suspending, that they had never been in use to pay the Bolls to the Kings Chamberlain, nor his Officers, at no time preceeding, but only the Prices modified by the Lords of Exchequer, which they were still content to pay to the Pensionar, as they should modifie the same. The *Lords* Found, that the Feuars were not holden to do to the Pensionar, but as they were in use before to pay to the Kings Thesaurers and Officers, and therefore that they were only subject to him to pay such prices as the *Lords* of Exchequer should modifie for the Feu-Farm-Duties. *Actor. Primrose.* Alter. *Scot* Clerk.

Dennistoun contra *M'clinto*, *Penult January*, 1630.

DEnnistoun having obtained Decreet against *M'clinto* in his own Court, he being his Tennent of the Lands, which were holden by *Dennistoun* of the D. of *Lennox*, for payment of certain Sums incurred for cutting of his Wood, conform to a Contract betwixt thir Parties, whereby the Tennent was obliged to pay the same, if it were tryed in his Masters Court, that he had contraveened; and upon this Decreet seeking Letters conform, the D. of *Lennox* compeared, and Alledged, that that Decreet was null, being given in his Vassals Court, in prejudice of his Regality, where the same should have been tryed and judged. The *Lords* Found, that in respect that the Sentence proceeded upon a mutual Contract betwixt the Master and his Tennent, who consented that the Tryal should be taken in his Masters own Court (he being Infeft *cum curiis*) that therefore the Master might Judge the same in his own Court, wherein the Superior and Lord of the Jurisdiction could not pretend prejudice; for if the Tennent had done any thing against the Law, in cutting green Wood, or otherways, which might bring him under Censure, the Lord having the Soveraign Jurisdiction, might pursue him therefore, wherein this Sentence upon a mutual Convention could not derogat; and it was Found, that the Vassal Infeft *cum curiis*, had power thereby to conveen his Tennent upon his

own consent, and that the Clause *cum curiis* extended not only to a power to hold Courts upon his Tennents for their Farm, but also to any other Act against his Tennents, specially it being so conveened between them; and it was not respected where the D. Alledged, that if all the Vassals should so Contract, his Jurisdiction would be eluded; nevertheless the Decreet was Rescinded, and the Defender Reponed to propone all his Defences *in causa* in this place here before the *Lords*, in respect the Defender produced an Instrument, where he offered to give his Oath (the Action being referred thereto) and nevertheless was Decerned as Contumax. Actor. Alter. *Burnet*, *Gibson* Clerk. *Vid.* 3 *March* 1630. Lo. *Lorn*.

Calderwood contra *Porteous*, *Eodem die*.

Porteous being conveened for payment of 100 pounds, adebted by his Father, as behaving himself as Heir to him, by intromission with his Heirship Goods; and he Alledging his Intromission to have been by vertue of an anterior Disposition made by his Father of the same to him. The *Lords* sustained this Disposition to liberat him; albeit the Pursuer Replyed, upon the Fathers retention of the Possession, notwithstanding of the Disposition, to the time of his decease; which was Repelled, seing the Defender Duplyed, that his Father becoming old and decayed in Means, and wanting a Wife, she being then deceased, and the Son being Married thereafter, remaining with him together in one Family, that could not make the Father to be esteemed Possessor, seing rather the Son might be repute to entertain his Father, which was sustained. *Hay* Clerk. *Vid.* 28 *June* 1632. *Dalrymple* and the Cases there. 12 *July* 1628. L. *Moristoun*.

Hamilton contra *Sharp* and others, *Feb.* 2. 1630.

Sir *John Hamilton* intents a Reduction against Mr. *John Sharp*, *John Inglis*, and one *Armour*, for Reducing at his instance as Proprietar of the Lands of *Barganie*, an Infeftment publick, anterior to his Right of Annualrent of 1000 pounds out of these Lands, granted to the Lord *Ochiltrie* by the Laird of *Barganie*, and *Josias Stuart* his Curator, for the Cause expresst in the said Infeftment: the reason was the Minority of the Disponer, and want of Authority of the Judge Ordinar, *viz.* the *Lords* of Session, finding upon tryal the Alienation necessary, and for the good of the Minor; which Reason the Pursuer Alledged to be Relevant *quocunque tempore*, as well *post annos utiles Minoris* as within the the same, when-ever it were Pursued to Reduce such Alienations, and that as it was enough to the Minor himself after the expiring of these years after his Minority, so to his Successors to Reduce upon that ground of wanting of a Sentence of a Judge, albeit he qualified no Lesion done thereby to the Minor, seing he Alledged it to be a Nullity of the Law, and that the Deed being null of the Law, as is evident by the Civil Law *de alienationibus prædiorum Minoris*, and that this Case was different from the Restitution of Minors upon Lesion, which requires Pursuit to be made within four years after Minority. The *Lords* would not Sustain this Reason, except the Pursuer joyned therewith lesion; and also Found, that the same ought to be Pursued within four years after the Minority, as is appointed by the *l.* 3. *Si quando Cod. si major factus alienationem factam sine decreto ratam habuerit, qui est Tit.* 74. *lib.* 5. *Cod.* and because the Pursuer condescended in his Reason upon Lesion, and that he Replyed, that the Minor himself had Revocked *debito tempore*, and intented his Action of Reduction of that Alienation; therefore this Reply was Sustained to interrupt the Prescription, and it was Found, it being so interrupted once by the Minor himself, the singular Successor might *de novo* intent this new Action of Nullity, without necessity to insist upon that prior Reduction. Actor. *Stuart*. Alter. *Nicolson*. *Gibson* Clerk.

Minister

Minister of *Falkland* contra Minister of *Stramiglo*, *Eodem die.*

TWo Ministers in a double Poynding, raised by certain Parochioners of *Stramiglo*, who had their Goods Pastured upon the *Lowmonds* of *Falkland*, contending who should be answered of the Viccarage of these Goods, which the Minister of *Falkland* claimed as due to him, seing *Falkland* and the *Lowmonds* ly within the Paroch of *Falkland*, and so all the Goods Pasturing thereupon ought to pay Viccarage to him: and the other Minister Alledging, that the Viccars of *Stramiglo* has been ten years in possession of receiving the Viccarage-Teinds for these Goods, which his Parochioners of *Stramiglo* were in use to Pasture on the *Lowmonds* continually, without questioning thereof by the Minister of *Falkland*. This use of Payment was Preferred in this Possessory Judgment, albeit the *Lowmonds* lyes naturally within *Falkland*, the samine being a great Pasturage Bounds, whereupon other Parochioners Pastures besides these of *Falkland*. Actor. *Pitcairn*. Alter. *Mowat*.

Dowglas of *Pumpharstoun* contra *Lyne*, *Eodem die.*

IN a Removing, the Defender defending with his Infeftment of the Miln libelled, and four Acres of Land; and the Pursuer passing from that, and desiring the Defender, to Remove from all which should exceed four Acres after Metting. The *Lords* Found, that in the Removing, the Defender and his Predecessors immemorial Possession of the Land, which they bruiked as four Acres of Land without interruption, ought to defend against this Removing, albeit the excresce of the Land possest should exceed four Acres, and should be more than six or seven; whereanent in this Removing, the *Lords* would take no tryal by Metting. Actor. Alter. *Craig*. *Vid.* 1 *Feb.* 1634, Sir *Patrick Murray*, and the Cases there.

Hamilton Minister at contra *Tweedie*, *Eodem die.*

A Minister being desired to Remove from the Soums Grass due to the Viccar Lands, wherein *Tweedie* the Pursuer was Infeft, and the Minister defending with his Designation, whereby he had Priviledge of Pasturage, seing the whole Viccar Lands was twenty six Acres, and the Minister had only four thereof designed, and so he ought to have Pasturage, seing the Kirk-Land had the Pasturage of twelve Soums Grass. The *Lords* Found, that albeit the Minister bruiked four compleat Acres for his Gleib, yet he ought also to have a part of the priviledge of Pasturage, which was due to the Viccars Land, and wherein the Viccars Feuar was Infeft; and therefore they Found due to the Minister the priviledge of one Horse Grass for his Travelling to Presbyteries, and others his lawful Business, and of two Gows Grass for his House and Family, and that the Pursuer had Right to the rest, and that the Minister should have no more.

Town of *Edinburgh* contra Town of *Leith*, *Feb.* 4. 1630.

IN a Suspension of Charges, Execute against the Town of *Leith*, for Selling and Tapping out of Wine in small, contrary to the tenor of the Act of Parliament, *Ja.* 4. *Parl.* 6. made in favours of Royal Burghs, which Prohibites the same. The *Lords* Sustained the Charges upon that Act, albeit it was Alledged, that it was past in Desuetude, and a constant contrary Consuetude observed, and that it was a prejudicial Act to the Common-wealth, to Prohibite the Selling of Wine and other Vivers in Land-ward, Claugh-lands, and Burghs of Barony, and other Villages where the Kings Leidges do Repair and Lodge; seing it is also commanded by Act of Parliament, *Ja.* 5. *Parl.* 4. *That all Villages be well furnished with Provision for Lodging of the Kings Subjects.* Notwithstanding whereof the Charges were Sustained, for this Reason, *viz.* not only in respect of the priviledge of Burghs Royal, but also becaus *Edinburgh* was Baron of

Leith, and the Inhabitants within the Barony ought to have Liberty of their Superior for Selling of such Furniture, and also there were divers Decreets *in foro contentioso* betwixt these Parties upon the same Subject. Actor. *Nicolson* & *Stuart*. Alter. *Aiton*, *Mowat* & *Craig*. *Gibson* Clerk. *Vid.* 11 *March* 1630, betwixt these Parties.

Earl of *Kinghorn* contra *Strang* of *Kilrinie*, *Eodem die*.

IN an Improbation, The *Lords* Found, that one Pursuing for Reduction and Improbation of Evidents of Lands made by the Pursuers Father, for Improbation whereof he Pursued as Heir to his Father, Maker of these Writs, had good Action and Interest as Heir to Pursue the same, albeit he was neither Infeft himself in these Lands as Heir, nor yet did libel that his Father was Infeft; for he being Heir, and so subject to Warrand the Deed done by him, to whom he was Heir, he might seek Reduction and Improbation; but *hoc titulo*, as Heir, if he be not Infeft, he could not Pursue Reduction of the Writs made by his Father of these Lands. Actor. *Advocatus* & *Nicolson*. Alter. *Stuart* & *Aiton*. *Gibson* Clerk. *Vid.* 1 *Dec.* 1630, *Ramsay*. 4 *Feb.* 1631, L. *Glengarie*. 7 *March* 1629, *Moreis* contra *Johnstoun*. 5 *July* 1632, Sheriff of *Forrest*. 12 *Dec.* 1635, *Rowan*.

And betwixt the same Parties an Infestment having followed upon a Compryfing, proceeding upon a Sentence of Non-entry, Obtained at the instance of one, who was made Assigney to the Gift of Non-entry by the Donatar thereto. This Infestment, Compryfing, and Sentence, being desired to be Reduced, because the Assignation was alledged false and feigned, there having interveened 48 years since the Infestment and Compryfing foresaid was expired, The *Lords* Found, after so long a time the Party was not holden to produce this Assignation, and therefore that the Sentence, Compryfing, and others following thereupon, ought not be Reduced for not Production, that Writ never being called for, nor quarrelled at any time before, and the Compryfing thereupon having taken effect, by Infestment and Possession continually sensine unquarrelled, and the Assignation not being a material and fundamental Right of the Land, and the Pursuer having no Right from the Cedent. *Vid. Ult. Feb.* 1628, E. *Nithisdale*, and the Cases there.

Muir contra *Muirs*, *Feb.* 6. 1630.

IN a Redemption of Lands, wherein the Son was Infeft by the Father under Reversion, the Reversion bearing, *Whensoever the Father should Redeem from him*, not making mention of his Heirs; the Father after decease of his Son Redeeming from the appearand Heir of his Son, no Party Defender Compearing, and the Clerk advising with the *Lords*, if this Reversion of this Tenor should be effectual, to Redeem from the appearand Heir of the Son; the *Lords* Found, that albeit the Reversion made mention of a Power to Redeem from the Son by the Father, and bore not these words *from the Sons Heirs and Assigneys*, yet that the Father had Power by the said Reversion after the decease of the Son, albeit there was no Redemption used by the Father, while the Son lived, to Redeem also thereby from his appearand Heir, and that the Reversion was not Personal, so as it became extinguished by the Sons decease. *Hay* Clerk. *Vid.* 25 *March* 1628, Mr. *James Hume*. 14 *July* 1629, Laird of *Wards*. 3 *March* 1630, *Murray*.

Commissar of *Dunkeld* contra Mr. *Patrick Murray*, *Feb.* 9. 1630.

THE Commissar Pursuing his Creditor, and also the Donatar to his Escheat, to produce the Horning, and to hear it Reduced; it being questioned betwixt the Pursuer and the Donatar (the Creditor being absent in the Process,) if the Pursuer be holden to produce the Horning himself to the Defender;

der; the Donatar Alledged he ought to do it, seing the same was Registrat in a publick Register, and so could not be Reduced for not Production, albeit the Defender should not produce the same. The *Lords* Repelled the Alledgance, and Found that there was no necessity, that the Pursuer should produce the same, but Found that if the Donatar who Compeared did not produce the same, that they would Reduce it for not Production. *Hay* Clerk..

Roß contra *Elliot* of *Stobbs*, *Feb.* 11. 1630.

IN an Action of Poynding of the Ground for a yearly Ground-Rent of 400 merks, at the instance of *James Roß*, the Defence against his Seasin being that it was null, being base and not clad with Possession against him, who was Infest publickly, and a singular Successor to the Author of the Pursuers Right. This Exception being Eleided by a Reply, that the Pursuer was in Possession of receiving of the Annualrent foresaid, conform to his Seasin, which supplyed the baseness of the Right; and this Reply being admitted at the Term of Probation, the *Lords* Found that this Possession might be proven by Witnesses; for albeit it tended to Burden the Land with that Annualrent, which the Defender Alledged could not be done by Witnesses, yet it was Repelled, seing it tended to Corroborate the Right, which was constitute by Writ. Actor. *Belshes*. Alter. *Gibson* Clerk. *Vid.* 16 *January* 1627, *Dawlings* Bairns. 14 *Feb.* 1633, *Charters*, and the Cases there cited. 18 *July* 1626, *Winrham*.

Ker contra L. *Lempitlaw*, *Eodem die*.

IN a Reduction of *Lempitlaws* Comprising, because *Lempitlaw* before the Comprising had discharged a part of the Sum, for which he had Compriſed. The *Lords* Found not this Reason Relevant, but Assoilzied therefrom, in respect that this Discharge was competent to have been proponed by the Reducer, before the Sentence whereupon the Comprising was Deduced, and he Compearing and proponing sundry Exceptions, this being omitted, It was Found, that he could not Reduce thereupon; But the *Lords* declared, that in the Redeeming of the Compriſed Lands, defalcation should be made, of as much of the Money, for which the Lands was Compriſed, as the Sum of the Discharge, extended to. Another Reason of Reduction bearing, *That is was agreed by Contract, betwixt the Parties, that if any of them should Annailzie any part of the Sums whereto they had Right, to any Person, that the Annailzier should tyne all Right that he had thereto.* And the L. *Lempitlaw* having sold his Right, which was sufficiently qualified, Absolvitor was also given from this Reason, because the *Lords* Found, that this Failzie against the Contract, by making of the Alienation, ought not to Import the Conclusion desired, and conveened on by both Parties in the Contract, except the Pursuer could qualifie some prejudice sustained by him, through making the Alienation contrair to the Contract, which Prejudice not being qualified, and the Reducer sustaining no hurt thereby, the *Lords* Found the Failzie ought not to be sustained, to pursue a Reduction thereon, but Assoilzied therefrom, albeit it was so expressly conveened betwixt the Parties. Actor. *Stuart* & *Lawtie*. Alter. *Nicolson*. *Hay* Clerk. *Vid. Novem.* 25. 1629. *Dickson* contra *Ker*.

Guthrie contra *Guthrie*, *Eodem die*.

FRancis *Guthrie* after his Minority, pursuing the Heir of one of his two Curators, for payment of a Sum of the Pursuers, Intrometted with by the said Curators, conform to an Acquittance subscribed by them both, upon their Receipt, the Heir of the Curator being conveened, Alledged, that she ought only to be conveened for that one half, wherein her Father, as the one of the two Curators, should be found Obliged; for they being conjunct in the

Office, the other should be Answerable for the other equal half. This Alledgance was Repelled, for the *Lords* Found each one of the two Curators lyable, *in solidum* to the Minor for the whole, and the Minor might lawfully pursue any of them at his pleasure for all; but Found that each one of the saids two Curators should relieve others of the equal half, and that amongst themselves, the Curator distrest might seek payment of the half from the other; And consequently a Curator taking Assignation from the Pursuer, who was his Minor, after Majority, to the whole Debt, and thereby seeking payment of the whole, from the other Curator, It was Found, that the pursuit could not be sustained for the whole, albeit it was pursued in the Minors own Name, seing his Name was borrowed, to the behove of the other Curator.

Laird *Rowallan*, contra the Relict of *Boyd*. *Feb.* 13. 1630.

THE Laird of *Rowallan* having Set a Liferent Tack Personal to one *Boyd*; which Tacksman dieing before *Martinmass*, after his decease *Rowallan* immediately raises Summons against the Relict, for Removing from the Lands, and to hear it Found, that he may enter to the Lands; and the Relict Alledging, that this Summar Order cannot be sustained against her, but that she ought first to be Warned before the Term of *Whitsunday*, as use is in all Ordinar Removings; The *Lords* Found, that this Summar Order of Removing ought not to be sustained, and that the Relict had no necessity to Remove, untill the time that she were Warned before *Whitesunday*, conform to the Order in other Actions of Removing: for albeit her Husband had only a Tack for his Lifetime, yet the *Lords* Found this Cause to differ from a Liferenters Right bruiked by Infeftment; In which Case the Fiar, after the Liferenters decease, gives no Warning, but may then Summarly Remove, and enter to the Possession of the Land Liferented, the same being Laboured with the Liferenters own Goods, albeit, if the Liferenter had Set the Lands to Tennents, *eo casu* the Fiar could not Remove the Tennents summarly, without Warning, but that he had then Right to the Duty, for which the Lands was Set by the Liferenter; but this Case of a Liferent-Tacksman was not found alike, and so that the Priviledge of the Fiar, when the Liferent of the Fie ceases, is not to be extended further than that Case: for the Relict of the Tacksman was not found to be in a worse case, than if her Husband had been a naked Tennent without a Tack, *quo casu* the Order of Warning ought to have been used: and this was found, albeit the Liferenter Possest, and at his decease laboured the Land with his own Plough; and albeit the Pursuer Alledged, that the Liferent-Tack was Set for Personal Service, of Ryding on Horse-back with the Pursuer, which he Alledged could not be performed by the Relict, nor by no other Person, whom she could furnish to Ryd with the Pursuer, whom she could not choose to the Pursuer, seing he had chosen the Person of whom he required the Service by the Tack, and no other could be substitute by her in his place, notwithstanding whereof the Order was not sustained, but the Relict was Ordained to furnish a competent man to the Pursuer, to Ryd with him, when he should require the same. *Gibson* Clerk. *Vid. Feb.* 1. 1631. L. *Blanse*.

Mr. *James Ord* contra *Duffs*, *Feb.* 15. 1630.

MR. *James Ord* having pursued *Duffs*, as Heirs and Executors to umquhile *Alexander Duffs*, for payment of the Prices of certain Glasses, *viz.* Drinking Glasses, and Window Glasses, which were received by the said umquhile *Alexander* at sundry times, pertaining to Mr. *James*, and were sent by him to *England* with his Servant in a Ship, Fraughted by the said *Alexander* to that effect, in which Ship the said *Alexander* made Sail, and who after Selling of the saids Glasses in *Hul* in *England*, intrometted with the whole Prices thereof

thereof, and never made him payment thereof. The *Lords* Found, that this *Action* (which was not intented within Three Years after the time of the lybelled Intrometting with the Glaſſes, and Prices thereof) came under the *Act* of Parliament 1579. anent Preſcription in certain Caſes of Debt, not being purſued *debito tempore*, and therefore that the ſame could not be proven but by Writ, or Oath of Party, and that it was not probable by Witneſſes, no more againſt the Executor than againſt the Defunct. Actor. *Nicolſon* & *Oliphant*. Alter. *Cunninghame*. *Hay* Clerk. *Vid. July* 2. 1630. *Haris* contra *Scot*.

Harper contra *Jaffrey*, *Eodem die*.

HArper as *Aſſigney* by a *French Man* in *Rouan*, to a Debt owing by *Jaffrey* to him, conform to his Bond, purſues therefore, the Bond being made in *French*, and done in *Rouan*, neither deſigning the Writer thereof, and wanting Witneſſes, and ſo the Defender Alledging, that it could not furniſh Action againſt him, ſpecially ſeing he denyed the Subſcription to be his Hand Writ. The Purſuer Replying, that he offered him to prove, that it was the cuſtom allowed by the Law of *Normandy*, where the Bond was made, that ſuch Bonds were effectual againſt the Maker, albeit both wanting Witneſſes, and wanting the Writers Name; and where he denyed the Subſcription, he abode by the ſame, as Subſcribed truely, ſo that his denyal ought not to be Reſpected, except he would Improve the ſame; and the Defender Alledged, that the Purſuer ought to approve the Bond to be the Defenders Hand Writ; ſeing the means of his Improbation was taken away, by the want of Witneſſes, and Writer. The *Lords* Found the Reply upon the cuſtom of *Normandy* Relevant, which being proven, ſuſtained the Bond, and Found no neceſſity to the Purſuer to approve the Bond, but that it was Good, except the Defender ſhould Improve the ſame, and had no reſpect to his denyal of the Subſcription, and the *Lords* would not burden the Purſuer, that this cuſtom was obſerved in Caſes where the Debitor denyed his Subſcription. Actor. *Nicolſon* & *Lawtie*. Alter. *Burnet*. *Gibſon* Clerk. *Vid. July* 1. 1631. *Mccubin*, and the other caſes there. *Decem.* 6. 1626. Strangers of *Midleburgh*. *Decem.* 11. 1627. *Falconer*.

Wright contra *Wright*, *February* 18. 1630.

THe Defender producing a Horning, to debar the Purſuer *ab agendo*, and the Purſuer producing a Ticket ſubſcribed by the Party, at whoſe Inſtance the Horning was Execute, whereby he declared, he would not uſe that Horning againſt him, and Diſ-aſſented, that this Party, or any other ſhould uſe the ſame againſt him, to debar him from his Purſuit. The *Lords* Found, that notwithſtanding of the ſaid Writ, any Perſons might produce Horning againſt the Rebel, albeit the Party would not uſe the ſame, at whoſe Inſtance it was Execute; For as long as he was Rebel un-relaxed, he could not have Proceſs, and being un-relaxed, any Party might Propone, and Produce the Horning; But Found, that this Ticket would be a good ground, whereupon the Rebel might ſeek to be Relaxed, to have *perſonam ſtandi in judicio* in that Purſuit; albeit thereby he would not be ſimply Relaxed therefrom. Actor. Alter. *Mowat*.

Douglas contra L. *Swinton*, *February* 19. 1630.

ONe *Douglas* Heir to *William Douglas*, who was Infeft in *Coldinghame*, by *John Stuart*, and *Alexander Cranſton* of *Moreſton* alſo Infeft, to be holden of the ſaid *John*, purſuing Improbation againſt the Laird of *Swinton*, for Writs of the Lands pertaining to *Coldingham*, holden of the King, and granted by the King Author to *John Stuart*. This Action was ſuſtained at the Inſtance of the Purſuer, upon his baſe Infeftment, for production of the publick In-

feſtment, and all Rights of theſe Lands, made to the Defender, becauſe they were lybelled to be falſe. Actor, *Craig* & *Stuart*. Alter, *Nicolſon* & *Nisbit*. *Gibſon* Clerk. *Vid. January* 25. 1627. *John Stuart*. *March* 2. 1627. Heirs of the Lo. *Teſter*.

L. *Hidleſton* contra *Maxwell*, *Eodem die*.

Hidleſton purſuing Contravention upon this Deed, *viz.* Becauſe he was Ejected out of his Roum; And the Defender Alledging, that ſeing the Purſuer had an Ordinar Action of Ejection Competent to him in Law for that Deed, for which he purſued Contravention, therefore that Contravention ſhould not be ſuſtained. This Alledgance was Repelled, for the *Lords* Found, that where the Party had two Actions in Law, by which, or either of them he might ſeek Redreſs for any one Deed, that he might purſue in his Option either of them, at his pleaſure; But where there are two Actions upon one fact, *ſi utraque tendat ad vindictam, electa una non recurrit ad alteram, quia pœnam petit, & ut injurians puniatur, niſi & cum injuria damnum datum ſit, tum enim poſt pœnam petitam, poteſt agi ad reparationem damni*, *Vide plura Pag*: 19. *Notarum mearum*.

Ritchie contra *Paterſon*, *February* 23. 1630.

William Paterſon being Cautioner Acted in the Books of Burrows for *Hector Paterſon*, who was admitted a *Flemiſh* Factor for *Scots* Merchants, after Sentence obtained before the *Lords*, by *John Ritchie* Merchant Burges of *Edinburgh*, againſt the ſaid *Hector*, for payment of a Sum adebted to him for certain Merchandiſe, conform to his Merchant-Compt, with the Annualrent thereof, ſince the Sum was due to be payed, which Decreet was given againſt him in Abſence, the ſaid *John Ritchie* purſues the ſaid Cautioner, for payment of the ſaid Sum, and Annualrents, wherein the Cautioner Compeared, and Alledged that this Action, betwixt Merchant and Factor, ſhould be purſued before the Conſervator, conform to the Act of Parliament, *Ja.* 4. *Pa.* 6. *cap*: 81. This Alledgance was Repelled, and the *Lords* Found, that this, and the like Purſuits may be purſued before the *Lords* of Seſſion; For by that Act it was only ſtatute, that ſuch Purſuits ſhould be purſued before no other Judges out of the Realm, but the Conſervator; And alſo the *Lords* Found, that the Cautioner was not ſubject to pay Annualrent for the Money adebted by the Factor, albeit the Factor himſelf was decerned therein as ſaid is, he being abſent and Bankrupt. Actor. *Miller*. Alter. *Trotter*. *Gibſon* Clerk. *Vid. March* 4. 1630. betwixt theſe ſame Parties.

contra *February* 25. 1630.

After an *Adjudication* Deduced upon the Creditors Decreet, obtained againſt a Party Renuncing to be Heir to the Debitor. The Creditor purſuing for the Mails and Duties of the Lands Adjudged, the Proceſs and Action was ſuſtained, albeit no Party was called, but the Tennents and Poſſeſſors; and there was no neceſſity found, to Summon the Party againſt whom the Adjudication was Deduced, as the Defender Alledged ought to be, which Alledgance was Repelled. *Hay* Clerk.

Maxwell of *Caſtlemilk* contra Mr. *David Rodger* Miniſter, *Eodem die*.

THe Miniſter being provided to the Parſonage of the Kirk of [illegible] and in Poſſeſſion of 12 or 14 Aikers of Land at the ſaid Kirk, by and attour his Gleib of 4 Aikers deſigned, from the which he was purſued to Remove by the Purſuer, and the Miniſter Alledging, that he was provided to the Parſonage of that Kirk, whereby he had Right to the whole Kirk-Lands thereof; Likeas he was 18. years in Poſſeſſion of the 12 Aikers acclaimed, which

are and has been reput Kirk-land, by common estimation; And the Pursuer Replyed, that this Possession whereto the Minister entered, was without Order of Law, the time of the Lord *Maxwells* Forfaulture, whom this Pursuer followed, and that estimation whereby the same was Alledged to be Kirk-lands, was only proven by two Witnesses, and could not be found enough, to take away the same from the Pursuer, which he Alledged to be his Heretage bruiked by him, and his Predecessors, past memory of Man, as a Part of his Lands of wherein he was Infeft, and his Predecessors; and for which Lands he Alledged, he and they received yearly Duty, past memory of Man, there being no monument extant, to qualifie that it was Kirk-lands, neither by Foundation, Charter, Feu, Tack or Rental; nor ever possest by any Kirk-man, or ever Duty payed therefore, to any Kirk-man; Likeas the same lyes contigue to his saids Lands, wherein he is Infeft; and by the contrair, there is a stryp betwixt the same and the Ministers four Aikers of his Gleib, whereby it appears, it has not been of before Kirk-land; and he offered to prove, by an Inquest of 15 sworn Gentlemen, that the same has ever been repute Land pertaining to him, and to his Predecessors, and not to the Kirk. This Reply was Rejected, and the Exception admitted to Probation, to the Defender, in this Judgement Possessor. Actor. *Cunninghame* & *Lawtie*, Alter. *Nicolson* & *Mowat*. *Gibson* Clerk.

James Hay of *Tourlands*, contra Earl of *Eglington*, *Eodem die*.

A Decreet of Spulzie of Teinds obtained by the Earl against *James Hay*, being Suspended by him, upon a *Reason* founded upon a Bond of Submission, made by the Earl to the Laird of *Caprington*, whereby he submitted to the Laird *Caprington*, what the said *James* should do to him, for the said Decreet, by which Bond he Obliged him to abide at whatsoever *Caprington* should Decern, and declare thereanent, the Submission and Bond being only Subscribed by the Earl, and not by the other Party, nor *Caprington*, and having no time therein contained betwixt and which the Judge was holden to decern; and he having decerned by the space of four years after the date of the said Bond, at least the Decreet produced by the Suspender in Writ, being written of that date, but proporting, that the Judge decerned the next morning, after the date of the Submission; And that he had intimat the Sentence to the Party submitter at that time, which he had then put in Writ, of that date whereof it was produced, whereupon the Earl proponing Nullity; and having Intented Reduction upon that same Reason of Nullity, *viz.* That it was dated after year and day; and that the Relation therein bearing it to be done *debito tempore*, ought not to be respected, being a Declaration made at that time, when the Judge was *functus officio suo* as said is, and when he had no power. This Alledgeance and Reason was rejected, and notwithstanding thereof the Decreet sustained: for this being a Bond, obliging the Party to abide at the Judgment, and Declaration of the Person chosen and nominat in his Bond, and he being limited to no day, betwixt and which to determine. It was *Found*, that such Bonds and Submissions expyres not after expiring of year and day, after the date thereof, but that the same lasts and endures, and the Judge may make his Declaration at any time, so long as the Party survives, at least at any time before he be Charged by the Parties to Decreet, and within a competent space, as the Judge shall think reasonable to Assign after the Charge. Actor. *Nicolson* & *Scot*. Alter. *Stuart* & *Belshes*. *Scot* Clerk. *Vid. March* 14. 1639. *Hepburn* contra *Hepburn*.

William Lockhart of *Carstairs* contra the Tennents of *Bothwel*, *Feb.* 26. 1630.

THe Defender Alledging in a Removing, that he could not Remove, becaus he was Rentalled in the Lands lybelled, for Terms to run;

And the Pursuer Replying, that the said Rental was Personal, only Set to himself, without any mention of his Heirs, or Assigneys, and so that it might not be Disponed by him to any other; and that it was true, that the Defender had Disponed the same to another, *viz.* who was also in Possession of the saids Lands, whereby the Rental was extinct. The *Lords* Found this Reply Relevant, and that the Rental could not Defend, neither the Rentallers self, who was only pursued to Remove, nor yet the Assigney thereto, if he had been pursued also, as he was not. But the *Lords* Found, that the Pursuer was holden to prove, that the Assigney was in Possession of the Land, albeit he was not warned, without which, many of the *Lords* thought, if the Reply had not been proponed upon his Possession, that the Rentaller himself, who was only pursued, might have maintained his Possession, if he had retained the same, by vertue of that Rental against the Removing, albeit so Transferred, which Opinion would appear to be hard; For if the Disponing of a Rental, will make it fall to the Assigney, if he had been Warned, and had Possest, as it was Found, (the Rentallers Possessing in the Assigneys Name, and to whom he was become Sub-tennent, by payment of the Dutie, for the Land) can never defend the Rentaller himself, seing his Possession behoved to be repute the Assigneys, so that the retaining of the Possession is of no Force. Actor. *Mowat.* Alter. *Gibson* Clerk. *Vid. July* 28. 1630. La. *Maxwel. Jan. ult.* 1633. L. *Cleghorn. Feb.* 21. 1632. L. *Johnston. March* 15. 1631. E. *Galloway* (at the end thereof) and the Cases there.

L. *Lochtower* Supplicant, *Feb.* 27. 1630.

THe Laird of *Lochtower* gave in a Supplication, making mention that he had Compriſed his Debitors Lands, to be holden of a particular person, who was not Superiour; which Compriſing was allowed by the *Lords*, and Charges were ordained to pass, to Charge the Superior to enter him, albeit he was not Superiour of these Lands, and therefore he craved new Charges against another, *viz.* the Lord *Yester*, who was the right Superiour, to receive him thereupon; The desire of this Supplicant was granted, and summar Charges ordained to be given against him at the Compriſers instance, without any further tryal, albeit the Compriſing and prior Charges made mention of another Superiour.

Helen Scarlet contra *Paterson*, *Eodem die.*

UMquhile *John Paterson* having given to *Alexander Paterson* his Creditor, Infeftment of a yearly Annualrent of 400 merks, to be uplifted out of his Lands in *Edinburgh*; Thereafter the same Lands are Compriſed by another of the said umquhile *John Paterson* his Creditors, and after the Annualrenter acquires from that Compriſer his Right of the Property Compriſed by that Creditor, after this Compriſer *Helen Scarlet* Compriſed the same Lands, for Debt owing to her by the said umquhile *John*, who contending with the prior persons for the Right of the Lands, and for the Maills thereof; and the Annualrenter who was before both the Compriſings, and who also had acquired the Right of the prior Compriſing, craving Preference, and *Scarlet* second Compriſer, Alledging that the prior Compriſing was extinct, because by his Intromiſſion with the Duties of the Land, he was fully satisfied of the Sums for the which he had Compriſed, and the Annualrent, and Expences of his Compriſing, and that for his Annualrent he could not retain Possession of the Lands against her, who had now come in the place of the said first Compriſing, whereby she had only Right to claim possession of the Land, and that he could not retain the Lands, nor come betwixt her and the Possession thereof, for payment of his prior Annualrent, because he might Poynd or Compriſe the Land therefore, but

but could not interveen betwixt her and the Tennents, for the Right to the Land, and the Maills thereof. The *Lords* Found, that the Annualrenter having acquired the first Compriser his Right of the Property Compriſed, had thereby confounded the Property with the Annualrent, and that the Intromiſſion had by him ought first to be aſcribed to the Compriſing, and for payment of the Sums for which the Lands were Compriſed, before he could claim payment of the Annualrent, albeit the ſame preceeded both the Compriſings, ſeing the Right of the Property Compriſed was the moſt Soveraign *Right*, and therefore the Intromiſſion ought to be aſcribed to that Cauſe, and not to the Right of the Annualrent; by the which Right he could never, as Annualrenter, have attained to the Poſſeſſion of the Land: for the first Compriſing, being become extinct by Intromiſſion with more than ſatisfied the ſame, it was Found that the Intromiſſion could not be aſcribed to the Annualrent, albeit prior, as ſaid is; but to the Compriſing of the Property, albeit the whole Intromiſſion, [the ſamine being Compted betwixt the Parties] did not compleat the Annualrent of the Terms owing to him; and albeit by the ſame the ſaid Compriſing was ſatisfied, whereby the Right of the Property, which thereby was in his perſon ceaſed, & by which the Argument of Confuſion and Conſolidation of the Property with the Annualrent now ceaſed, the ſaid Compriſing of the Property being unexpired, and ſubject to the Legal Reverſion, and found now in effect redeemed and extinct, wherethrough he Alledged he ought to have the preference, and might have recourſe to his Right of Annualrent; whereas the Conſolidation might only have place, if he might bruik the Land as Proprietar, which now he could not: Notwithſtanding whereof the Lords preferred the ſecond Compriſer to the Right of the Land, and the Duties thereof, againſt the Tennents, as ſaid is; ſeing they Found, that the Annualrenter might Poynd for the Annualrent, or Compriſe the Property therefore; after which Compriſing he would be preferred in the Right to the Land; but as an Annualrenter he could not retain Poſſeſſion of the Land before he had Compriſed, and ſo the ſecond Compriſer might ſeek the Tennents, or Remove them from the Lands, as ſhe pleaſed; neither was it reſpected, where the Annualrenter Alledged, that if ſhe Removed the Tennents, the Lands might become waſte, and un-inhabited and ruinous, whereby he would be prejudged of his Annualrent; which was Repelled, ſeing he might Compriſe the Lands therefore, as for all Terms whereof he ſhould be unpayed. Actor. *Cunninghame* & *Scot.* Alter. *Stuart. Scot* Clerk. *Vid. 9 March* 1630. *Alexander Auld.* 15 *July* 1629. Sir *John Hamilton.*

Wright contra *Wright*, *March* 2. 1630.

Thomas Wright in *Leith* having Purſued *James Wright*, for the price of a Ship pertaining to him, and which the Defender had ſold for a price within the juſt avail, the Ship being only Diſponed by the Purſuer to him upon truſt: This Summons being referred to the Defenders Oath, and he Summoned and holden as confeſt for not Compearance, and Decreet given againſt him for the price of the Ship Libelled, whereupon the Defender, who was not within the Countrey when he was Summoned to give his Oath, raiſing Summons at his home-coming, which was divers years after the Sentence, and deſiring to be Reponed, and his Oath to be received, ſeing that Citation was only Execute againſt him upon 60 days, he being then in *Muſcovia*, whereby the Citation could not come to his knowledge, and thereby could not be called *contumax*; it were great rigour that a Decreet ſhould ſtand againſt him for ſo great a Sum, above his value, and exceeding the worth of the Ship; ſpecially ſeing the Ship came again in the hands of the ſame Parties Creditor, *viz. Robert Monteith*, who ſold the ſame to another perſon, with expreſs conſent of the ſaid *Thomas Wright* and the price recovered therefore was converted to his own uſe, *viz.* for payment of

his Debts: And the Party Alledging, that this would invert the inviolable Practick, if Parties should be Reponed against such *Decreets*, for being out of the Countrey when they were Cited; for such Sentences are als lawful, as if the Party had been *Cited* within the Countrey, they being absent for their own privat Negotiation; and if either the Party holden as confest so Decerned should die, or that Execution should follow thereupon, it were a dangerous preparative to make such *Sentences* to fall, but specially in this case, where, after the Parties Citation to give his Oath, his Procurator Compeared, and obtained divers long Dyets Assigned to Exhibite him, which depended more than a year, in which time he might conveniently have advertised him, or craved Commission to the Judges, where he was to take his Oath, if there had been reason for granting the same. Notwithstanding whereof the *Lords* Found, that he ought to be Reponed, and restored him to the giving of his Oath, specially seing nothing had followed upon the Decreet, and seing it was confest by *Thomas Wright*, that he had consented to the posterior Alienation of the *Ship*, and that the price was given to his Creditors. Actor. *Nicolson*. Alter. *Mowat*. *Gibson* Clerk.

Lo. *Lorn* contra L. *Panholls*, *March* 3. 1630.

A Pursuit being made by the Donatar to the Earl of *Argile* his Liferent-Escheat against *Graham* of *Panholls*, Vassal to the Earl of *Argile*, before the Earl of *Argile* and Lord *Lorns* Baron Baillie, for Payment of the Feu-duties contained in his Charter of the Lands of *Panholls*, holden of the Earl of *Argile* divers years by-past; which being desired to be Advocat upon this Reason, because he was Infeft in his Lands *cum curiis*, &c. whereby he was not obliged to Compear in his Superiors Court, being by that Clause exeemed therefrom: This Reason was not Sustained, for the *Lords* Found, that the Vassal, albeit Infeft *cum curiis*, was not thereby exeemed from his Superiors Courts, but that notwithstanding thereof he was subject to his Courts, and that by that Clause he had only Power to hold Courts upon his own Tennents of that Ground for his Farms, or for wrong done amongst themselves, which also was not privative of the Over-Lords Jurisdiction, and if the Vassal himself should do Wrong, or commit Blood, he might be conveened therefore in his Over-Lords Court, notwithstanding that he was Infeft *cum curiis*; but the Cause was Advocat, because the Pursuit was at the instance of the Donatar to the Earl of *Argile* his Liferent, which could not be Dispute before the Lord *Lorn* his Baron Baillie. Actor. *Miller*. Alter. *Fletcher*. *Gibson* Clerk. *Vid.* 30 *January* 1630, *Dennistoun*. 12 *March* 1630, T. *Aberdene*. and 22 *July* 1631, Sir *Robert Dowglas*.

Murray contra *Myles*, *Eodem die*.

ONe *Myles* in *Dundee* being Infeft by *Coustoun* in a Tenement in *Dundee*, under Reversion Personally to himself allenarly in his own Lifetime, of 10 Shilling; shortly thereafter *Coustoun* useth an Order of Redemption against *Myles*, and Intents Declarator thereon in his own Lifetime, and constitutes *Robert Murray* Assigney to the Order and Summons; and thereafter before Declarator he dies, whereupon the Assigney, after Transferring in him as Assigney, Pursues Declarator, and the Defender Alledging, that the Reversion being Personal was extinct. The *Lords* Repelled the Alledgance, and Sustained the Declarator Pursued by the Assigney; for the *Lords* Found, that albeit the Reversion was only Personal, yet seing he, to whom it was granted, had used the Order before his decease, and had Intented Summons of Declarator, his dying before the Sentence after the Order, made not the Order to cease, nor the Reversion to be extinct, but that it might be prosecute lawfully by his Assigney, or by his Heir, if he had not made an Assigney, seing by the Order he had declared his Will, and thereby had Redeemed, and the Sentence was only a Declarator, finding that the Order used by

by himself was good. Actor. *Russel*. Alter. *Gibson* Clerk. *Vid. 6 Feb.* 1630, *Muir*.

Maxwel of *Hills* contra Tennents of *Gleffack*, *Eodem die*.

Maxwell Compryser Pursuing for the Mails and Duties of the Lands Compryfed, and the Defenders defending with a Tack Set for 19 years, to begin after the Ish of a principal standing Tack then not run out, but Suspending the Entry until a Sum were payed to the Tacks-man by the Setter of the Tack, and which was unpayed, and which Tack was clad with many years Possession before the Pursuers Compryfing. This Tack was not Found sufficient to Defend against this Pursuit for Mails and Duties, no more than it would defend against the Removing, the same being Pursued by a singular Successor: and it being Alledged that the Sum was payed to the Tacks-man, so that the time of the Entry had begun, and so the Tack was good for the rest of the 19 years, since the time the Sum was payed. This Alledgance was also Repelled, because the Payment was made since the Pursuers Compryfing, and so the Entry of the Tack was conferred *in tempus indebitum*, not having its Entry before the Compryfing.

Ritchie contra *Paterson*, *March* 4. 1630.

MEntioned before, *Feb.* 23. 1630. It being Alledged by the Cautioner for the Factor, that the Pursuer was in *mala fide* to send any Wares out of *Scotland* to *Flanders* to the Factor, and thereby to make the Cautioner lyable therefore; for the Pursuit was for the Prices of the Wares sent to the Factor by the Pursuer, and for which Decreet was given against the Factor before, because the said Factor was a notour Bankrupt before the sending away of the said Wares, and was so known to the Pursuer himself; so that this being known to him, the Cautioner ought not to be answerable to him therefore. This Alledgance of the Pursuers knowledge, was Found only probable by Writ, or the Pursuers Oath, and not by these who were alledged to have intimat and signified it to the Pursuer, before the sending away of the Wares, that he was Bankrupt.

Lord *Lesly* contra *Eodem die*.

A Spuilzie being Intented, and the Summons Execute *debito tempore* within the Prescription, *viz.* within three years after the Committing, which was committed in *anno* 1601; and after Citation having layen over, without Continuation, Calling, or Wakening, until the year 1622, at which time it was Transferred, and after the Transferring, being Wakened and Called this day; and the Defender Alledging that it was Prescribed, in so far as albeit it was Intented *debito tempore*, yet seing it lay over twenty two years after the Intention, during which space nothing was done therein, both the Parties being dead, by that long Intermission it was Prescribed, sicklike as if it had not been Intented in due time: This Alledgance was Repelled, for the *Lords* Found, that the lying over of the Cause, being once Intented lawfully, made it not fall under Prescription. *Scot* Clerk. *Vid.* 26 *January* 1622, *Hamilton* contra Lo. *Sinclar*, and the Cases there.

Fowler contra *Cant*, *Gray* and La. *Lowriston*, *March* 5. 1630.

MR. *John Cant*, *Alexander Gray*, and the Lady *Lawriston* being Complained upon in a double Poynding, raised by *Alexander Fowler* Tennent in *Lawriston*, who was distrest by both Parties for his Farms Cropt 1629, Mr. *John Cant* claiming them as being Infeft in the Land, and so as *dominus fundi*; likeas he had Arrested the same in *October*, before the Terms of Payment, and the Lady and *Gray* (who concurred claiming them) because Mr. *John Cant* had Set a Back-Tack to Sir *Alexander Napier*, who gave him that Heretable Right, for Payment of a Silver Duty, and which Sir *Alexander* had given a Factory to the Lady his Wife to Intromet with the Farms, and Dispone thereupon; likeas she had sold

the Farms the years libelled to the said *Alexander Gray*, who had payed her therefore, and the said *Fowler* the Tennent had given at her desire his Bond to the said *Alexander Gray*, for delivery of the Victual to him, whereby *Gray* Alledged he had Right to the said Victual, seing his Bond preceeded the Arrestment, used by Mr. *John Cant*. The *Lords* Found, that the Farms of the Land were lyable to the Heretor, notwithstanding of the Back-tack Set by him, and notwithstanding of the Tennents Bond, given to *Gray* who bought the same; for they Found, that by the granting of a Back-tack for Payment of a Silver-Duty to the Granter of his Right, at the time of the acquiring of his Right, the Heretor Setter of the Tack was not denuded of the Right, which he as Master of the Ground had to the Fruits of the Ground, but that the same remained ever Hypothecat to him for the said Back-Tack-Duty, until he were payed thereof, and that he might take himself to the Ground, and to the Possessors thereof, or any Intromettors with the Fruits of the same, for Payment of the said Duty, which he might lawfully do, albeit he had never discust his own Tacksman, nor had ever charged him therefore, and the Creditor who had received the Tennents Bond, was Found to have no Right thereto. Actor. *Stuart*. Alter. *Scot* Clerk. *Vid.* 3 *July* 1630, *Cochran* contra *Hamilton*. 26 *Feb.* 1631, L. *Garthland*. 22 *Nov.* 1633, *Warnock* contra *Anderson*.

E. *Wigton* contra E. *Cassils*, *Eodem die*.

IN a Reduction and Improbation for Production of Writs of the Lands of *Lenie*, made to the Earl of *Cassils* Predecessors, by the Earl of *Wigtoun* his Father, Goodsir, or other Predecessors, to whom he might be Heir, or by his Goodsirs Brother, who had Disponed these Lands to his Goodsir. It being questioned in this Cause, if the Defender should be holden first to Produce, or if the Pursuer should crave Production before he instructed, whether his Goodsirs Brother had Disponed these Lands to his Goodsir; and sicklike where the Brother was Infeft in these Lands, seing the Defender Alledged, that the same was his Title, which should *ante omnia* be Produced. The *Lords* Found, that the Pursuer should Prove and Instruct the same, before the Defender should be holden to Produce, but Assigned the same day to the Defender to Produce, which was Assigned to the Pursuer to Prove, that after it was Proven, the Defender might instantly produce thereafter; and this Summons craving Production of whatsoever Decreets, obtained by any of the Defenders Predecessors, which might affect the Lands, and establish any Right thereto in any other persons. This general Clause was Sustained, albeit the same neither bore the special name of the Party, Obtainer of the Sentence, nor against whom, nor before what Judge, nor for what special Cause or Manner of Decreets the samine were. And it being Alledged, that no Process ought to be granted for any Writs, made by the Pursuers Goodsirs Brother, or his Predecessors to the Defenders Predecessors of the Lands libelled, because no person was Summoned to represent, as Heir or appearand Heir, the said Brother and Predecessor, who were necessary Parties to be Summoned, seing they behoved to warrand the Rights made to the Defenders Predecessors now called for, specially seing the Pursuer pursued not on that Member, as Heir of Blood to him, but as Heir by Progress to his Goodsir, to whom the Brother is alledged to have disponed the Lands libelled, and so the Pursuer was singular Successor to his Goodsirs Brother, which Brothers Predecessors were alledged to have disponed the Lands to the Defenders Predecessors. This Alledgance was Repelled, being contentiously Disputed, and there was no necessity Found to Summon any, to represent the said Brother and his Predecessors, which was Found alike both in the Reduction and Improbation; for albeit he were subject in Warrandice, the Defender may Suit the same as he best may, but the Pursuer is not holden to Call or Summon any for that end of Warrandice

Warrandice to the Defender, and he being Author to the Pursuers Predecessor, he needed not Summon any to represent his own Author. Actor. *Advocatus* & *Stuart*. Alter. *Nicolson*, *Aiton* & *Neilson*. *Gibson* Clerk. *Vid.* 17 *June* 1630, betwixt these Parties. 20 *March* 1630, *Murray* contra *Mckenzie*. 11 *Jan.* 1628, E. *Marr. Ult. Jan.* 1627, L. *Lawristoun.* 13 *Feb.* 1627, La. *Borthwick.*

Campbel and *Ore* contra *Salmond*, *Eodem die.*

UMquhile *John Ore* being Infeft in an Annualrent out of an House in *Edinb:* Redeemable, and thereafter he Resigning in his Daughters favours, who was Infeft with Reservation of her Fathers Liferent; the Father thereafter Tochers that Daughter with a greater Sum than that Sum, whereon the Annualrent was Redeemable, and divers years therea ter, upon Payment made by the Granter of the Right of the Annualrent to the Father, he grants the Right of the Annualrent lawfully Redeemed by the Heretor; after the decease of her Father, the Daughter and her Husband Pursuing to Poynd the Ground for that Annualrent, by vertue of the said Seasin, past upon the Fathers Resignation, and the Defender opponing the Fathers Renunciation, and the Fathers giving of a greater Sum to the Daughter in Tocher with her Husband, who Pursued. The *Lords* Repelled the Alledgance, and Sustained the Pursuit, for the Father being denuded of the Heretable Right of the Annualrent, with Reservation only of his own Liferent, It was Found, that he could not Prejudge the Heretor thereby, albeit the Right made to his Daughter was under Reversion to himself of 40 Shilling, the same not being Redeemed by him, and albeit upon his Death-bed he Willed that Right made to his Daughter to be Cancelled, which was not respected, not being *habilis modus*, and the Contract of Marriage bearing, the Tocher-good, had neither relation to this Annualrent, nor to any Provision made by her Father, but had relation to her Portion fallen by her Mother, which she Discharged. *Gibson* Clerk.

The Laird of *Caskiben* Supplicant, *March* 6. 1630.

A Supplication given in by the Laird of *Caskiben*, Craving, that no Warrant might be granted by the *Lords* to discharge Brieves out of the Chancellary, direct to the Baillies of the *Cannongate*, for Serving of him before them, general Heir to one of his antient Predecessors, *viz.* the L. of *Dalgetie*; the *Lords* doubting hereupon amongst themselves, Found, that Brieves for Serving of any Party general Heir to their Predecessors, might be Served before any Judge within the Kingdom, to whom the Brieves were directed out of the Chancellary, and that that Judge (whosoever had Jurisdiction) might proceed in these general Services, the same not being special Services to Land, and that this hath been the usual Custom before, albeit neither the Impetrator of the Brieves, nor his Predecessor, to whom he was to be Served general Heir, did ever dwell or remain within that Judges Jurisdiction.

Barclay contra *Binnie*, *Eodem die.*

ALexander *Barclay* charging *William Binnie*, and Mr. *Robert Livingston*, for 500 merks conform to their Bond, and they Suspending, because the Chargers Wife (he and she keeping an open Change-House in *Edinburgh*) had received als much Beer and Ale in their House since the date of their Bond, as in Price extended to the Sum acclaimed, which they referred to her Oath of verity; and the Charger Alledging, that this Reason ought not to be admitted, to take away his Registrat Bond, the Debt neither being declared, nor yet liquid, neither could his Wifes Oath be taken to his prejudice. The *Lords* nevertheless, Found the Reason Relevant to be proven by the Wifes Oath, in respect both the Debt and the Price was referred to her Oath, whereby it would be declared, if it was a true Debt, and also she was to declare the Prices; and whereupon the

Lords Found, that the Wife might depone, albeit having an Husband, seing they keeped an open Change-House, and the Wife might receive Ale and Drinking-Beer therein as she did before, the Husband never Disallowing thereof. *Actor. King.* Alter. *Gibson* Clerk..

[*Whiteford* contra *March* 9. 1630.

MR. *Walter Whiteford* being provided by the Kings Presentation, to the Benefice of the Sub-Deanry of *Glasgow*, and seeking Letters conform thereto, and to be Answered of the Fruits of the Benefice, and specially of the Fruits of the Kirks of *Calder* and *Monk-land*, which were the only two Kirks, and the sole Patrimony of the Benefice, except some few Lands, *Feued* for a small *Duty*, whereof there was no Benefit; Compeared Sir *James Cleland*, and Alledged, that this Presentation by the King could not be sustained as a Right, whereupon Letters Conform should be granted for the Fruits of these two Kirks, because the Right of Presentation of these two Kirks, was *Disponed* long before to the E. of *Melrose*, who was Infeft therein by the King's *Majesty*. To the which Right Mr. *Patrick Wakenshaw*, then Sub-Dean and Titular, Consented, conform to the 172 Act of Parliament 1593. Likeas, Sir *James*, upon the Earl of *Melrose* his Resignation was Infeft in the same, and had presented Persons to the Kirk, who ought to be Answered of the Fruits of these two Kirks, and not this Pursuer, as Presented to the Sub-*Deanry*; For he Alledged, that if the Sub-*Deanry* consisted of these two Kirks only, as he Alledged it did indeed, when the Earl of *Melrose* acquired the same, *viz.* after the year 1587. at which time the Kirk-lands of the Kingdom were all Annexed to the Crown, then his Right of Presentation behoved to extend to the Sub-Deanry, the whole Parts thereof, *viz.* The two Kirks falling under the same, *Quia partes integrantes faciunt totum*: And if the *Dignity* of the Sub-Deanry Comprehended any other than these two Kirks, he was content that the Pursuer should have the same, but for the *Fruits* of thir two Kirks disponed in Patronage before, as said is, as presented to the Sub-Deanry, he could not have the same, for albeit Chapters and Dignities of *Chapter*-Kirks were Restored, yet it was with the exception of Rights of Patronage, and other Rights lawfully acquired, and this excepted one was so, *Ergo*, &c. And the Pursuer contending that the *Right* of Patronage of thir two Kirks disponed, as said is, to Sir *James Cleland*, was not valid in Law, seing the same being Incorporat, and making up the *Sub*-Deanry, they could not be Disponed by the King, upon the Sub-Deans consent, except they had been first dissolved from the *Sub*-Deanry, or else that the Patronage of the Sub-Deanry had been expresly Disponed by the King, for the King had no Right ever of the Patronage of thir two Kirks, as several Rectories, but only the *Patronage* of the Sub-Deanry, which comprehended these Kirks, so that the 172 Act of *Parliament* 1593. Anent the Titulars consent, had no *Affinity* with the Case Lybelled; for that Act is only for Patronages of several Kirks, and Rectories which were at the Kings *Presentation* before, and these Kirks were never at the Kings *Presentation*. And so he Replyed, that the Right of Patronage could not stay Letters conform. The *Lords* Found this Reply Relevant, and that the two Infeftments of Patronages of these two Kirks, could not hinder Letters Conform; but that the Sub-Dean presented by the King, ought to be answered of the Fruit of thir two Kirks, and not the Persons presented by Sir *James* to the saids two Kirks, in respect the same were not particularly *Dissolved*, nor Dis-membred from the Benefice of the Sub-Deanry, neither was it Found to be sustained, albeit having the Sub-Deans Consent, and so in this Judgment of Letters Conform, the saids two Heretable *Rights* were everted. *Actor. Advocatus.* Alter. *Nicolson* & *Aiton*. *Gibson* Clerk. *Vid. March* 26. 1629 Colledge of *Aberdene*.

Auld

Auld Butter-man in *Edinburgh*, contra *Zuill* and *Thomas Auld*, *Eodem die.*

Auld being Infeft by the Heretor with consent of his Wife conjunct-fiar, in an *Annualrent* out of there Lands, after which the Husband, who was Heretor of the Lands dies, and the *Relict*, who was Liferentar, and who consented to the Infestment of an *Annualrent* after her Husbands decease, Setting a Tack of that Land, after which Tack the *Annualrenter* Comprises from her, and from the Heir of the Heretor, the whole Right of the Land, for divers years owing of the Annualrent; and upon the Compriſing, being Infeft, pursues Removing against the Relict, and the said Tacks-man, wherein the *Lords* Found, that the Compriser, during the Tack, could not Remove the Tacks-man, the Tack being Set before the Denunciation of the Compriſing, albeit after that the Setter had consented to the Right of the Annualrenter; For the *Lords* Found the Tack, albeit posterior to the Annualrent, yet before the Compriſing, was not good to stay Poynding of the Ground for the Annualrent, but was sufficient to stay Removing upon the Compriſing, and it was not respected, what the Compriser answered, that the Compriſing ought to be drawn back to his own Cause, *viz.* The time of the Infestment of the Annualrent, after which time he Alledged, nothing could be done by the Granters thereof, that might derogat to the Effect thereof, which was Repelled; neither was it respected what he Replyed, that the Ground might become unanswerable to pay the Annualrent, and so the House becoming ruinous, he might effectually Compriſe the Property therefore, wherein as the Author of the Annualrent could not Imped the Removing, no more could the Tacks-man *qui habet causam ab eo*, which was also Repelled. *Gibson* Clerk. *Vid. Feb.* 27. 1630. *Helen Scarlet*, at the end of that Decision.

Grierson contra *Gordon* of *Troquhen*, *March* 10. 1630.

IN an Order of Redemption, the Defender quarrelling the Instrument of Consignation, Because it bore not, *That the Money was numbered and told, before it was consigned*, as all such Instruments bears; and therefore Alledged, that the Order ought not to be sustained, seing Redemptions are *Strictissimi Juris*. The *Lords* Repelled this Alledgance, because the Instrument bore, *That the Redeemer made offer of all and whole, that Sum contained in the Reversion, viz. and that he consigned the same*, which Words (of all and whole) The Lords Found Supplied the not Numeration, and for want of the other Words, they would not cast the Order. Actor. Alter. *Belshes*. *Hay* Clerk.

Doctor *Lindsay* contra Town of *Edinburgh*, *Eodem die.*

THE Town of *Edinburgh*, being Debitor by an Heretable contract, to umquhile *Thomas Heriot*, in the Sum of 10000 pounds, to be payed upon Requisition at three several Terms, who having required for the first Terms Payment, which was against *Whitsunday* 1629 and he having deceast before the Term, the Doctors Wife, Sister to the Defunct, his Executrix, and his Brother as Heir, contending for that first Terms Payment, and for the Profit of the whole Sum, which by the contract was not due to be payed before that *Whitsunday*, before which the Creditor died. The *Lords* Found, that the said Sum payable at the first Term, *viz.* 5000 merks became Moveable, by the said Requisition, made before the Term, and in respect thereof, and that the Creditor died before the said Term, they Found, that the same, and so meikle of the Annualrent as effeired to that Part of the Sum, which was Moveable, pertained to the Executor of the Defunct, and not to his Heir, and that the rest of the Annualrent of the 10000 pound, albeit the same Annualrent was also payable at the said Term, before which the Creditor died, as said is, was due to the Heir, and pertained not to the Executor, seing the Defunct survived not the Term, at which he might have craved it, and so that his Ex-

ecutor could no more seek it than himself, and the rest of the Principal Sum was Found also due to the Heir, and not to the Executor; for the Contract Ordained, that Requisition for each part should be made before the Terms, at which the payment of every Part thereof should be made; But it might be Alledged, that the Executor hath alike right to the rest of the whole Sum, as to the first Terms payment of the three, seing the Creditor died before the first Term, and thereby the clause of the Heretable Security, contained in the contract, might appear to be no more profitable to the Heir, for the other two Terms, than for the first; the Creditor not living while that Clause might take effect, and albeit Requisition was made, by the necessity of the condition Required by the Contract, for the first Terms Payment, that Inferred to the Executor no prejudice, because the Executor might also Require before any Term, at which he Required payment, as well as the Heir; Likeas, it might also appear, that the Executors had no more Right to the Annualrents of that Part of the Sum, for which Requisition was made, than for the rest, because the Creditor survived not the Term, whereat he might have craved the Annualrent thereof, no more than the rest of the Annualrent, so that the Reason is alike for all: for the Executors Right is alike for all *quoad hoc*, that the Creditor lived not while the Annualrent might have been craved by himself, and so that thereby his Right fell to his Executors. But it was so Found, as is above written, because the Contract was very strictly conceived in Heretable Terms. Actor. *Lawtie*. Alter. *Cunninghame*. *Gibson* Clerk. *Vid. Jan.* 8. 1624. Col. *Henderson* and the other Cases there, *Feb.* 12. 1623. *Wallace*.

Town of *Edinburgh*, contra T. *Leith*, *March* 11. 1630.

THE Town of *Edinburgh*, having acquired from the Laird of *Restalrig* Barron of *Leith* in *anno* 1398. a Writ, or Bond of Servitude, whereby he, as Barron, and Heretor of *Leith*, for him, his Heirs and Successors, Renounced in Favours of the Provost, Baillies, Council and Community of *Edinburgh*, all Priviledge of Girnilling of Victual in *Leith*, or Baking, or keeping of Booths for Selling of Wares within *Leith*, or holding of Mercats; Which Evident being Confirmed by King *James*, and Ratified in Parliament, 1621. And *Leith* being Charged thereon, to Desist conform thereto; and they Suspending, that Writ could not be found a Servitude, which was Real to affect their Houses, wherein they were Infeft, with all Priviledges and Liberties bearing *no Servitude*. And if it should be Found Obligator, it was only against the Maker, and his Heirs, and could not strick against them, who were singular Successors, to the Rights of their Dwelling-Houses and Tenements, whereon they had builded Kills, Cobles, Bake-Houses, Brew-Houses, and all other Easements, meet for their Calling; and which they had used thir Ten or Twelve score years by-past, without Interruption, in full Liberty, without Claim of any such Priviledge, or Servitude by the Town of *Edinburgh*, so that if it were a Servitude Real, as it is denyed, yet by these Tenscore years Desuetude, and by the contrair using of the Liberty of Baking, Brewing, Girnilling of Corns, *&c.* but Interruption; the Servitude, if any had been, was Prescribed, and also that they were Infeft in their several Lands, with all Liberties, by the Town of *Edinburgh* themselves since that Alledged Servitude, making no Reservation thereof, in their Infeftments, and that not only since the Servitude, but also since the time whereat they Acquired from the Laird of *Restalrig*, the Superiority of *Leith*, by the which Acquiring of the Superiority, since the Servitude, the Servitude was in effect confounded with the Superiority, and the Inhabitants of *Leith*, having Acquired Right of thir Lands from the Town of *Edinburgh*, since their Purchasing of the Superiority, thereby the Servitude was extinguished, and could not affect their Land: Attour,

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It would not be reput a Servitude, becauſe it tended not to the weel, nor for the Good of any *Prædium Dominans*, without which no Servitude can in Law affect *Prædium Serviens*, and this kind of Servitude is againſt the Law of nature, and all common Law and Equity, to Prohibit the Indwellers at ſo publick a Place, the chief Port of the Kingdom, and where the greateſt concurſe of the King's Subjects are to uſe this Lawful Trade of buying of Victual, and Selling to the Leidges, and tended to Prohibit all Barrons, Lords and Gentlemen of the Countrey, to have any diſpatch of their Victual in *Leith*, where there is, and ever has been greateſt diſpatch; for if the Indwellers in *Leith* may not Girnel Victual, it is alike to prohibit them to Buy and Sell, which has been ever their calling. For when it is bought, they may not lay it up in Girnels, and the prohibition of Girnelling ought only to be extended to ſuch Girnelling, as is done to keep Victual to any Dearth, from which they were content to be Prohibited, and if any other Girnelling ſhould be Prohibit to them, and the only Power thereof Found to pertain to *Edinburgh*, it would tend to make a Monopoly, and to force the Gentry to Sell their Victual at what Prices *Edinburgh* pleaſed. The *Lords*, after that the Town of *Edinburgh* had declared, that they were content that this Writ and Prohibition ſhould not ſo extend, but that the Indwellers in *Leith* might Set their houſes, for Girnels to Gentlemen, and all the Leidges, and that the whole Subjects, except *Leith*, might Girnel Victual in *Leith* as they pleaſed; and alſo that the Indwellers in *Leith* might Buy and Sell, and Girnel Victual, and bake Bread all for their own uſe, but no further to Block and Sell again, after they had Girnelled the ſame, without licence of *Edinburgh*, Found the ſaid Servitude to be Real, and not to be Perſonal only, but that it affected all the Houſes in *Leith*, diſponed ſince the ſaid Servitude. And Found the ſame lawful, notwithſtanding of all the above-written Reaſons, in reſpect the ſame was both Confirmed by the King, and Ratified in Parliament, which being ſo Corroborat, and that it was now queſtioned, & agitat within the years appointed by the Act of Parliament 1621. Anent Preſcription (which took away the Preſcription of the Civil Law) and therefore Found the Letters Orderly proceeded; But the *Lords* declared, that when any Action ſhould be purſued by Reduction againſt *Leith*, for any Fact or Deed, done againſt that Prohibition of the Servitude, and againſt this Sentence, that they would conſider thereof, if it might Import a Contraveening of the ſaid Prohibition, and would Judge thereof, according to the quality of the Fact and Deed, and the Extent thereof, if it came under this Prohibition.

Item, In this Proceſs, it was Found, that a Servitude ſo conſtitute, neither needed any *Reddendo* to be expreſt in the Writ, whereby it was Conſtitut, neither needed Seaſin, and being of the Date 1398. Found it not null for want of Witneſſes in that time, being Sealed and Subſcribed by the Party, and when there was no uſe of Witneſſes, Actor. *Advocatus*, *Nicolſon*, *Stuart*, & *Belſhes*. Alter. *Mowat* & *Craig*. *Gibſon* Clerk. For this Queſtion, *Vid. l. Si quando §. Cum in domo ff. Si ſervitus vindicetur, qui §. ſic loquitur de ſervitute, qua prohibetur quis habere aliquid ſitum vel poſitum in loco vel fundo ſuo, invito Domino. Item, vid. l. ſi quis. ult. de pactis inter empt: & debit. compoſit. Tit. 54. Lib. 4. C. Qua lege late conſtituitur pactum valere, quo venditor fundi paciſcitur cum emptore, ne liceat emptori monumentum conſtituere in fundo vendito, vel alio modo, humano juri eum eximere, & vide gloſſam ad hanc legem; vide etiam l. venditor. 50. ff. communia prædior: qua lex dicit, pactum à venditore, in venditione factum, ne liceat emptori piſcari in illa parte Maris, tenere emptorem & ſucceſſores ejus in illo fundo: ubi* Bartol. &c. *Scribunt quod valeat iſta conventio, ut obligeris tu & ſucceſſores tui, non autem ut ſit aliqua ſervitus, cum non ſit prædium dominans; unde ſi tu promittis aliquid te facturum vel non facturum in publico, per quod uſus aliorum non impediatur, ſed tuus tantum, iſtud pactum valet. Vid.* 4 Feb. 1630. *inter eoſdem.*

L. *Lochmabony* contra *Rollock*, *Eodem die.*

THe *Lords* having *ex officio*, for their better information and tryal of the Cause betwixt the Parties, Ordained some Witnesses to be Examined, Found, that albeit the said Witnesses might be declined in Law from being Witnesses againstthe Party, who opponed to the receiving of them, yet that they ought to be received, but Declared, that in the advising of the Cause, they would not only consider of their Declaration, but also that they were such persons as in Law were declinable. *Hay* Clerk.

Scougall contra *Dowglass*, *March* 12. 1630:

ALexander *Scougall* having recovered Decreet against *Alexander Dowglass* & *Margaret Inglis* his Spouse, for the Sum of 28 pounds, for the price of Wares confest to be received by her upon her Oath, being referred thereto, and also her Husband holden as confest thereon; and she being charged to pay after her Husbands decease, and Suspending, the *Lords* Found, that that Decreet, albeit given against her self, and for Gear confest to be received by her self, and albeit the Sum was so small, yet being recovered against her and her Husband, and she having a Husband at the Receipt of the Goods, ought to be Execute against her Husbands Heirs and Executors, and not against her self, and therefore Suspended the Charges against her. *Gibson* Clerk. *Vid.* 20 *Novem.* 1630. *Rutherford* contra *Halcro*.

Somervell contra L. *Drum*, *Eodem die.*

SOmervels Father being Infeft in an Annualrent out of *Somervell* of *Drums* Fathers Land, to be holden of him and his Heirs Blensh for payment of a Penny; and the Charges being Execute upon the Retour, as Heir to his Father, to enter him therein; and being Suspended by the Superior, that he could not receive him, while he payed *id quod jure facere tenetur*, as his Retour bears; which he Alledged to be two years Duty of the Annualrent it self, seing it had no other extent, in respect the extent of the Retour bore, *quod seipsum valet*, being an Annualrent out of the Lands, and therefore that the Superior ought to have the double of the Retoured Duty, at the Entry of the Vassal, which was two years Duty of the Annualrent. This Reason was not sustained, for the *Lords* Found, that for the Entry of the Vassal, neither one nor two years Duty could be craved by the Superior, but only the Blensh-Duty of the *Reddendo*, therefore the Letters were Found orderly proceeded. *Actor. Nicolson.* Alter. *Hay* Clerk. *Vid.* 3 *February* 1631. *Thomas Ogrie*, 23 *March* 1631. *Somervel.* 23 *January* 1630. *Peebles.*

Bishop of *Aberdene* contra his Vassals, *Eodem die.*

THe Bishop of *Aberden's* Baillie having Un-lawed some of the Vassals of the Bishoprick, for not Compearing to Answer in the Bishops Head-Courts; And some of the Vassals Suspending the Charges Execute for payment of these Un-laws, upon this reason, that they were Infeft in the Lands in Feu *cum curiis*, and for payment of a Feu-duty *nomine Feudifirmæ*, and thereby were not subject to answer at his Head-Courts. The *Lords* Found, that Feuars, who were Infeft for payment of a Feu-duty *nomine Feudifirmæ*, for their Lands *pro omni alio onere*, were not subject to compear in their Over-Lords Head-Courts, they not being Cited, nor Warned thereto, and so for their not compearance that they could not be Un-lawed: For the *Lords* Found, that Vassals holding their Lands by Ward holding, by the nature of that holding, are holden, and obliged *hoc ipso* to appear in their Superiors Head-Courts, without any Warning or Citation, whereas the Vassals by Feu or Blensh-holding, by the nature of that kind of holding (except it be otherways provided by the Tenor of their Infeftments) are not obliged to compear at the Superiors Head-Courts, nor at no other Courts, except upon particular Citation lawfully made

made to them, in cases where they ought to compear to answer there; In which cases being so cited, their Infeftments do not always exeem them from their Over-lords Jurisdiction. *Gibson* Clerk. *Vid.* 3 *March* 1630. Lo. *Lorn*, & 22 *July* 1631. Sir *Robert Dowglass* contra *Kellie*.

Sempill contra *Mcnish* and *Dolie*, *March* 17. 1630.

ONe *Mcnish*, Son to umquhile *Robert Mcnish*, and *Agnes Dobie* his Relict, Executors Confirmed to the said umquhile *Robert*, having obtained Decreet against *John Sempill*, for a Sum owing by him to the Defunct; and he Suspending upon payment made to *Mcnish*, one of the Executors, and producing his Acquittance thereon; and the Relict who was Co-executor, and had obtained the Sentence with the other, Alledging, that that Discharge would only liberat the Suspender of the one half of the Sum, and that the other half was yet resting to her, seing the one Executor could not Discharge but his own part; And the Suspender Alledging, that the Acquittance, albeit granted only by one of the two Executors, yet ought to liberat him of the whole Debt, seing he had payed, and might pay the whole Debt to any one of them, and he needed not to be troubled in seeking them both, and to pay a part to ilk one of them, but they ought to compt amongst themselves anent their Receipts, and the Executors and the Debitors ought not be troubled with any thing, which was betwixt them; for ilk one of them having found Caution in the Testament, thereby the Debitors ought to be found *in tuto*, and that they might lawfully pay the whole to any of them. The *Lords* Found, that seing two were Confirmed Executors, that payment might be made to the one only, of the equal half of this Debt, and would not sustain the Discharge, given by one of the two Executors, for the whole Sum, but only to liberat of the half; and the rather this was found, seing the Decreet for the Debt was recovered at both their instances, and Decerned payment to be made to them, not bearing *conjunctly and severally*: And it being further Alledged, that the Discharge should not liberat for that Executors own half, who gave the Discharge, seing he was Interdyted for just causes, and which Interdiction, with the Publication thereof, was instantly verified. This was not received *hoc loco* by way of Exception and Suspension, but reserved by way of Reduction *pront de jure*. Actor. *Mowat*. Alter. *Lawtie*. *Scot* Clerk. *Vid. March* 24. 1630. Betwixt the same Parties.

Horseburgh contra *Frank*, *March* 18. 1630.

Frank upon his Infeftment having obtained Decreet against the Possessors of a Tenement in *Peebles*, for payment of the Maills thereof to him of the year 1627. In the which Decreet the Laird of *Horseburgh* Compearing, and admitted for his Interest, proponed Defences, which were discust, and Sentence given, he Compearing; And this Decreet being Suspended upon double Poynding against the Obtainer, and the Laird of *Horseburgh* who proponed other Defences, and produced other Rights to the Lands, than these which were proponed and produced for him in that other Process, and the other Party opponing his Decreet given against him Compearing; the *Lords* Found, in respect of the foresaid Decreet given against him compearing, at the which time the Defences upon the Right now produced, were then competent, and were not then proponed; therefore being then competent and omitted, that it ought not now to be received; therefore Repelled the same, and Ordained the Obtainer of the Sentence to be answered and obeyed. *Actor.* Alter. *Burnet* Major. *Hay* Clerk. *Vid.* 20 *Decemb.* 1622. *Knox*, and the other cases there. 19 *March* 1628. *Lamb* contra *Blaikburn*. 28 *Feb.* 1628. *Glen*.

La. *Maxwell* contra her Tennents, *Eodem die*.

IN a Removing Lady *Maxwell* contra her Tennents, she being Served, and upon a Precept of the Macers before whom she was Served, being kenned

ned to her Terce, produced the Instrument of Kenning for her Title; and the Mr. of *Yester*'s Son, who upon Compriſing from the Heretor was Inſeft by publick Inſeſtment in the Land, and by vertue thereof divers years in Poſſeſſion, being Alledged to be a neceſſar Party, who was not Warned nor Summoned, as he ought to have been to this Purſuit; and alſo it being Alledged, that the Kenning, without production of the Service, could not be a Title to the Purſuer for this Purſuit. The Alledgances were Repelled, and the Kenning Found enough to inſtruct this Purſuit as a Seaſin, without neceſſity of the Charter or Warrand thereof; and that there was no neceſſity to produce the Service, or to Warn the Compriſer, albeit Infeft and in Poſſeſſion, no more than there was neceſſity to Warn the Earl of *Nithſdale* Heretor, from whom the Lands were Compriſed, who was the Heir, or appearand Heir of her Husband, by whoſe deceaſe ſhe hath right to her Terce. Actor. *Dowglaſs*. Alter. *Sharp*. *Hay* Clerk. *Vid.* 15 *March* 1632. Relict of *Veitch* of *Dawick*.

Laird *Haddo* contra L. *Ludquhairn*, *Eodem die*.

L. *Haddo* a Minor within 21 years having obtained Decreet againſt *Ludquhairn* his Curator *ſine quo non*, *durante Curatela*, and without concourſe of any other Curator, for delivery of the Writs of his Lands to him; and *Ludquhairn* Suſpending, that during his Office he could not be compelled to deliver the ſame, eſpecially ſeing the Writs were all Exhibite before the *Lords*, and that they were in cuſtody in the *Lords* Clerks hands and that the Office of Curatory was not yet expired, and that there were Actions of Tutor-compts *binc inde* depending betwixt them, before the ending whereof the Evidents could not be given up to the Minor, for they behoved to be alſo patent for inſtructing the Articles of the Account. The *Lords* Found, that in reſpect thir Writs were conſigned in their Clerks hands, and that the Office of Curatory was not yet expired, that the Curator could not be compelled in Law to deliver the Writs to his Minor, but that they ought to remain there while the Minor was Major, whereby the Curator might have a valid Diſcharge thereon, which he could not lawfully now give, and would not ſupply it by Caution: And becauſe the Minor deſired, that he might have up the Evidents of ſuch of his Lands as he held by other holding than Ward, whereby he might obtain himſelf Entered and Infeft in the ſame, and ſo eſchew the danger of Non-entry. The *Lords* Found (albeit the Curator and his Cautioner were lyable for theſe dangers to the Minor) yet to eſchew ſuch prejudice to the Minor, and that he might not be put to ſuch Action, that he might borrow, and take upon truſt from the Clerk any of his Writs whereof he had uſe, and which he would deſire for that effect, upon good ſecurity to the Clerk, to re-deliver the ſame to him again, at the day unto the which they ſhould be borrowed. This was done to eſchew the Minors prejudice; but in Legal manner they Found by Proceſs, that the Minor could not crave them, the Curator not being Removed, nor purſued as ſuſpect; for the Minor had diverted from his Curator foreſaid, and was Married without the Curators advice, whereby they agreed not in their buſineſs. Actor. *Nicolſon* & *Mowat*. Alter. *Stuart* & *Burnet* Minor. *Gibſon* Clerk. *Vid.* 29 *March* 1631. L. *Haddo*: 23 *July* 1629. betwixt theſe ſame Parties.

Dalgarno contra *Forbes* of *Byth*, *Eodem die*.

A Woman being made Aſſigney by her own Son *Patrick Dalgarno*, to certain Debts adebted by umquhile *Forbes* of *Byth* her own Son alſo by another Marriage, to divers his Creditors, which Creditors had made the ſaid *Patrick Dalgarno* her Cedent Aſſigney thereto; and ſhe purſuing Regiſtration of theſe Bonds againſt the Heir of the ſaid umquhile *Forbes* of *Byth* Debitor thereof, wherein the Defender Compearing, this Defence was found Relevant by the *Lords*,

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to stop the Registration against the Heir of the Defunct, at the instance of this Assigney constitute by the Son, who was made Assigney by the Creditors, because it was offered to be proven, that the Assigney *Dalgarno* was Executor decerned to the Defunct Debitor; which Defuncts Testament being Confirmed, the free Gear thereof amounted to greater Sums than would satisfie the foresaid Debts, whereto he was Assigned by the Creditors; and he being Executor, and the Testament containing more free Gear than would satisfie the Debts acclaimed, and being Confirmed, and he Decerned Executor before the acquiring of the *Assignation* from the Creditors; the said Assignation made by them to him, must of necessity be converted for the well of the *Defuncts* Heir, whom in Law the Executor is obliged to relieve of the Defuncts Debt, so far as the free Gear of the Testament extends to, and no other Assignation can be made by him to any other Assigney, which might prejudge the Heir of that relief, which the Pursuers Cedent, being Executor, was obliged to give him of the Defuncts Debt, by the Defuncts Moveables. This Alledgance was found Relevant against this Pursuer, albeit she answered, that she was a singular Successor, and that her Cedent was answerable, and had found Caution in the Testament, and the *Defender* might conveen him for any thing wherein he was obliged in Law, for which this Pursuer could not be lyable; for he might Alledge, that the free Gear was otherways exhausted, or that after diligence, the Gear of the Testament was not recoverable, which she could not know, and was not competent to her to Alledge; notwithstanding whereof the *Alledgance* was found Relevant to meet this Assigney, as it would have met the Executor, who was Cedent, and the first Assigney constitute as said is. Actor. *Baird.* Alter. *Lermonth. Gibson* Clerk. *Vid. infra, Hart* contra *Hart*, & *penult July* 1630. L. *Carnousie*, where Heretable Debts should be payed by the Heir, and the Executor relieved thereof, *& contra*, the *Executor* should relieve the Heir of Moveable Debts, which differs as appears from this Decision.

Hart contra *Hart*, *Eodem die.*

UMquhile Mr. *John Hart*, as Cautioner for *Patrick Hart* his Son, who was Principal, being obliged in 1000 merks, for which he being distrest by the Creditor, he borrows the Sum from *Eupham Wilson* and pays the Debt, and gives Redeemable Infeftment of his Lands to her for her Security; thereafter the said Mr. *John*, who payed the Debt as Cautioner, in his Testament makes his Son *Patrick* who was principal Debitor foresaid his Executor, who is confirmed Executor to him; thereafter the Heir of umquhile Mr. *John*, whose Lands were engaged for the Debt as said is, Pursues *Patrick* the Principal, to relieve him and his Lands of the foresaid distress: In which Process the Defender clothing himself with the said Executry, the *Lords* Found that the Heir of the Cautioner had no Action for Relief against the Principal; for albeit his Father the Cautioner, to whom he was Heir, had payed the Debt, and that the Payment was made by that Money, for which he gave Heretable Infeftment out of his Lands, yet thereby the Heir had not the Right of that Relief competent to him, albeit his Lands were burdened therewith; but they Found that the Right of that Relief pertained to the Executors of the Cautioner, and who had the only Interest to seek the same; and consequently they Found, that the said Principal being nominat Executor and Confirmed to the Defunct, who as Cautioner payed the Debt, the said Relief was Confounded, he having Right to seek the Relief, as being Executor, and being the same Person, who should make the Relief, being the Principal, and so oblig'd to relieve his Cautioner, and so he was both Creditor and Debitor; but as to this Relief, albeit the Heir was excluded from the Right thereof, yet the Creditors of the Defunct will have Right thereto against the said Executor, or may be sought by the Executor Dative *ad omissa*, if it be not confirmed in the principal Testament.

stament. Actor. Alter. *Stuart. Hay* Clerk. *Vid.* 20 *Decemb.* 1631, *Menzies.* 10 *July* 1628, *Cant* contra *Edgar*, and the Cases there. 10 *July* 1629, *Wardlaw* contra *Wardlaw*. *Penult. July* 1630, L. *Carnowsie*, and the Cases there.

Chisholm contra L. *Torsonce*, *Eodem die.*

IN a Reduction of a Poynding Deduced by *Pringle* of *Torsonce* of the said *Chisholm* his Goods, because the same were not lawfully Appryſed, neither at the Head Burgh of the Sheriffdom, nor yet at the Head-Burgh of the Regality, within the which the Lands lay where the Goods were apprehended, *viz.* neither at *Edinburgh*, nor *Kirkliſtoun*, which is the Head-Burgh of the Regality of *St. Andrews*, within which the Lands of the Bailliary of *Stow* lyes, in which Bailliary these Goods were Poynded. And the Defender Answering for Sustaining of his Poynding, that he offered to prove, that the frequent Custom in the Country was, that Goods within the Bailliary of *Stow*, were still Poynded and Appryſed at the place called which is the place where the Goods libelled were Poynded, and no use has been to drive Goods to *Kirkliſtoun* there to be Appryſed. This Exception upon the Custom was Sustained to Eleid the Reason: for the *Lords* would not Reduce the Poynding for not driving the Goods, such as Kine, and Ews with Lambs to *Kirkliſtoun*, being 20 or 24 Miles distant from the place, where the Goods were apprehended, and where they were Appryſed; for by that Deed the Goods so driven might be undervalued, and the Debitors self thereby prejudged; neither was it reſpected that the Pursuer Replyed, that Poynding Execute by vertue of the Baillie of *Stows* Precept, might be Execute at the place of this Poynding, and that that was the use & Custom only keeped in such Poyndings, but in Poyndings by vertue of the Lords Letters, as this was, the use was ever to Excecute them at *Kirkliſtoun*; which Reply was not Sustained here, the Action tending to Reduce a Poynding, Deduced for a lawful Debt, whereby to make the Creditor a Spuilzier, whereas neither the reason bore, nor was there any thing Alledged against the Debt, for the unlawfulness thereof, nor yet to purge the same, nor that the Goods Poynded were undervalued and Poynded within the worth, or for less prices. Actor. Alter. *Sandilands. Scot* Clerk. *Vid.* 3 *June* 1630, betwixt these Parties.

Crichton Stabler contra *Pirie*, *March* 19. 1630.

PIrie being Charged to deliver certain Quantities of Straw to *Crichton*, conform to his Bond, and the other Suspending, because by his Bond he was obliged only to deliver the same betwixt and *May*, which was not as yet come. And in case of Failzie, to pay a penal Liquid Sum, which he was content to pay at the day, aud so he could not be compelled to pay, or deliver the Straw. The *Lords* Found, that the Subjoyning of the foresaid penal Sum, in case of not delivery, liberated not the Debitor from fulfilling of that, which was Principally Deduced in the Obligation, but that notwithstanding of the Provision of the Failzie, he ought to fulfil the Obligation, by and attour the paying of the Failzie, but Superceeded the Execution, while the day came. *Hay* Clerk.

James Hay of *Tour-lands* contra L. *Auchnames*, *Eodem die.*

IT was Found, that a Declarator of Non-entry needed not to abide Continuation, the Superiors Seasing being produced of these Lands. *Hay* Clerk *Vid. March* 23. 1630. betwixt the same Parties. as also L. *Kilbirny* contra *Ker*, *ibidem.*

Broun contra *Mitchel*, *Eodem die.*

A Decreet before the Sheriffs of *Edinburgh* was sustained, Decerning a Party to pay to the Owner a Sum of Money yearly, for the use of his Worklomes for the Smith-Croft.

Murray

Murray contra *Mckenzie* of *Lochsline*, *March* 20. 1630.

A Reduction of a Tack Set by the Sub-Tacksman, Pursued by the Principal Tacksman against him, to whom the Right of that Sub-tack was Transferred and Disponed, no Party being Conveened in the said Reduction, but only the said Assigney made thereto. The *Lords* Found, that the Sub-Tacksmans Heir, or Appearand Heir to represent him (himself being dead) ought to be called to the Reduction of the said Tack; and that it was not enough, to conveen the Assigney, who had the only Right to the same; for that Writ being quarrelled, some ought to be called, to Represent him whom that Writ concerned, and who was to be presumed, to know more for sustaining thereof, than the Assigney could know; Therefore no Process was Found, while his Heir, or Appearnd Heir were Summoned. *Hay* Clerk. *Vid. March* 5. 1630 E. *Wigton* contra E. *Cassils*. *July* 9. 1630. *Fisher* contra *Broun*, and the Cases there cited.

John Stark contra *Thumb*, *Eodem die.*

CErtain special Controversies betwixt thir Parties, being particularly expresst, and therewith all other Questions betwixt them generally, whatsomever they were, being submitted to Arbiters, who having Decerned, the Decreet was quarrelled by way of Suspension as null, because in one Article of the Decreet, the Judges had referred the payment of the Taxation, whether of the Parties should pay the same, to the Judgment of two Lawyers, one to be chosen by each Partie, by the which Reference, they not determining upon one Article controverted, the whole rest of the Decreet was null; for the Suspender Alledged, that the Judge not Deciding in all the Questions, but Remitting one to others, which they could not do, after they had accepted on them the Decision of all, thereby the Decreet is null: for the which he Alledged, *L. qualem. ff. de Receptis*, and the other Party Alledging, that the Decreet could not be null in all the Articles, albeit it were yeilded, that it were null in that head, because *utile per inutile non vitiatur*, especially *ubi capita sententiæ sunt separabilia*, as in this Case. The *Lords* Found the foresaid Article of the Decreet Remitting to the Lawyers, to Determine on the Taxation, rendered not the whole Decreet null, because though the Civil Law, and Reason declares such Clauses to make the whole Decreet null, where any Article specified in the Submission particularly accepted, to be Decided by the Arbiters, is not decided, but referred to others, *quo casu nulla est sententia*, except by the Power of the Submission the Judge has Warrand from the Party, so to refer the same to others, *& pro hoc facit l. non distinguimus* 32 §. *quæsitum est ff. de Receptis*, &c. *Vid. l. qualem* 19. §. *dicere*, *& L. quid tamen* 12 *ff. eodem. ex quibus scire licet an sententia lata super quibusdam rebus compromissis, super aliis autem non lata, valeat in iis, supra quibus lata est*, but in this Case questioned, *viz.* anent the Taxation, it was not specially Submitted, but mentioned in a Clause of the Decreet, so that the Law militated not against the same; Likeas the Party renunced simply that Clause, and all Interest and Benefit which he could have by vertue of the same, or for Relief of any Taxation, so that there needed no Sentence thereon, albeit it had been specially set down in the Submission, as it was not, and therefore they Decerned as said is. *Gibson* Clerk.

James Hay of *Tour-lands* contra L. *Auchnames*, *March* 23 1630.

JAmes *Hay* being Infeft in the Lands of *Corsbie*, and others, by Disposition of the Earl of *Glencairn* (the Infeftment being of the Superiority, Disponed to him by the Earl of *Glencairn* Superior thereof) Pursues *Auchnames* by his Donatar, to hear and see the Lands Found in Non-entry; and the Defender Alledging, that this Pursuer as Superior, nor his Donatar, had no Right to pursue the Non-entry Lybelled, because that before he was Infeft in the said Superiority

by the Earl of *Glencairn*, the Defender was Seased in the Lands Lybelled, by vertue of a Precept direct, and granted to that Effect by the Earl, to and in his Favours; and it being Controverted, betwixt the Parties if the Non-entry for all years Interveening, after the Precept given in favours of *Auchnames*, by the Earl of *Glencairn*, and before the taking of Seasin was purged, by granting of the Precept, seing the Defender Alledged, that the Seasin ought to be drawn back *ad suam causam, viz.* the Precept granted, as said is, whereby he Alledged, that the Superior had past from all Non-entry after the date thereof. The *Lords* Found, that the Superiors Precept purged not the Non-entry, for all the years Interveening, before the taking of Seasin by the Vassal, for only the Seasin, and not the Precept, purges Non-entry, otherwise the Vassal after the Precept might ly out, to the prejudice of the Superior, as long as he pleases, for no Entry can be but by Seasin; But because the Vassal was Seased before the Pursuer was Seased in the Superiority, it was questioned, if this Right of Non-entry might fall under that Posterior Seasin for the years Lybelled, which preceeded his said Seasin, or if the Right and Action remained with the Earl of *Glencairn*, and so if the same pertained to the Pursuer, by vertue of that Posterior Seasin; and if that Right should extend to all the preceeding Casualities, or only to these which should fall after the date of the Seasin; Therefore the *Lords* Ordained the Pursuer, to produce the Disposition made to him, of that Superiority whereon the Seasin depended, that thereby it might be known, what was comprehended therein. This Cause being called, *July* 3. 1632. the Pursuer produced the *Di*sposition made by the Earl of *Glencairn* to him, which extended to all by-gone Casualities preceeding that Disposition, which were any ways competent to the Earl of *Glencairn* of before, and so that the *E*arl was denuded thereby, and that the same pertained to *James Hay*, and therefore Repelled the Defenders Exception. Likeas *June* 10. 1631. In a Declarator of Non-entry, L. *Kilbirnie* contra *Ker*, It was found, that the *C*harter granted by the Superior, albeit for Sums of Money, and Obliging the Superior to warrandice, yet would not stay the Non-entry, pursued by the Donatar, seing there was never Seasin taken thereon in the lifetime of the Superior, Granter of the Charter, and it was not *R*espected what the Defender Alledged, that the Accident of the Superiors *D*eath, which hindered the Seasin, ought not to prejudge the Vassal, seing the Heir, Giver of the Non-entry, and to whose use it is Pursued by the *D*onatar, is obliged to warrand the Charter, and will be forced to give him a new Charter, whereupon he may be Seased. This was Repelled; For the Party may charge him to Enter him, and if he ly Un-entred by the Superiors default, it will have its own Consideration against the Non-entry, but not the Default of the Vassal, if he charge not the Superior to receive him. *Actor. Advocatus* & *Lawtie. Alter. Stuart* & *Burnet. Gibson* Clerk. *Vid. Decem.* 24. 1642 Lo. *Leslie.*

Mr. *William Oliphant* contra Earl of *Marshel, Eodem die.*

IN a *R*eduction of a Horning, because he dwelt within another Sheriff-dom, *viz. Linlithgow*, and so should have been *D*enunced at the Mercat-Cross of the Head-Burgh of that Shire, whereas he is Denunced at *Edinburgh*, within the Shire where he then dwelt not, and the Defender offering to prove, in Fortification of the Horning, that he dwelt within *Edinburgh*, at the Mercat-Cross whereof he was Denunced, and so Alledged that he ought to be preferred, for maintaining of the Writ, it being *pro Fisco.* The *Lords* nevertheless Repelled this Exception, and preferred the Pursuer, in admitting of his Reason to prove, that he dwelt *alibi*, which was done, because he offered to prove the same by Witnesses, condescended upon by him, which were *omni exceptione majores, viz.* Barrons, Advocats, or Ministers, albeit the Excipient offered to prove his

his *Alledgance*, by famous un-suspect Witnesses. Actor. *Prasens*. Alter. *Nicolson* & *Fletcher*. *Hay* Clerk. *Vid. Novem.* 9. 1632. *Montgomery*.

The Laird of *Wardis* contra his Creditors, *Eodem die*.

THe L. of *Wardis* craving Protestation against a Summons, pursued aginst him by his Creditors, who were Infeft in his Lands of *VWardis*, and which Lands were Evicted by the Earl of *Mar*, whereupon *VWardis* had gotten Regress against L. *Balcolmy*, & therefore the saids Creditors craved Regress to the Lands of *Balcolmy*, according to their Proportion of their Wodset, against which Summons, this Protestation was craved, and the Pursuers desiring a day to be Assigned, at which day their Procurators declared, that they were content, that if they Insisted not at that day, that Absolvitor should be given *simpliciter* from that Pursuit, sicklike as if after Protestation, they had been Summoned to Insist with that Certification. The *Lords* Found, seing the Pursuers self was not present, to take the day with that Certification, that no such day could be taken by, or Assigned to *Advocats*, which might bind their Parties, they not being Summoned for that effect. Actor. *Stuart* & *Aiton*. Alter. *Nicolson* & *Lawtie*. *Hay* Clerk.

Murray contra Donatar of *Commissar* of *Dunkell's* Escheat, *Eodem die*.

MR. *Patrick Murray* Donatar to the Commissar of *Dunkell* his single Escheat, after General Declarator pursuing a Special, wherein he craved the Corn and Increase thereof, growing upon the Lands of pertaining to the Rebel yearly, of diverse years, since his Rebellion, and the Donatar to the Liferent of the same Rebel, of these Lands constitute by the Bishop of *Dunkell*, of whom the Rebel held these Lands, Compearing, and Alledging, that the Sums which these Lands were worth, and which they used to pay before the years Lybelled, during the which years Lybelled, the same were Laboured by the Rebels self, ought to be defalked yearly off the Cropts, and ought to be Adjudged to the Superior, and to his Donatar, and the King and his Donatar had no Right thereto; and that the same came not under the single Escheat; and the Kings Donatar Alledging, that the same fell under single Escheat, and that the Superior had no Right for the by-gone years acclaimed, because the Pursuit was for years of long time by-past, during the which space, the Superior made no use of his Liferent, nor acclaimed the same, but suffered the Rebel to continue in Possession, & *facere Fructus suos*, whereby the King had Right thereto, as single Escheat, and not the Superior, nor his Donatar, who has only obtained the Gift of Liferent in *Jan.* 1630. since his Gift from the King, since which Gift of Liferent he may seek the Liferent, and Duties of these Lands, for subsequent years, but not for the years by-past. The *Lords* Found, that the Superior, and his Donatar had only Right to als many of the Farms the years lybelled, since the Rebel was year and day Rebel, as the Land was worth, and in use before to pay of Farm, and that yearly, of all years as well bygone, as in time coming, and that the King's Donatar had no Right thereto, but only to the rest of the Cropt, and Increase of the Corns, each of these years, which Increase pertained to him, and not to the Superiors Donatar: and it being Alledged by the Rebel, that the Expences Deburst upon the Labouring of the Land, Winning, Shearing and Collecting of the Corns, expended by the Rebel thereon; and also the Seed sowen yearly upon the Ground ought sicklike to be Deduced yearly off the Increase acclaimed, and the Pursuer Alledging in the contrair, and sicklike the Rebel Alledging, that besides the foresaid Defalcations, there ought also to be Defalked off the first end of the Cropt, and Increase of the Grouth of the Corns yearly, for the which he was pursued, the Tiends, Taxation due to the King for the Lands, and the Feu-Dutie payed to the Superiors of these Lands. And the Donatar

Alledging, that theſe ought not to be Defalked. The *Lords* Found all the Defalcations reaſonable, and Found that the ſame ſhould be Defalked to the Donatar, out of the firſt end off the Corns craved from this Rebel, after Probation, and in the end of the Cauſe, except for the Seed of the laſt years Increaſe, acclaimed by the *D*onatar, which ought not to be Deduced that year. Actor. *Nicolſon* & *Aiton*. Alter. *Stuart* & *Mcgill*. *Gibſon* Clerk. *Vid. June* 26. 1629. *Advocat* contra Excommunicants.

Maxwel contra Lord *Herries*, *March* 24. 1630.

THe Lord *Herries* being Bound to one *Maxwel*, by an Heretable Bond, in a Sum of Money, and to be payed upon Requiſition, which Requiſition, as was expreſly contained in the Bond, ought to be made by the advice of the Perſons therein named, and no otherwiſe; This Bond being Compriſed by a *C*reditor of the ſaid *Maxwel*, who required the Lord *Herries* to pay him, as Compriſer, ſucceeding in the ſaid *Maxwels* Place and Right, and thereupon the Lord *Herries* being Charged, who *S*uſpended upon that Clauſe in the Bond, that Requiſition was not made by advice of the Friends, named in the Bond, as ought to have been done, and without which he was not ſubject in payment. The *Lords* Found, that ſeing this Bond was Compriſed by the Creditor of *Maxwel*; which Compriſer was become Singular Succeſſor to her, that he was not ſubject to that Clauſe, to make Requiſition, by the conſent of theſe Friends, who were adjoyned to the Perſonal *R*equiſition, which might have been made by that *C*reditor, in caſe the *R*ight of the Sum had ſubſiſted, and remained with her; For that *C*lauſe being ſet down for Perſonal *R*eſpects, to take away the Power from the Woman, to Diſpone, or Up-liſt the Sum, without the advice of theſe Perſons, could not go out of her own Perſon, to affect the Singular Succeſſor, and to bind him to ſeek their Concourſe thereto, whereto ſhe was tyed; And it was not reſpected what the Suſpender anſwered, that the Compriſer could not have the *R*ight otherwiſe tranſmitted to him, than his Debitor had the ſame her ſelf, which being ſo affected to her ſelf, behoved to remain ſo to every one claiming her Right, otherwiſe that condition would be Eluſory, and was un-profitably adjected: for then ſhe might have made one Aſſigney thereto, and ſo if the Condition ſhould not bind every one, who ſhould obtain that Right, the Aſſigney, albeit to the Debitors own uſe, might fruſtrate the meaning of the Bond, & without the Friends advice, liſt up the Sum, and thereafter reſtore the ſame to her, to be uſed at her pleaſure, which were againſt the Intention of the Bond; Attour that Clauſe is not ſimply conceived in favours of the Creditrix, but it is alſo Introduced in the *D*ebitors Favours, who poſſibly would not have given the Bond otherwiſe, but with this expreſs Condition, notwithſtanding of all which the Requiſition and Charge thereon was ſuſtained, but the Execution was delayed to a Term thereafter, againſt which the Debitor might provide to pay the Money. Actor. Alter. *Belſhes*. *Hay* Clerk. *Vid. July* 12. 1631. Lady *Huttonhall*.

Semple contra *Dobie*, *Eodem die*.

THis is mentioned in the 17 of *March*, 1630. where the Payment Alledged made to one of the two conjunct Executors, was ſuſtained to liberat from the whole, and that the other Executrix, who acclaimed her own half of that *D*ebt Alledged payed, could not ſeek any Part thereof, nor oppone to that Diſcharge, becauſe ſhe had Intrometted with her own half of the whole Goods and with als much more, as the Debt now payed to the other Executor extended to, which Alledgance was ſuſtained to maintain the ſaid Payment, and *D*iſcharge; and it was not Reſpected, what the ſaid Executrix anſwered, that this was not pertinent to this *D*ebitor to Alledge, that an Executor had Intrometted with more nor his own Part, and more than the others: For that was proper to the Executors among themſelves to compt thereon, and which they would

would do in their own competent time: But this not being Alledged by the Co-Executor, it could not be proponed by the Debitor, which was Repelled, and the said Alledgance sustained: For as an Executor may be Conveened alone, where there is two, or moe Executors, by the Creditor, for the whole Debt, if he have Intromeited with as much as may pay it, so may payment be made to on, of the whole Debt, where the other Executor has Intrometted with the like quantity, more than her own Part. *Vid. March* 17. 1630. betwixt thir same Parties *.

The King and the E. *Monteith* contra 29. *March* and *Penult* 1630.

AFter Mature Deliberation, and Reasoning amongst the *Lords*, upon a Letter Exhibit by the Earl of *Monteith* to them from the King's *Majesty* divers days of before; It was at length Found, that the Publication and Proclamation of that Letter at the Mercat-Crosses of any Sheriffdom, within the which any Party having Interest dwells, whose Right might be Quarrelled by the King, without Intenting of any Action against any Person, or any Particular Citation of any Person, should serve to the King, being so Published to the Leidges Generally before the 13 years expired, appointed by that Act of Prescription, to Interrupt the Prescription, which might run against the King's Right, appointed by the Act of Prescription, *anno* 1617. as effectually, as if Action had been Intented, and Execut against Particular Persons, within the space foresaid, notwithstanding that by that Act, Intention of Action within that space, was appointed & required specially to be Execute. Which the *Lords* by their Ordinance Found, was supplyed by this Publication of the King's Letter and Will, whereof the *Lords* allowed, and interponed their Authority thereto, *nemine opponente*.

Chisholme contra L. *Torsonce*, *June* 3. 1630.

IN a Spulzie pursued against *Torsonce* by *Chisholme*, an Exception of Poynding being proponed, and the Poynding produced, being quarrelled, because it was not Execute at the Place of the Regality of *Stow*, which by the Infestment of that Regality is designed, and appointed, Likeas the Party poynded, dwelling, and the Goods being within that Regality: And the Defender Duplying, that it has been the continual Custom in all times by-past, to Execute Poynding & Compriſing, Deduced against Parties, and their Goods within that Regality at the Place of at which Place, this Poynding Excepted on was Execut, and no ways at that other Place designed in the Infestment, which Duply and Exception, being admitted to Probation, and at the Term Assigned to Prove, it being questioned betwixt the Parties, and by the Pursuer, who Alledged that this Duply was only probable *scripto*, *viz.* by Production of Poyndings and Compriſings so execut, as the Defender Alledged, and that the said Alledged Use and Custom could not be proven otherwise, by any Witnesses, both tending to Destroy, and Change the Infestment, and against the Tenor thereof; And also in effect to make up an Act in it self unlawful, to make it lawful by the testimony of Witnesses, which was alike as to prove Poynding by Witnesses. The *Lords* Found, that this Custom to Execut Poyndings and Compriſings at the place excepted on, was probable by Witnesses, *viz.* by Messengers, executors of such Acts, and by the Witnesses present with them, the time of their executions; and that there was no necessity, to prove the same by production of Poyndings and Compriſings execute, because Parties Deducers of Poyndings, when they are satisfied, will deliver to their Debitors these Executions back again, or they will then cancel the same, and so such Writs may probably not be recovered by the Party, to prove his Duply, and this was to eschew Spulzie. Actor. *Stuart*. Alter. *Nicolson*. Scot Clerk. *Vid. March* 18. 1630. betwixt these Parties.

Viscount of Stormount contra Mr. *William Hunter*, *June* 10. 1630.

IN a *Pursuit* for payment of *Rental* Bolls of Teinds, being cleided by a Tack, for payment of the Bolls therein contained; and it being Replyed, that since the Tack the *Defender* had payed other qualities of Victual divers years, than the *Species* contained in the Tack, *viz.* Wheat, whereas the *Duty* of the Tack was Beer, whereby the *Pursuer* Alledged, that the *Defender* had prejudged his Tack, either to make it fall, or at least to make him subject, during the years thereof to run, to pay that same quality, and sort of Victual which he has been in use to pay the preceeding years, since the said Tack. This Reply was not respected, but the Exception notwithstanding thereof was sustained; For the *Lords* Found, that the Tack was not prejudged by the Tacksmans payment of other sorts of Victual, than was conditioned by the Tack, the change of which quality derogated not to the Tack, neither did the said payment bind the payer, to pay the quality which he payed for any bygone years, or for any years of the Tack to run, there being no condition *Alledged*, that the like payment should be made in time coming; and so the Concession acknowledged by the *Defender* of the said change of the quality of bygone years, was not Found sufficient, to oblige him to continue in that payment in time coming; but if the Tacksman had payed a greater *Duty* in quantity than his Tack *Duty*, it is commonly estimat to be prejudicial to the Tack, the same being proven by Writ or Oath, which wanted not the same Scruple: for the Tacksman may, upon many considerations, pay more than he is obliged by his Tack, and yet have no purpose, but to keep his Tack in Integrity, as when the Setter may become depauperat, or when the Tacksman has made an easie Purchase, or otherwise may be moved voluntarly, to do more than he can be obliged to do in Law, in which case it were hard his Tack should fall, for his kind dealing; But where this is admissable, it would appear necessary to be Alledged and Proven, that that payment of a greater Quantity was expresly conditioned betwixt the Parties to be made for the Lands, or Teinds Set in Tack, and consented to betwixt them, and conform thereto, payment was made *eo nomine*, *viz.* as for the Duty adebted therefore. Actor. *Hope*, *Aitoun* & *Cheap*. Alter. *Stuart* & *Russel*. *Hay* Clerk.

Fairlie contra *Fairlie*, *June* 11. 1630.

ONe *Fairlie* being Heir to her Brother *Fairlie*, and *Richard Maxwell* her Spouse, pursues Mr. *Patrick Forrest* as Haver, and *Eupham King* as Maker of an Assignation to some Obligations, made by her in favours of the said umquhile *Fairlie* her Son, to whom the Pursuer was Heir, for delivery of the said Assignation, wherein the Defender Haver producing the Assignation, the Mother, who was Maker, Alledged the Summons was not Relevant, never proporting that the same was delivered to the Defunct in his own time, before his decease, or that it was delivered to this Haver, to the Assigneys behove, nor no ways qualifying, that the same ever became the said Defuncts Evident. This Alledgance was Repelled, and the Summons and Action was sustained and found Relevant, bearing, That the *Assignation* produced called for, was made in the *Defuncts* favours, and that the same was out of the Cedents own hands, and was in the hands of this Defender, who produced the same, who was Father in Law to the Assigney, (the *Assigney* having Married his Daughter) and whose having the same, without any qualification how he received the same, and from whom, was found to be a presumption that the same was become the Assigneys Evident; in respect whereof the *Lords* Found it not necessary, to Libell or Reply, that the Writ was in the Assigneys hand at any time before his decease, or that the Haver had received it to the Assigneys use, or to make any other qualification or probation, that the Writ had become his Evident in his lifetime, but without any such qualification or probation, except only upon production

production of the said Asignation by the Haver thereof, they Found, that the same should be delivered to the *Asigneys* Heir, as an Evident proper to the *Defunct*, and so now to the Heir. Actor. *Stuart* & *Cunninghame*. Alter. *Nicolson* & *Aiton*. *Gibson* Clerk. *Vid.* 21 *Feb.* 1628. L. *Monimusk* contra L. *Pittarro*.

Mowat contra the Magistrats of *Striviling*, *June* 12. 1630.

MR. *Roger Mowats* Charges being Suspended by the Baillies of *Striviling*, who were Charged by the first Letters upon Caption, to take one *Archibald* Rebel his Debitor, wherein the Magistrats Disputing, that seing they had done Diligence to take him, and searched for him in the Town, and offered to pass with the Officer, to take him in any part within their Jurisdiction where he would shew them the Rebel, as Instruments produced bears; Therefore they contended that this obedience of theirs should free them, and that Letters of Horning could not be direct upon the second Charge against them, as use was in thir cases, while they were Charged again of new by other new Letters of Caption, which supplied again the first new Charge, and the first Letters, seing by their obedience foresaid these first Charges behoved to be holden as extinct, and as if they never had been Charged by vertue thereof. And the Charger Alledging, that that obedience given by the Magistrats at that one special time, when they were Charged by the Officer, could not liberat them for time to come, but that the Charge once given to them was Sufficient, and ought to be effectual to make them lyable at any time thereafter to take the Rebel, whensoever they should find him within their Jurisdiction, and might take him without necessity to use a new Charge against them for that effect; for it were a great iniquity that such obedience at that time should ever liberat the Magistrats, for then at any time thereafter they might converse with the Rebel, and Intercommune and Traffick with him without danger, which were against the Law; and it were also hard that the Creditor should be holden, ever to keep a Messenger beside the Magistrats, to be ready ay upon such occasion to Charge him, which will tend rather to make him quite his Debt, than to bestow such cost thereon, which would exhaust the same. The *Lords* Found, that the Magistrats once lawfully Charged to take the Rebel, were holden still thereafter to take him, when-ever they might conveniently have the occasion, and when-ever they should find him within their Jurisdiction, and might take him; and that they needed not to be of new Charged again for that effect, but that the first Charge sufficed therefore, to put them in *mala fide* for not doing of the same thereafter, at least that they ought to do all lawfull diligence to take him, and to qualifie some lawful impediment, why his Diligence was not effectual, which being shown, he was thereby excusable, as if the Rebel had been riding on Horse-back, and had out-run the Magistrats, or had more company with him for the time, and had by force escaped, while others were conveening to help the Magistrats, or some such other impediment: In all which cases it is required, that all things were done *bona fide* upon the Magistrats part; and it being here Alledged, that after this Charge and obedience, the Baillies had seen the Rebel within their Town, and so that the Charge should be Found orderly proceeded against them; and the Baillies contending, that this was not enough, except it were Alledged that they had seen him at such a time, when they had power to take him within their Jurisdiction. The *Lords* Found it sufficient to Alledge, that they had seen him after that disobedience of theirs, within their Jurisdiction, and that it needed not to be Alledged, that they then had power to take him, seing it was presumed that they had power, the Rebel being their Burgess, and offered to be proven to have been a man past sixty years, which was found to be enough, seing they Alledged no presumption, impediment, or circumstance, to excuse their not obedience, nor to qualifie that

the Rebel did any deed, or used any force or means to hinder them to take him, and so this Alledgance was sustained against the Reason; but it is to be considered, that it is not Decided how long the Magistrats remain obliged after the Charge to take the Rebel, for it may be the Creditor agree with him (but that is no excuse to the Magistrat, who is holden to do what he is lyable in Law) and if he cease either for his knowledge of any thing *in facto*, or for presumption of that which may be *in facto*, he ceases *suo periculo*; And in Magistrats in Burgh, and other Magistrats, whose Offices are Annual, it may appear that these Charges should last during their Office, which at furtheſt is a year; but in Hereditary Offices, the Question is greater. Actor. *Prasens* & *Nicolson*. Alter. *Cunninghame*. *Gibson* Clerk. *Vid.* 12 *March* 1629. *Cunninghame* contra Sheriff of *Striviling*, and the Cases there. *Item*, 19 *Novemb.* 1628. *James Rae*. But this is decided 13 *July* 1630. *Hay* contra Earl *Marshall*.

Earl of *Wigtoun* contra Earl of *Cassils*, *June* 17. 1630.

IN an Improbation and Reduction of a Seasin produced by the Earl of *Wigtoun*, granted to one of his Predecessors, to instruct his Interest in that Pursuit moved by him, for improving of the Writs of the Lands Libelled, made to the E. of *Cassils* by that person Seased, or his Predecessors; this Seasin was sustained, albeit it bore not, that the Seasin was given by tradition of Earth and Stone, or by such Symbols, as is usual in giving of Seasins, but only proported, that the Baillie gave actual, real, and corporal possession of the Lands, but no other mention of any further Tradition, which was sustained, the Party Seased, the Baillie and Nottar being all deceased, long before this time when it was quarrelled. *Item*, another Seasin of thir Lands controverted, granted to the Pursuer, being a Transumpt, Transumed since the Intenting of this Cause, the said Transumpt was sustained, albeit this Defender, who was Pursued for Improving and Reducing of his Right of the same Lands, contained in the same Seasin, by the same Parties whose Right was Transumed, long before the Intenting of the Action of Transuming, was not Summoned to the said Transuming. *Item*, It was Found, that the Pursuer, whose Pursuit to improve the Defenders Right of certain particular Lands Libelled, was founded upon his Right and Interest of a Barony, of the which Barony the Lands controverted (the Defenders Right whereof was quarrelled) were Libelled to be part and pertinent, that the Pursuer in *ingressu litis*, and before the reasoning of the Cause, was not holden to prove nor qualifie, that these Lands were part of that Barony, wherein he Libelled and shewed himself to be Infeft, especially seing the Defender proponed no Exception, tending to deny the same, and which might urge him to prove the same *in Ingressu*. Actor. *Advocatus*, *Stuart* & *Robertson*. Alter. *Nicolson*, *Aiton* & *Craig*. *Gibson* Clerk. *Vid.* 15 *March* 1631. L. *Smeitoun*. 6 *July* 1630. L. *Hermistoun*. *Item*, 5 *March* 1630. Betwixt these Parties.

Hume contra *Hume*, *Eodem die*.

IN a Removing the Defender, who used an Incident to prove his Exception, admitted to his Probation, being desired conform to the Act of Parliament, and Practick observed, to find Caution for the violent Profits, and offering to give *Cautionem Juratoriam*, and to make Faith, that he was not able to find another Cautioner, and that he could get none who would be Cautioner for him to that effect; this *Cautio Juratoria* was refused, and Found ought not to be admitted in such Actions and Causes, but that either he ought to find sufficient Caution, or else that Decreet should be given against him to Remove. *Actor*. *Craig*. Alter. *Belshes*. *Gibson* Clerk. *Vid.* 6 *July* 1630. Betwixt these Parties. *Item*, 10 *July* 1630. *Bennet* contra *Porteous*.

Mr-

M^c*adam* contra Laird of *Kerss*, *Eodem die*.

A Bond whereby the Master borrowed from his Tennent 500 Merks, and allows so much of the Duty of the Maills, which the Tennent should pay for the Land to him, to be allowed and retained in his own hand for the Annualrent and Profit of his Money, ay and while he should be re-payed of the said Principal Sum; which Bond being Confirmed by the Executor of the Person, who was made Assigney thereto by the Tennent Creditor, and the Executor having Charged the Debitor for the said Principal Sum, who Suspending that it was Heretable, and pertained to the Heir of the Assigney, and not to his Executor; the said Bond was Found Heretable, and that it pertained to the Heir, and not to the Executor, being of the Tenor foresaid, and that the Creditor should retain so much of the Duty of the Lands, for the Annualrent and Profit thereof yearly, while it was re-payed. Actor. *Miller*. Alter. *Belshes*. *Gibson* Clerk.

Nisbet contra Lady *Abercorn*, *June* 19. 1630.

One *Nisbet* Creditor to the Lady, after Sentence obtained against her by him, for payment of the Debt, and after Arrestment and Sentence thereupon, against her Tennents for the same, the Ladies Liferent is after these Decreets Disponed to Sir *James Fullerton*, falling by her Excommunication, and Horning, whereat she remained year and day before the Sentence upon Arrestments at *Nisbets* instance against her Tennents; whereupon in a double Poynding, at the Tennents instance against this *Nisbet* and the Donatar, which of them had Right to the Farms. The *Lords* Found, that albeit the Lady was Rebel year and day, before any Sentence obtained by the Creditor against her Tennents, whereby the Donatar claimed to be preferred to the Creditor, seing the King nor his Donatar pays no Debt, but the Debt of the Horning, whereupon the Escheat is taken, and at the time of the expiring of the year, the Duties of the Rebels Lands pertains to the King, and not to any Creditor thereafter Arresting and obtaining Sentence therefore; for he Alledged *hoc ipso momento*, after expiring of year and day instantly without Declarator, the Duties of the Lands pertained to him, and could not be evicted by any other Creditor, thereafter Arresting and obtaining Decreet, albeit before the Liferent was Gifted and Declared, seing the matter ought not be considered, from the time of the Gift and Declarator, but from the time of the falling of the Escheat. And the Creditor Alledging, that his Arrestment and Sentence, albeit after the Horning year and day, yet being before both the Gift and Declarator, in respect of his Diligence, he ought to be preferred, seing he had recovered Sentence also against the Rebel for the Debt, before she was put to the Horn. The *Lords*, in respect that the Creditor had obtained Sentence for his Debt against the Lady, before she was Rebel, albeit the Arrestment and Decreet thereon were after the Rebellion year and day, whereby the Farms controverted were affected, and that the Donatars Gift and Declarator were long after the Sentence upon the Arrestment, yet the *Lords* preferred the Creditor, in respect of his Diligence. *Gibson* Clerk.

Mr. *Walter Whitefoord* contra L. *Johnstoun*, *Eodem die*.

One *Johnstoun* having Disponed some Lands to Mr. *Walter Whiteford* by Contract, whereupon Inhibition was Served; and having thereafter Disponed the same to the Laird of *Johnstoun*, the said *Johnstoun* and Mr. *Walter* Pursues the Laird of *Johnston*, for the Exhibition of the Writs of the said Lands, made to this Disponer and his Predecessors, wherein the *Lords* Found, that neither this Disponer, nor Mr. *Walter*, by vertue of this Contract and Inhibition, Execute before the acquiring of the Laird of *Johnstouns* Right, could have Action to seek Exhibition of the Writs of the Lands from the Laird of *Johnston*, who stood Infeft therein, albeit this Right was acquired from the Pursuer after Mr. *Walter* his Inhibition: For he being Infeft in the Land, so long as his

Inseftment stood, he ought to bruik the Land, and would not be compelled to produce the Evidents at his instance who Disponed the same, nor at Mr. *Walters* instance who was not Infeft, without Prejudice to Reduce upon the Inhibition, in the which Process the Defender might be called to produce the same. Actor. *Lermonth.* Alter. *Stuart.* *Gibson* Clerk.

E. *Crawford* Supplicant, *Eodem die.*

A Supplication given in to the *Lords* at the E. *Crawfords* instance, Craving, That seing he was to Serve himself Heir to some of his Predecessors, before the expiring of the time of *Prescription*, and that sundry of his Creditors, or other persons might produce Hornings against him, whereby the Judge, before whom his Brieves were to be Served, might be hindered to proceed therein, and he would lose the benefite of the *Prescription*; therefore that the *Lords* would give Command to the Judge to proceed, notwithstanding of the Hornings to be produced by any person, and to Dispense therewith. The *Lords* Found, that they could not grant such a Warrant, nor Dispense therewith, that not being proper for them to do; but they Ordained and Found, that the Supplicant should have a general Relaxation and Suspension from all Hornings whatsoever, without necessity to express any particular, and which he might Execute by a general Execution of *Relaxation* at the Mercat-Cross of *Edinburgh*, without necessity of any particular Citation, and which they Declared they would grant, and granted the same to that effect, that his Brieves might not be stayed, but that the Judge and Assisers might proceed therein, notwithstanding of any Hornings to be produced against the Impetrator of the Brieves, and albeit there was a contrary Supplication, given in by the Creditors and others, who were Infeft in the Lands by the Earls of *Crawford*, that the Hornings might have that effect, which in Law they ought to produce, yet the other Bill was granted, and the Creditors Bill refused; for the *Lords* Found that the Service would tend to the Creditors benefite. *Vid.* 21 *Nov.* 1626, L. *Meldrum.*

Somervel contra *Gordon*, *Eodem die.*

Lewis Somervel Donatar to the Marriage of *William Gordon*, Pursuing for Declarator of the single Avail of his Marriage, according to the *Rental* of the Lands given in by him, and the Defender desiring Defalcation, in respect of the Burdens on the Lands, and other personal Debts owing by him, whereon he was ready to condescend; the Pursuer Answering, that no respect ought to be had to any of his Burdens, because the Superior, who Disponed these Lands to his *Predecessors*, gave them free of Burdens, so that his Casualities ought to be respected, according to the Estate of the Lands, wherein they were, when the Superior conferred the same, and not according to the Burdens, which flowed from the Vassals Deed, specially no respect could be had to the personal Debts, contracted by the Defender or his Predecessors, nor to real Burdens, not acknowledged or confirmed by the Superior, nor to no other Burdens whatsoever. This Alledgance was Sustained, notwithstanding of the Answer; for the *Lords* Found, that no Sum could be modified for the Defenders Marriage, but with respect to Defalcations of his Rent and Estate of the Burdens, under which the Defender lay, whether the same were real or personal, or whether the real were confirmed by the Superior or not; for if they were not Confirmed, the Superior had his other Casualities thereby; but in this Pursuit for the Marriage, which was personal, and respected the person of the Vassal, and not real, for the paying of the Profites of the Land to the Superior, The *Lords* Found, that Consideration ought to be had of all the Vassals true Debts, either personal or real, and that according to his free Estate, a Modification might be Decerned for the Marriage, and which Modification would be made, not only according to the Avail of these Lands, which he held of that Superior, but according to his whole

Estate

Estate of Lands, albeit holden of other Superiors, if he had any, and also according to the Sums and other Movables, which he had beside his Lands, so that as all came under Consideration in the Valuation of his Estate, to make up the Modification, so all should in like manner come under consideration, which might justly detalk and lessen the quantity thereof. Actor. *Nicolson*. Alter. *Aiton*, *Gibson* Clerk.

Scrimzeour contra L. *Dean-miln*, *June* 24. 1630.

ONe *Scrimzeour* Executor Confirmed to the Goodman of *Kirktoun*, who had an Liferent Pension of certain Victual, to be payed out of the Teind-Sheaves of Pursues the Goodman of *Dean-miln* for payment of the said Pension the Cropt 1629, the Teind-Sheaves being intrometted with by him the said year, by vertue of a Right thereof made to him by the Titular; and the Executor claiming Right to the Pension that year, seing the Pensioner died in *June* that same Cropt, whereby at least (as he Alledged) the half years Duty of the Pension should be payed to him, seing he lived a while after *Whitsunday*; wherein the *Lords* Found, that seing the Pensioner lived not till after the Corns were shorn that Cropt, but died before the Harvest libelled, the same was appointed to be payed out of the Teind-Sheaves of the Lands libelled, that therefore the saids Teind-Sheaves could not be affected with the Burden of the Pension that year, and so the Pensioner, who had it for his Lifetime, dying as said is before the Harvest, albeit after *Whitsunday*, and consequently his Executor, was found to have no Right thereto, albeit he Alledged that it was a Debt which was running, *ubi cedebat dies*, *licet non venerat* when he died, which was Repelled. Actor. *M'gill*. Alter. *Aiton*. *Gibson* Clerk. *Vid.* 21 *March* 1628, Mr. *Patrick Murray*.

Fairholm contra *Hume*, *Eodem die*.

AN Obligation of 200 pound being desired to be Registrat by the Creditor against the Heir of the Debitor, who Alledged it was null, because it was made by the Alledged Debitor, on his Death-Bed, at which time he could not burden the Heir, who was now pursued, & which was instantly verified by the Pursuers own Title produced; for it was subscribed by a Nottar for the Alledged Debitor, bearing to be so done, because of his great sickness, which rendered him unable to Subscribe himself; Likeas the Charge produced by the Pursuer, whereby he had charged the Defender to enter Heir to him is raised, & execute within four days after the date of the Bond: And the Pursuer Replying, that this Nullity could not be received *hoc ordine*, *sed per viam Reductionis*. The *Lords* Found, that this was Receivable *via Exceptionis*, without further Proces, being instantly verified by the Pursuers own Writ. And it being also Alledged, that the Bond was null, being above 100 pounds, & Subscribed only by one Nottar. The *Lords* Found the same null also for that cause, albeit the Pursuer Alledged, that it was a Bond made by one who could Writ, but in sickness not being able to Writ, was supplied by a Nottar for him, and which was done on his Death-Bed, and so ought to have force, which Reply was rejected, seing the Bond was used as a Writ made by form of Obligation, and so ought to have the Solemnities requisit, & was not used as a Deed depending on the Form, or Act of a Testament, in which case it behoved to have been Confirmed, & Pursuit Intented upon that Ground, & so the Obligation was found null. Actor. *Cheap*. Alter. *Craig*. *Hay* Clerk.

Kier contra *Lamb*, *Eodem die*.

A Minister provided by the Deprivation of the last incumbent, who was Deprived for Disconformity, having Charged him who was Deprived, to Remove from his Manse and Gleib, and the other Suspending. The *Lords* Found, that he ought not to Remove, while he were satisfied by the Intrant of the Expenses and Charges wared by him, upon the Reparation of the Manse, albeit the said Expenses were neither liquid, nor proven that he had deburſed any, and albeit the Charger Alledged, that upon that naked Alledgance un-

tryed, he ought not to be Deprived from the use of his Manse, the want whereof was an Impediment to the Service of the Cure of that Kirk, where none could serve, except they had the Manse to remain in, so that the most that could be done to the Suspender, was to Pursue by way of Action therefore, where it would have its own tryal, which was Repelled; And sicklike, it was Found, that before he *Removed*, he should be repayed of the *Moneys* given to the Relict of the deceast Minister, for it was als competent to this Minister, to seek the same, being removed from the *Kirk*, whereby he was civilly dead, as it might have been competent to his Executors, if he had died Minister. *Actor. Gibson*: Alter. *Mowat*. *Gibson* Clerk.

Cochran contra *Dawling*, *June* 29. 1630.

Patrick Cochran being obliged in *Robert Dawlings* Contract of Marriage with the said *Patricks* Daughter, to make her equal with the rest of his Bairns, the time of his decease, the said *Patrick* thereafter, by the space of four or five days before his decease, which was seven years after the said Contract of Marriage, makes his eldest Son *Assigney* to all his Goods, whereby the said Clause of the Contract, if the Assignation had Subsisted, had been Eleided, whereupon *Robert Dawling* having raised Action to anull the said Assignation, as done on Death-Bed, and to his prejudice, in the said Clause, and Contract of Marriage: the said Assigney, and he, by Intercession of Friends, agreed by Contract, to anull the Assignation, in so far as thereby the said *Robert* his Contract was prejudged; And at that same time, the said *Robert* grants a Bond to the said Assigney his Wifes Brother, to Infeft her in Liferent in 400 merks yearly, wherein no mention, nor relation was made to the said Contract, which Bond being desired to be Reduced, because it was *donatio inter virum & uxorem*, and was Revocked. The *Lords* Found the Bond, neither Reduceable nor Revocable; For it was Found to be a part of that Contract, whereby the foresaid Assignation was *Renunced* (albeit it was a distinct several Writ, having neither Relation thereto, nor *Dependence* thereon) seing it was of the same date, and betwixt the same *Parties*, and before the same Witnesses; and so it was *Found* thereby, that it was *donatio remuneratoria*, which *de jure inter conjuges valet*, albeit the Reducer Alledged, that it could not be called *remuneratoria donatio*, seing the Renuncing of the Assignation done on *Death*-bed, which was thereby null in the Law, was no benefite, for which the Bond quarrelled might be maintained to have been given in remuneration, by reason he got no more thereby, than before was conditioned to him by the Contract of Marriage, and which could not be prejudged by that Assignation done on Death-bed, neither did the Bond make any Reference to the said Contract of Agreement, and had nothing to do therewith, but was a several Writ not done *eo intuitu*; which *Reply* was Repelled, and the Bond sustained. *Actor. Aiton & Stuart*. Alter. *Nicolson*. *Gibson* Clerk.

Herris contra *Scot*, *July* 2. 1630.

ONe *Scot* Beer-Brewar being Conveened, by *Herris* Coal-grieve to the Lady *Louthian*, for the Prices of Coalls furnished to him, in the year 1625. & sensine yearly. And the *Defender Alledging*, that the Furnishing in the years 1625. and 1626. was prescribed by the Act of Parliament 1579. Not being Pursued within three years, and so was not probable by Witnesses, but by Writ or Oath. The *Alledgance* was Repelled, and the Summons Found Probable for these years also by Witnesses; Because the Pursuit was for a continued Furnishing, not only these two years, but still on yearly thereafter, which was in effect a Compt, and the *Prescription* cannot be esteemed to begin, but after the last time of the Furnishing, which is in *anno* 1629. Likeas, in *anno* 1627. The Parties compted amongst themselves for the furnishing of the two preceeding years, in respect of which Compt then made, and that the *Defender* promising payment of the two preceeding years, the Prescription was found to be Interrupted, and this Compt,

and

and the Promise was also Found Probable by Witnesses: Also the *Lords* Found, that the Pursuer *hoc titulo*, as Coal-grieve had good Interest to Pursue this Action, albeit he had lybelled no Power from these who had Right to the Coal, but the Procurator for the Lady concurred also to the Pursuit. Actor. *Belshes.* Alter. *Cunningham.* *Hay* Clerk. *Vid. Fed.* 15. 1630. *Ord* contra *Duffs.*

Douglas Minister of *Balmerinoch* contra *Johnston*, *Eodem die.*

IN a Reduction at the Pursuers Instance, upon an Inhibition raised against the Debitor upon his Bond, of a Sum of Money, for Reducing of a posterior Bond of a Sum of Money granted to *Johnston*, after the said Inhibition, and whereupon *Johnston* had Compriſed the Common-Debitors Lands, and was thereon Infeft. This Reason and Action upon the Inhibition was sustained, to Reduce the said Bond, albeit it was of a Moveable Sum, in so far as might be a ground to Compriſe, or take away any Heretable Right from the Debitor, to the Pursuers hurt, but not to stay either Personal Execution, or Payment by the Debitors Moveables, upon which the *Lords* Found the Inhibition strack not, but only that it should be effectual for his Heretage, or such like Real Securities. Actor. Alter. *Mowat.* *Hay* Clerk. *Vid. Novem.* 27. 1630. betwixt thir Parties.

L. *Rowallan* contra *Boyd*, *Eodem die.*

IN a Removing, an Exception upon a Rental, wherein both Setter and Receiver were died, bearing a Clause, *That the Pursuer should receive the Rentallars Bairns after him, kindly Tennents, upon such conditions as they should agree upon*, This was Found sufficient to defend the eldest Son of the Rentallar, he paying such a quantity of Grassum, and such yearly Duty, as others of the Pursuers kindly Tennents do for the like Lands, and which should last to him for als many years, as are granted in the Rights made to others of the like Lands, and upon the like Conditions, and Admitted to the Rentallars Probation, to prove what others payed for the like Lands. Actor. Alter. *Boyd.* *Gibson* Clerk. *Vid. March* 11. 1626. L. *Corshill.*

M'alaster of *Tarbet* contra *John Cunninghame*, *Eodem die.*

IN a Suspension, the Suspender being debarred *ab agendo* by Horning, which he Alledged to be null, because it was not stamped. The *Lords* would not in this Proces Find the Horning null, but reserved that Nullity to be tryed in an Ordinary Pursuit, but they Found that the Suspender had *personam standi in judicio*, notwithstanding of that Horning, and that he was not debarred thereby. Actor. Alter. *Cunninghame.* *Scot* Clerk.

E. *Hume* contra *Francis Stuart*, *Eodem die.*

IN a Poynding of the Barrony of *Coldinghame*, for a yearly Annualrent, the Defender offering to Improve the Execution of the Summons against him, and the Pursuer Answering, that seing he Compeared, he thereby affirmed in effect the Citation, and this offering to Improve, ought not to stay this Proces; but the Defender, if he pleased, may Intent his Action by way of Pursuit thereupon, and cannot now be received, being a Dilator, which has not instant verification, as it ought to have, if it could be here received. And the Defender answering, that he Compeared only here to quarrel the Citation, and proponed the Improbation, as a *peremptory*, in the Cause. The *Lords* Found, that the Improbation of the Execution might be proponed *peremptorie* in this Judgement *& hoc loco*, and received the same, without necessity of instant Verification. But Found that the Proponer ought to have all the Terms for Improving, which are given to prove other Exceptions; For seing if the Defender were Decerned in absence, he might Reduce the Decreet upon that Reason, to offer to improve the Execution, so he might now propone it by way of Exception, which would be Relevant by way of Reduction, albeit he now Compeared. Actor,

Advocatus & *Nicolson*. Alter. *Craig*. *Gibson* Clerk. *Vid. November* 25. 1630. *Thomson* contra *Rig*. & 6. *March* 1629. B. *Isles*.

John Ross contra the Town of *Perth*, *Eodem die*.

IN a Spulzie at the Instance of *John Ross*, he having Right made to him, by his Father the Laird of *Craigie*, of the Teinds of the Kirk of *Perth*, Set to him during his Life-time, *viz. the Fathers Lifetime, and thereafter for the space of two ninteen years Tack to the Heirs Male, gotten of his own Body, which failzieing, to their Heirs Male whatsoever*; to the which Tack the Father, who was Tacksman for his Lifetime, *primo loco* as said is, made the said *John* Assigney, with Reservation of his own Liferent, and accordingly retained the Possession, he surviving divers years thereafter, after whose decease the Right of the Tack is Comprised from his Heirs Male by the Town of *Perth*, who, conform thereto, came in Real Possession of the Teind-Sheaves divers years; And the Town of *Perth* being conveened for wrongous Intromission, against which they opponing the Tenor of the said Principal Tack, and their Comprising, clad with Real Possession many years together, which they Alledged should give them preference to the Pursuers anterior Right, which never took effect, by any Possession or Intimation of his *Right*, except only by Executing of an Inhibition 12 years since thereon, whereupon nothing more was prosecuted, nor done by him sen. sine, specially seing they Alledged, that the Nature and Tenor of the Tack being Set to the *Father*, during his Lifetime, and the 19 years Tack therein, to his Heirs Male, therefore that he had no power to Dispone upon this 19 years Tack, which was to take beginning after his decease, in the Person of his Heirs Male, whom he could not prejudge in his *Right*. The *Lords* Found this Exception Relevant, and preferred the Compriser to the anterior Right, acquired from the Father by the Pursuer, as said is, seing the Pursuer had no Possession; but this was in this Judgment Possessory, and to defend the Possessor against this *Pursuit* of wrongous Intermission. Actor. Alter. *Chaip. Gibson* Clerk. *Vid. June* 22. 1627. *Lidderdale* of St. *Marie Isle*. *March* 10, 1631. La. *Samuelston*. *July* 29. 1625 Sir *Robert Ker*. *July* 9. 1630 *Veitch* contra *Robertson*. 20 *Feb*. 1629. L. *Drumkilbo*.

Cochran contra *Hamilton*, *July* 3. 1630.

Hamilton of *Tweidie* being *Debitor* by Bond to *Cochran* in 1000. merks, for payment of the Annualrent whereof, while the principal Sum were payed, he causes *William Henry* his Tennent oblige himself in the Bond, to pay yearly 100 merks, which the Bond bore, *To be done by the said Tennent, at the direction of his said Master*; Likeas in that same Bond, his Master allows to him that 100 merks, in the first end of the Mails adebted to his *Master* yearly. The Tennent being Charged by the Creditor foresaid, to pay the 100 merks for Annualrent, he Suspended upon double Poynding against the Creditor, on the one Part, and against the Compriser, *viz*. the Lord *Balmerino*, who had Comprised the Lands from the said *Hamilton* of *Tweidie*, and was Infeft therein, by vertue whereof the *Dutie* of the Lands was Alledged to belong to him; And the other Creditor Alledging, that the Tennent was obliged to him by his personal Bond, to pay that yearly Profit to him for the Annualrent of his Money, while their payment thereof, for so the Bond bore; so that whatsoever *Duty* should be evicted from him, as Tennent of the Land, it should not be derogat to his personal Obligation, which had no respect to the Lands. The *Lords* Found, that this Tennent, notwithstanding of the said Obligation, whereby he was obliged to pay this Annualrent to the Creditor, was only subject to pay the said *Duty* of 100 merks acclaimed, once to any of the two Parties, which might befound to have best Right to the *Duties* of the Lands possest by him, and therefore Ordained the two Parties to Disput, which of them should be preferred therein; For it was Found, he ought not to pay to both Actor. *Lawtie*. Alter. *Gibson* Clerk. *Vid. March* 5. 1630. Mr. *John Cant*. *Novem*. 28. 1635. *Morison* contra Tennents of *Orchardton*.

Mr.

Mr. *George Symmor* contra L. *Balgillo*, *Eodem die.*

MR. *George Symmor* Minister at *Megill*, being Assigned by the Bishop of *Dunkell*, to the Parsonage of *Megill*, to which Bishoprick the Parsonage was Annexed, Pursues by way of Action the L. *Balgillo* and his Tennents, Intromettors with the Teind-Sheaves, for the Rental Bolls thereof, *viz.* 36 Bolls. whereof his Predecessors were once in Possession about 30 years since. And the Defender Alledging, that he could not be subject, nor yet his Tennents, in any greater quantity nor 26 Bolls, because they have been ever these 30 years bypast in use to pay yearly, only the said quantity of 26 bolls, as the Ministers serving the Cure at the said Kirk their Acquittance thereof bears, so that after so long and constant use of payment, the Minister now cannot Pursue for any greater quantity, after so long desuetude of paying more: and albeit the Bishop has subscribed this greater Rental of the Teind acclaimed, yet that ought not to prejudge the Possessor, specially seing the Minister at this Kirk has by the Decreet of Plantation, *anno* 1628. a constant Stipend modified, which is compleat by this quantity used sensine, ever to be payed out of these Teinds, and so he can never seek any more. The *Lords* Repelled the Alledgance, and Found, that the Minister had Right to seek the quantity acclaimed, notwithstanding of the said Decreet of Plantation, and use of paying of the foresaid lesser quantity, the Minister proving that of before, he, or his Predecessors had received payment of the said greater quantity acclaimed, seing the Minister sought the same, not as his modified Stipend by the Decreet of Plantation, but by vertue of the Bishops Assignation, to whom the Right of the Parsonage Teinds belongs, seing the use of payment Alledged was interrupted now by this Pursuer, for thir years pursued for. *Gibson* Clerk.

L. *Harmeston* contra *Butler*, *July* 6. 1630.

IN a Removing from the Lands of *Blanse* and Tower thereof, a Seasin bearing Tradition of Earth and Stone, as use is, of the Lands and Tower, But in the words of that Clause of the Seasin, which bears, *Acta erant.* &c. No mention being made by the Nottar, that the same was done in *Turri*, but only *in fundo dictarum terrarum*, whereby the Defender Alledged, that seing *Turres* are *inter regalia*, and that Seasin thereof is not taken *per expressum*, at the Tower and Fortalice, as it ought to be, therefore that the Pursuer cannot seek Removing from the Tower by vertue thereof. This Alledgance was Repelled, and the Seasin sustained, bearing, *That the Seasin was taken of the Land & Tower*, albeit the Clause of *Acta erant*, &c. made no mention of the Tower. Actor, *Mowat.* Alter. *Stuart.* *Gibson* Clerk. *Vid. June* 17. 1630. *E. Wigton.* *March* 15. 1631. L. *Smeiton.*

Hume contra *Hume*, *Eodem die.*

IN a Removing, Caution being offered by the Defender, to whose Probation an Exception was admitted, as use is, for violent Profits. The Cautioner being at the Horn, was refused, albeit he was a Landed-Man, and was at the Horn, as Caution for another Mans Debt, and the Horning of an old date. Actor, *Craig.* Alter. *Belshes.* *Gibson* Clerk. *Vid. June* 17. 1630. betwixt these parties.

Mr. *James Aikenhead* contra *Bothwell*, *Eodem die.*

A*Dam Bothwell* being obliged in the Contract of Marriage betwixt Mr. *James Aikenhead* and his Daughter, to make her a Bairn of his House at the time of his decease, diverse years after there is a Contract made betwixt the eldest Son of the said *Adam Bothwell*, Brother in Law to the said Mr *James*, and the said Mr. *James*, whereby the said Mr. *James* dispones that Clause of the said Contract, and all benefit which he might have thereby, or by the decease of his said Father in Law, to his said good Brother, who is obliged therefore by his particular Bond, to pay Mr. *James* 8000 merks, at the first Term after his Fathers decease, which Bond being desired to be Reduced at the Instance of the

said *Adam Bothwells* Son, upon this Reason, because it was *pactum contra bonos mores, factum super hæreditate viventis*, which is forbidden in Law, for thereby the Good-Son sells his Partage of the Goods, which he may succeed to, or fall to him, by his Father in Law's decease. This Reason was not sustained, but an Absolvitor was given therefrom, because the Civil-Law in this Case (albeit also it receive diverse Constructions and Limitations, as if such Pactions be made, *consentiente eo, de cujus hæreditate paciscuntur, tuncpacta sic facta tenent*, & sundry others) has no place according to the Laws of *Scotland*, as in Tailzies and Renunciations of the Bairns Part of Gear, and others; and this was a *Disposition* of that which was Provided by the Father in Law to his Good-son, in his Contract of Marriage, which might be in Law Disponed upon by him, in whose favours it was conceived. Actor. *Advocatus* & *Mowat*. Alter. *Nicolson* & *Stuart*. *Gibson* Clerk. *Vid. January* 14. 1631. *Sharp* contra *Sharp*.

Doctor *Monro* contra Sir *William Scots* Executors, *Eodem die*.

THE Executors Suspending against all the Legatars, that the free Gear Confirmed would not be so meikle as will pay all their Legacies, and so the Legatars disputing amongst themselves, and Doctor *Monro*, as Doer for the Kirk, Alledging that a Legacy of 5000 merks left for building of a Kirk in the *Elie* should be totally payed, albeit the rest of the Legacies should suffer Defalcation, because the same was left *ad pios usus*, which ought to have the Preference to all other Legacies. The *Lords* Found, that there ought no Preference to be given to any of thir Legacies before others, where the Free Gear was not sufficient to pay all the Legacies, and that all should suffer a proportionable Deduction; for all the Preference which in Law, a Legacy *ad pios usus* had before other Legacies, was only where the Defuncts Gear was sufficient to pay all, *eo casu Falcidia detrahebatur de cæteris Legatis, & non de Legato ad pias causas, sed quando legata excedunt vires hæreditatis, tum Falcidia detrahitur, tam de legatis ad pias causas quam aliis*. And upon the 15 of *July*, they Found, that *a Legatum ad pias causas* being *solutum*, and delivered to the Legatar in name of the Kirk, and so being perfited by the Testator in his own Lifetime, should not suffer Defalcation with the other Legacies, albeit the Free Gear would not pay all the Legacies. And that it was delivered by the Defunct himself in his Lifetime, it was Found probable by Witnesses. *Actor. Nicolson*. *Alter. Stuart* & *Lermonth*. *Scot* Clerk.

Nisbet contra E. of *Cassils*, *Eodem die*.

ONE *Nisbet* in *Anno* 1609. having acquired the Heretable Right of some Lands by Contract, Charter and Seasin, from the umquhile Earl of *Cassils*, under *Reversion*; which Lands the Earl and his Heirs were in the Contract obliged, to make worth to the Wodsetter yearly 22 Bolls of Victual; and this Earl as Heir, in whom the Contract was transferred, being Charged to pay two Bolls yearly for the whole bypast years, seing the Wodsetter had only received payment of 20 Bolls, which were Suspended by the Earl, *Alledging* that the same was Usury, and that he was not subject to pay the two Bolls Acclaimed, because the 20 Bolls received did compleat him and more of his Annual at ten *per cent*, being a Wodset redeemable upon 1000 pounds, according to the Act of Parliament 1597. Likeas he had used the Order of Redemption, and had consigned the Principal Sum the last year, *viz.* 1629. Conform to the Act of Parliament 1592. with the Annual thereof, extending to 100 pounds: And the other Party Alledging, that this Right came not under these Acts, because it was a proper Wodset of Lands, neither bearing any Back-Tack, or Annual-rent, but a Right of Property, by vertue whereof he might claim the Benefite of the Lands Wodset, and the yearly Duty thereof, which the Contracter and his Heirs were obliged, to make to be worth the quantity agreed upon, so that what inlaked thereof, he ought to refound it. The *Lords* Found the Reason Relevant,

levant, and Suspended the Letters *simpliciter*; for it was Found, that the Charger could not personally seek from the Contracter any greater quantity of Victual, or profit for his Money, but according to ten *per cent*, seing this personal Charge upon that Security, made the same to come under the Act of Parliament 1597. But if the Party by his Right of Property of the Land, should seek the Duties thereof from the Tennents and Possessors thereof, he might pursue therefore as he best might in Law, but he could not seek personally from the Party no more as said is, than according to ten *per cent*; and in the Redeeming of the Wodset, the Redeemer was Found only obliged to consign the Annual, according to ten for ilk hundred, and not the prices of the Victual. *Actor. Nicolson* & *Neilson*. Alter. *Gibson* Clerk. *Vid.* 22 *July*, 1634. Commissar of *Dunkeld*. 21 *Feb.* 1623. L. *Glengarno* contra *Forrester*.

Landes contra *Dick*, *July* 7. 1630.

AN Action at *Landes* instance being Pursued before the Baillies of the *Cannongate*, being the Baillies of the Regality of *Brughtoun*, against *Dick*, for Deforcing of their Officer, in Execution of a Precept of Poynding, direct by themselves, and therefore to have tint his Moveables, the one half thereof to pertain to the Pursuers, the other half to the King, or Lord of the Regality: This Cause was *Advocat*, because Inferior Judges were not Judges competent to Actions of this nature and consequence.

Houstoun contra *Maxwell*, *July* 9. 1630.

ONe *Houstoun* being Seased in a Tenement in the Town of *Dumfreis*, as Heir to his Mother's Brothers Oye, cognosced and tryed by an Inquest before the Town, Pursuing thereupon for Reduction of a Disposition of the said Tenement, made by his said Predecessors, to whom he was cognosced nearest Heir, as said is, to the said Defender; the Pursuers Seasin being quarrelled as null, because it flowed not upon a Retour past the Chancellary, without which had preceeded, to have been the Warrand of the Seasin, no Process could be granted for *Reducing* of the *Defenders* Rights, especially the Pursuer not being in Possession; for albeit the same might be sustained to produce Action, for recovery of Maills and Duties, against naked Possessors *sine titulo*, or to continue and retain Possession, or to seek Removing; yet it could not be a Title *in petitorio*, to Reduce another Parties Heretable *Right*, and could not instruct this Pursuit *Activè*. The *Lords* Repelled this *Alledgance*, and Found the Seasin sufficient to produce this *Action*, seing the same was not pursued to qualifie the Pursuer's Heir, but upon his *Seasin*, as Infeft in the Lands controverted; which albeit it was given to him as Heir, yet the controversie was for that Land, wherein he was Infeft thereby, and not if he was Heir thereby; for a Seasin upon a Precept of *Clare constat*, would have produced the like Action to Dispute upon that Subject contained in the Seasin, which gave Right to the Lands, except it had been Eleided by one having a better Right. *Hay* Clerk.

Fisher contra *Brown*, *Eodem die*.

ONe *Fishers* Predecessors having Disponed some Annualrents out of Lands Redeemable conform to a Reversion, the Right of the which Annualrents, being acquired by *Brown* a Smith, against whom an Order of Redemption was used, and Declarator thereon sought. The *Lords* Found no Process upon that Declarator, because none was Summoned thereto, to represent the Granter of the said Reversion; but because it was *in facto antiquo*, and it was not known, who was of Kin to the said person, who granted the said Reversion, Therefore the Defender was ordained to condescend, who was appearand Heir to him, who ought to have been Summoned; but this Decides not the doubt arising on the 27 *Act*, 5 *Parl. Ja.* 3. whether the Order of Redemption ought to be used against that person or not, or if it suffice that the

singular Successor only was Warned by the Order; for this Decision was only for this Citation to the Summons of Declarator: For albeit that was not now questioned, yet many of the *Lords* were of opinion, that the Order needed not to be used against the appearand Heirs foresaids, but only the Declarator; but it would appear, that if the Order needs not to be used against him, no more the Declarator; and sicklike if he be necessar to be Cited to the Declarator, far more to the Order. Actor. Alter. *Mowat*. *Hay* Clerk. *Vid.* 20 *March* 1630. *Murray*. 1 *Feb.* 1631. *Williamson*. 21 *Decemb.* 1633. L. *Weym.*

L. *Rowallan* contra *Boyd*, *Eodem die.*

IN a Removing from a piece of Land Set in Rental to the Defender by *Rowallan*, wherein the Lord *Boyd* Compeared for his Interest, Alledging, that that Land was part and pertinent of his Land, and was so bruiked before this Rental produced, past memory of man; and the other Alledging the same to be part of his Lands, and so bruiked by him continually; and so the Parties being alike pregnant in their contrair qualifications, the *Lords* Found, that the readiest way to try the verity, was, by giving a Commission to a Gentleman in the Countrey, to see the Ground controverted, and both the Parties Lands Alledged, and to take all the most exact tryal that might be had by inspection, and Deposition of Witnesses *hinc inde* unsuspected, and by any other presumption, or probable circumstance, and to report the same to the *Lords*. Actor, Alter. *Boyd*. *Gibson* Clerk. *Vid.* 29 *Jan.* 1631. L. *Hermistoun.*

Veitch contra *Robertson*, *Eodem die.*

AN Husband giving Infestment to his second Wife in Liferent, & to the Heirs to be begotten of that Marriage, of an Annualrent out of his Lands, which Lands the Husband thereafter Disponed, divers years after the Procreation of a Son in that Marriage, and which Son of the said second Marriage being served Heir of that Marriage, and Infeft in that Annualrent, Dispones the same to another, who pursues Poynding of the Ground therefore against the Heretor of the Land, who had acquired the Right from the Father, as said is, after the said Seasin of the Annualrent, and whereby he Alledged, that the Pursuer nor his Author, as being the Heir of that Marriage, had no right to the said Annualrent, the Father remaining still Fiar, who Disponed the Land, and which Disposition absorbed the said Annualrent: And the Pursuer Answering, that after there was Seasin given to the Wife in Liferent, and to the Heirs of that Marriage in Fee of the Annualrent Libelled, the Bairns of that Marriage became Fiars thereof, how soon they were born, so that thereafter, albeit the Father remained Fiar of the Heretable Right of the Lands, yet his Right was affected with the burden of that Annualrent, so that the Father could never thereafter valiably Dispone the Heretable Right of the Lands, but with the burden foresaid, and wherewith the said Disposition behoved to remain affected, even as if his eldest Son of the first Marriage, who was universal Heir, if the said Disposition had not been made by the Father, as said is, would have succeeded to the Right of the Lands, but ever with the said burden; even so must the said Disposition be affected therewith. The *Lords* Found the Disposition made by the Father sufficient to exclude this Pursuit, and that the Fee of the said Annualrent subsisted in the Fathers person, notwithstanding of the Seasin given to the Wife, and Heirs of that Marriage, and consequently that the Fathers Disposition of the Land was not affected with the burden thereof; so that albeit the Heir might have been compelled to warrand that Annualrent personally as Heir, yet it was not alike in a singular Successor, to affect the Ground against him. Actor. *Stuart*. Alter. *Advocatus* & *Taylor*. *Gibson* Clerk. *Vid.* 2 *July* 1630. Town of *Perth*. 20 *Feb.* 1629. L. *Drumkilbo*, & 28 *July* 1625. L. *Haddo*, & 10 *Decemb.* 1630. *Nisbet.*

Hay

Hay contra L. *Philorth*, *Eodem die.*

THe deceast old L. of *Philorth* having Disponed certain Lands to *Hay* of *Crimonmogat*, and in the Contract of Alienation, having expresly obliged him and his Heirs, that he nor they hath done, nor should do no deed prejudicial to that Heretable and irredeemable Alienation: His eldest Son the time of that Contract not being Contracter, and having Disponed a Right, which he had in his own person to these Lands, to a third person, divers years before that Contract; by the which Right the Alienation made to *Hay*, as said is, by the Father, was not valiable; and the said Son being served Heir to his Father, and the Contract transferred in him as Heir, and he Charged to Infeft him, and to warrand the Lands from that Deed, done by himself before the said Contract, in respect of the said Clause, whereby his Father obliged him and his Heirs, that they had done no deed prejudicial thereto, which the Charger Alledged he ought to fulfill, seing he was obliged thereto, by entering Heir to his Father sensyne. The *Lords* Found, that the foresaid Clause of the said Contract, whereby the Father obliged him and his Heirs, to Infeft the Charger in the saids Lands, and to warrand the same from all bygone deeds done by them, was effectual to cause the said Suspender, in whom the Contract was transferred, as Heir to him, to give to the Charger an Infeftment of the saids Lands, and that the Contract was not satisfied by the Infeftment given by the Father, which Infeftment was not valid, in respect of the Deed foresaid, done by the Son before the Contract: From the which Deed the *Lords* Found, that this Suspender was obliged to warrand the Fathers Alienation, he being now Heir, albeit he was neither then Contracter, nor could not be then Heir to his Father, who was living; But he being now Heir, it was Found, that that Clause, whereby the Father obliged him and his Heirs, that they had done no deed prejudicial, bound the Son who was Heir sensyne, to warrand from that Deed done before the Contract, when he was not Heir; albeit that was no Deed done by the Son, but a Right made to him of before. Actor. *Advocatus* & *Nicolson*. Alter. *Mowat*. *Gibson* Clerk. The same Decision was done again betwixt the same Parties 22 *July* 1631. The same Cause being then called.

Patrick Whitelaw contra Lo. *Ruthven*, *July* 10. 1630.

THe Lord *Ruthven* being pursued by the said *Patrick*, to pay his Fathers Debt, as lawfully Charged to enter Heir to him, who offering to Renounce; and the Pursuer contending, that he could not be heard to Renounce, because there was a Decreet obtained against him, as Charged to enter Heir at an other Creditors instance of before, which Decreet standing unsuspended, or taken away, behoved so to work against him, that he could never be heard to Renounce to any other Creditor, so long as that Decreet stood; for if this were permitted, that he might Renounce against one Creditor, and let Sentence pass against him in favours of another, as lawfully Charged to enter Heir by collusion, or favour of preferring one to another upon any other respect, then he might take back again, upon such conditions, as the Parties could agree upon, the Land which the Creditor, whom he favours, should Compryse for a Debt possibly not owing, and bruik the same to the prejudice and defraud of other Creditors, which were unjust; notwithstanding whereof it was Found, that he might Renounce: for the foresaid inconvenience was not to be respected, seing an Adjudication upon a Parties Renounciation to be Heir, is more summarly expede, than a Comprysing upon a Sentence against the Party, as lawfully Charged, seing there must another special Charge preceed before Comprysing, which is not needful in Adjudications; and if there be any collusion or unjust ground of the Sentence, or no just Debt, the Parties interessed thereby, hath Action of the Law against the same. *Gibson* Clerk. *Vid.* 11 *June* 1631. *Tailzifer*,

and the other Cases there Cited. But the same day in a Process wherein *Hay* was Clerk, a Sentence betwixt a Defender and another Pursuer, obtained against this same Defender, conveened as Intromissatrix, to pay her Husbands Debts, proceeding upon lawful Probation, wherein she was proven Intromissatrix was sustained in this Process, to prove her Intromissatrix, she being so conveened by another Creditor; and it was not Found necessar to prove her Intromissatrix *de novo* again, but this Sentence as said is, proceeded upon Probation by Witnesses; whereas if it had proceeded upon Contumacy, to give her Oath, it could not have proven out of that Process betwixt other Parties. *Vid.* 26 *January* 1631. L. *Gadgirth* contra *Auchinleck*.

Bennet contra *Porteous*, *Eodem die.*

IN a Removing an Exception admitted to Probation, and an Incident used for Proving thereof, Caution being desired for the violent Profites, as use is, the Defender being a poor miserable Woman who was not able to find Caution, and offering *cautionem juratoriam*. The *Lords*, in respect of the Act of Parliament, refused to accept of *cautionem juratoriam*, and Ordained her to find Caution, but Declared that they would Admit such Caution as the poor Woman could find. Actor. *Tailzor*. Alter. *Gray*. *Hay* Clerk.

Shaw contra Duke of *Lennox*, *Eodem die.*

THe deceast Sir *James Stuart* having sold the Wood of *Methven* to one *Younger* for 12000 Merks, to be payed at three several Terms, to the price whereof *John Shaw* being made Assigney, for payment of Furnishing made by him to the said Sir *James*, and then the said *John Shaw* giving a Back-bond to Sir *James* that he should resound the said Sum to him, he being satisfied for his own Furnishing in the first end thereof; and thereafter the said Sir *James* being Convict of Adultery, and his Escheat Disponed to the Duke of *Lennox*, who disputing with the said *John Shaw*, which of them had best Right to the said Price, which the Duke claimed by vertue of the Escheat & the foresaid Back-bond, and the said *John Shaw* claimed by vertue of the Assignation foresaid, and that his Back-bond derogat not to his Right thereof, seing the said Sir *James* had granted to him a Discharge thereof, confessing that the Furnishing made to him by the said *John Shaw* exceeded that Sum. To the which it was Answered by the Duke, that that Discharge could not prejudge him as Donatar, seing it was granted after that the said Sir *James* was cited for a Capital Crime, wherefore he thereafter came in Will, and whereby his Escheat fell, after which Citation he could do nothing to prejudge the King: And the other Alledging, that he might then take a Discharge for Furnishing made before, the Particulars whereof he could not now instruct, being all given back at the time of the Discharge. The *Lords* Preferred *John Shaw* to the Duke, albeit the Discharge was after Citation, but Ordained to take *Shaws* Oath, if that Furnishing was all truly made before the Citation; which being sworn to be so, the *Lords* Found, that the Discharge ought to be Sustained, albeit Dated after the Citation, and Found it not necessary to prove the preceeding Furnishing otherways than by his Oath, in respect of the Discharge. Actor. *Mowat*. Alter. *Burnet*. *Gibson* Clerk.

Hay contra E. *Marshal*, *July* 13. 1630.

THe Earl of *Marshal* as Sheriff of the *Mearns*, being Pursued by a Creditor to pay the Debt for not taking of the Rebel, he being charged to take him, because he keeped Company with him divers times thereafter: The *Lords* Found, that that Charge given to the Magistrat, should make him lyable for Obedience thereunto, for the space of a whole year after the Date of that Charge given to him, and that the same lasted and was effectual against him, during all that space of one year, but for no longer time; and albeit the Debt was

payed

payed to the Principal Creditor by one of the Cautioners for the Rebel, yet that thereby the Magistrat was holden to obey the Charge, given to him at the said Creditors instance, the Rebel not being Relaxed, seing the Cautioner, who payed for the Rebel, might use the Creditors Name for his Relief, by Charging to take the Rebel, and albeit the Creditor Conversed after the Charge with the Rebel in *Aberdeen* divers times, the said Creditor being then Baillie, whereby he had power and occasion to take the Rebel; yet the *Lords* Found the Sheriff not liberat thereby, from obeying the Charge given unto him, neither was the Sheriffs Offer to enter the Rebel in as good Estate, *& cum omni causa* as he was the time of the first Charge, Sustained nor Received, seing there was three years past since he was Charged, albeit the Sheriff excused himself with a Treaty, which was divers times thereafter keeped betwixt the Creditor and the Rebel for his Satisfaction, whereby he had probable Cause not to take him; and albeit also that he took him, and Incarcerate him in *Dunnottar*, out of which Ward he escaped, and left the Keeper for dead; which was not respected, seing he was not put in Ward in a publick Goal, and was not detained in that Ward in *Dunnottar* in sure Firmance, having escaped for want of a sufficient number to guard him, there being only an old Porter to attend him, whom the Rebel Wounded and Escaped, whereas if there had been a sufficient Guard he would not have Escaped Actor. *Hay* & *Davidson*. Alter. *Nicolson*. *Hay* Clerk. *Vid.* 12 *June* 1630, Mr. *Roger Mowat*, and the Cases there mentioned. & 6 *July* 1631, Bailies of *Perth*.

Vallange contra *Kincaid* and *Forrester*, *July* 17. 1630.

THe deceast *Vallange* in his Testament leaving *Kincaid* his Wife his Executrix, and also Tutrix, with other two Friends, to his Bairns; which Testament being Confirmed by her, and she remaining Intromissatrix with his Goods, thereafter she marries Doctor *Forrester* for her second Husband, and she and he continues in Intromission divers years after this second Marriage; thereafter the other two Tutors Testamentars, who before accepted not the Office, Pursues the Relict as Tutrix, and her said second Husband, who also had given his Bond to be Comptable for the Minors Goods *hisce nominibus*, *viz.* as Protutrix, and as Intromettors, and in respect of the said Bond, to make Compt, Reckoning, and Payment to them as now accepting the Office of Tutory, of the saids Goods & whole Profites, since the time of their Intromission, unto the time of the Payment of the principal Sums: Wherein the Husband and his Wife Compearing, Alledging that they cannot pay any Annualrent since the time of their second Marriage, because then she lost her Office, and so ought not to be considered as a Tutrix to pay Profites, but as any other Stranger, and who being so respected, could not be subject in Annualrent; but these two Tutors were only in Law Answerable to the Minors for Annualrent; so that their own Omission till now to accept the Office of Tutory, and to do the Duties thereof, that Omission ought to be burdenable to themselves, and not to the Relict, who was not Tutrix since her said Marriage. The *Lords* notwithstanding Found, that albeit where there are Tutors, a Pro-Tutor is not ordinarly obliged and bound in Annualrent for the Minors Goods, yet that here she continuing in the same Intromission, which she had when she was Tutrix, and having Confirmed the Testament, that she was subject and her Husband in paying of Annualrent, for the Sums and Goods intromett with by her, seing the Goods remained in her and her Husbands Possession, and they had not exonered themselves by any contrary Action of Tutory, or other Action whereby she might have been freed of her Intromission. Actor. *Robertson*. Alter. *Mowat* & *Gibson*. *Gibson* Clerk.

Lo. *Erskin* contra E. of *Hume*, *Eodem die*.

THe Earl of *Hume* being Charged to receive the Lo. *Erskin*, as Superior to Sir *George Hume* of *Manderston's* Lands, Comprised by the Lo. *Erskin*,

who, as uſe is, Suſpending, that he ought to have a years *Dutie*, and alſo Payment of all the bygone Feu-Duties, before he were holden to receive him. The *Lords* Found, that ſeing the Superior had Confirmed ſundry Inſeftments of *Annual*-rent out of theſe Lands Compriſed, which abſorbed a great Part of the yearly *Profits* of the Lands, that the Compriſer was not ſubject to pay to the Superior any further for his Entry, but only according to the Free *Profits*, which reſted by and attour theſe Annualrents, which were Confirmed by himſelf, albeit that the *Right* of theſe Annualrents was alſo Acquired by this ſame Compriſer, and albeit the *Annualrent* was *Diſponed* to be taken out of other Lands, as well as the Lands Compriſed. And Found, that the not paying of the *Feu*-Duties for the bygone years, adebted to the Superior, was no cauſe to ſtay the Compriſer to be Entred, ſeing the Compriſer could not be Perſonally Obliged to pay theſe *Feu*-Duties, for any years owing by the Vaſſal, before his Compriſing, and the Superior nevertheleſs would not be prejudged therein, ſeing by his Right he might ſafely Poynd the Ground againſt whatſomever Poſſeſſor, for the ſame. Actor. *Nicolſon*. Alter. *Belſhes*. *Gibſon* Clerk. *Vid. July* 21. 1630. Mr. *Archibald Moncreiff*, & *March* 26. 1629. *Rollock* contra *Murray*.

L. *Lie* contra *Porteous* of *Hauk-ſhaw*, *Eodem die*.

IN a Removing againſt the Father and the Son, the Son being Minor, and his Father Summoned as Adminſtrator to him, the Summons was ſuſtained, albeit the Tutors nor Curators were neither Generally, nor Specially Summoned, which was not Found neceſſar, albeit the Son had other Curators given to him than his Father, and that his Father was not one of them; and the Warning being quarrelled, becauſe the time of the Execution thereof, the *Party* was out of the Countrey, and he was neither Warned at the Ground of the Lands, nor at the Paroch-Kirk, upon 60 days. This Alledgance was Repelled, and the Warning ſuſtained, becauſe he was Warned at the Ground of the Lands, and the Paroch-Kirk, upon 40 days: and he was Warned alſo at the Mercat-Croſs of *Edinburgh*, and Peir and Shoar of *Leith* upon 60 days, which was Found to be ſufficient, and that he needed not to be Warned upon 60 days, at the Ground, nor Paroch-Kirk. Actor. Alter. *Scot*. *Gibſon* Clerk. *Vid. July* 20. 1630, betwixt thir Parties. *Jan*. 23. 1627. *Wallace* contra *Porteous*, *March* 19. 1628. *Raith*. *February* 16. 1631. Lo. *Cranſton*.

In the Immediat above-written Cauſe of the L. *Lies*. *July* 20. 1630.

ONe Compearing, and Defending againſt the ſaid Removing, by vertue of a Diſpoſition of the Liferent made by that Rebel, whoſe Liferent was ſought, and Poſſeſſion conform thereto, and which was Acquired from the Rebel, for Onerous Cauſes of a Juſt Debt. The *Lords* Repelled the Alledgance, and ſuſtained the Donatars *Right*, becauſe when this Party Diſponed his Liferent to this Excipient, he was then Rebel; and albeit he was not then Rebel year and day, whereby his Liferent was *Acquired* at that time to his Superior, yet he being then Rebel, and continuing in that Rebellion, which was *in curſu*, and from the which the Rebel was not *Relaxed* within year and day, how ſoon the year was expired, made the Liferent of theſe Lands to fall to the Superior, wherein he was not Prejudged by the ſaid preceeding Diſpoſition, made before the year expired, being made as ſaid is, after he was at the Horn, and the ſame being *in curſu*. *Partibus ut ſupra*.

Mr. *Archibald Moncrieff* contra Lady *Balnagown*, *July* 21. 1630.

MR. *Archibald* being Penſioner to the King of a *Duty*, to be taken out of the Feu-Duties of the Lands of *Ferne*, *Diſponed* in Feu by the King, to the Laird of *Balnagown*, and which Feu-Duties were Aſſigned to him for payment of the ſaid Penſion, and the Laird of *Balnagown* having given Sub-Feus to his

his Sub-Vassals, for payment of certain Feu-Duties to him, and these Feu-Duties payable to him by his Sub-Vassals, being Disponed again to the Lady, and she being Charged by the Pensioner, to pay the Feu-Duties, wherein the Principal Feuar was adebted by his Infeftment to the King, seing the said Principal Feuar was Irresponsable, she Suspending, that she was not obliged therein, but the Principal Feuar; and that she could not be Personally Charged. The *Lords* Found, that seing she had Right to the Duties payable by the Sub-Vassals to the Principal Feuar, that the King as Superior, and his Pensioner, who had the Kings Right, might Personally Charge her to pay the said Feu-Duties, adebted by her Author to the King; and that he needed not to be casten off, to Poynd the Ground therefore, seing he might either Poynd or Charge her Personally as Intromettor therefore, as he pleased. Actor. *Mowat.* Alter. *Scot* Clerk. *Vid. March* 26. 1629. *Rollock* contra *Murray*. *July* 17. 1630. Lo. *Erskin*.

Fairlie contra *Maxwell* and *Fairlie*, *Eodem die*.

BY Contract betwixt umquhile *James Fairlie* and *William Fairlie* Brethren, every one of them is obliged, that in case they die without Heirs of their Bodies, the Surviver should succeed to the Lands and Heretage of the deceased, and *James* being deceast without Bairns, *William*, who was the Youngest immediat Brother, craves this Contract to be Registrat against the Daughter and Heir of umquhile *John Fairlie*, who was immediat Elder Brother to the said *James*, and so who was Heir of Conquest to him: wherein the *Lords* Found, that the Heir General and of Line, needed not to be called in this Registration, as use is in all Pursuits against Heirs of Conquest, which are not sustained, except the Heir of Line be first called, and discust; but it was not Found necessar in this Pursuit, seing he himself, who pursued the Registration, was that Person, who would be General Heir, and of Line, he being the younger Brother, and so he could not call himself, because he Renunced to be Heir to him, therefore the Process was sustained at his Instance against the eldest Brothers Daughter, who was Heir of Conquest; whereas, if he had not Renunced, he could not have pursued this Action, being Heir himself, and so that Person who ought to fulfill the Contract to himself, whereby it would have been Confounded. Actor. *Nicolson* & *Aiton*. Alter. *Advocatus* & *Stuart*. *Vid. Novem.* 20. 1630. *Pryd* contra *Thomson*, and the other Cases there cited.

Salmond contra *Ore*, *July* 22. 1630.

John Ore being Infeft in an Annualrent out of a Tenement pertaining to *Salmond*, Redeemable upon eight hundred merks, and the said *John Ore* thereafter Resigning the said Annualrent to one of his Bairns, who thereupon was Infeft, reserving his own Liferent: thereafter the Annailzier of the Annualrent to *John Ore*, not knowing of the Infeftment given by *John Ores* Resignation, in the hands of the Baillies of *Edinburgh*, to his Bairn, payes the Sum whereupon the Annualrent was Redeemable, to the said *John Ore*, and obtains his Renunciation; after the decease of the said *John*, his said Daughter being Infeft, obtains Poynding of the Ground for the said Annualrent, notwithstanding of the Renunciation granted by the Father, whereupon the Heretor of the Land being Distrest, pursues Warrandice of the said Renunciation granted to him by the Father, against the two Executors Confirmed to the Father, wherein he conveens them conjunctly and severally, to Warrand the same; and for that effect, to make payment of the Principal Sum payed to the Father, and of the Annualrent thereof payed sensine to the Daughter, of the years for which she had obtained Decreet of Poynding. In which Process the *Lords* Found, that there being two Executors, they could not be conveened but for their own halfs, and not one of them for all, seing one of them was not Alledged to have intromett with

so much as would pay the Sum acclaimed: And it being also Alledged, that this Action of Warrandice being for Warranding of an Heretable Infeftment, that Fact was not Prestable by the Executors, but by the Heir. The *Lords* Repelled this Alledgance, and Found the same Prestable by the Executors, *viz.* to pay a Sum for which the *Defunct* had given Renounciation of an Annualrent, but because the Annualrent was for more than ten for ilk hundred, The *Lords* Found, that the Executors should Refound no more than that Proportion, albeit that Decreet was obtained by the Daughter, against this Pursuer, to poynd for the Annualrent Lybelled, which was more nor ten: for that was his own fault, who proponed not that *Alledgance* in that Pursuit, without prejudice to him to Repeat from the Daughter what he had payed, more than the Annualrent allowed by Act of Parliament. Actor. *Mowat.* Alter. *Gibson* Clerk. *Vid. Decem.* 11. 1632. *Geills-shaw, penult. July* 1630. L. *Carnousie*, and the Cases there. *Feb.* 17. 1632. *Kinnaird, Novem.* 25. 1630. *Miniman* contra *Ramsay.*

L. *Carnousie* contra L. *Meldrum*, *Eodem die.*

IN a Pursuit made by the Bairns of the L. *Meldrum*, Executors Confirmed to her, against the Executors of her umquhile Husband, & the Intromettors with his Goods & Gear, for payment of that part of their Mothers Goods confirmed, which belonged to her, and consequently to them, as her Executors, and wherein her Husband would have been Debitor to them, they being her Bairns of an anterior Marriage. The *Lords* Found, that albeit there were Executors Confirmed to the umquhile Husband, yet that thereby the Pursuers were not excluded, but that they might also pursue the Intromettors with the Goods, to make their part thereof due to them in Law forth-coming; For this is not, as when the Creditor pursues a vitious Intromettor to pay the Debt, seing here the Intromettor is only pursued to make payment of the very particulars, wherewith he should have been proven to have Intrometted with, and which he had no Reason nor Right to Retain, yet usually where Executors are Confirmed, no Process is granted against Intromettors, as is done 14 *July* 1626. & *Novem.* 23. 1620, *Gray* contra *Smith.* & *Novem.* 25. 1630, *Miniman.* And even in a Wifes Testament Confirmed, albeit her Husband be living, Defalcation ought to be of such Particulars, which ought not to come in Testament, *viz.* Which of their own Kind and Nature are Heirship, albeit the Husband, to whom the Goods Confirmed belonged, cannot have an Heir to claim the same, he being on Life the time of the Confirmation, and therefore that the Wifes Executors had no Right to any particular of that Kind. Actor. *Nicolson* & *Baird.* Alter. *Advocatus* & *Burnet. Gibson* Clerk. *Vid. penult July* 1630. betwixt these Parties.

L. *Pitsligo* contra *Davidson*, *July* 23. 1630.

THe deceast *Forbes* of *Pitsligo*, who was Elder Brother to this L. *Pitsligo's* Guidsirs Brother, and to whom the said Pursuers Guidsirs Brother succeeded in the Lands and Living of *Pitsligo*, had only two Daughters, whereof the one being first Married to *Doguid* of *Achinhove*, and from whom she being Alledged to have been Divorced, thereafter she is Married upon umquhile Mr. *Thomas Davidson* Minister, in which Marriage there are two Sons Procreat *Alexander* and Mr. *Thomas Davidsons*; after the decease of the Parents, *Alexander* is Served and Retoured Heir to the said umquhile *Forbes* of *Pitsligo*, his Mothers Father, one of the two Heirs, whereupon he Intents Action of Reduction and Improbation of this L. *Pitsligo*, and his Father, and Guidsirs Rights of the Lands; This L. *Pitsligo* thereupon Intents Reduction of this Retour, and Service of *Alexander* upon this Reason, because the said *Alexander* was a *Bastard*, in so far as he was begotten upon his said Mother, who then had a Husband, *viz. Achinhove* living, with whom she was standing lawfully Married, as

the Reaſon bears. This Action upon the Reaſon of *Baſtardry* was ſuſtained, being Purſued before the *Lords* of Seſſion, and they were Found competent Judges thereto, and that there was no neceſſity, as the Defender Alledged, that it ſhould be Remitted to be Cognoſced before the Commiſſars; but it was ſuſtained, albeit there were alſo ſix Moneths expired after the Deducing of that Service, before it was quarrelled by this Reduction; for that is only Competent the time of the Deduction of the Service to the Party, to oppone *Baſtardry*, to ſtay the Service, and then the Service and the Tryal of *Baſtardry* is Remitted *ad Judicium Chriſtianitatis*, which is the Commiſſariot, and which is appointed to be Terminat within ſix Moneths, and the Opponent finds Caution to ſatisfie the Parties Charges, if he prevail not before the Commiſſars; and upon occaſion alſo, the Term after Diligence will be Prorogat at the parties deſire. Alſo the *Lords* Found, that this Purſuer had ſufficient Intereſt to Reduce this Retour and Service, albeit he was not neareſt of Blood to that Party, to whom the Defender was Served Heir, if that Service were Reduced, and although the Perſon Served Heir were a Baſtard, ſeing there were Bairns on life begotten in lawful Marriage, of the other Daughter of the ſaid umquhile L. *Pitſligo*, and who would ever be preferred to this Purſuer, being nearer in Blood than he; Likeas there is one gotten of that Marriage Served, and Retoured Heir to the ſaid umquhile Guidſir, and whereby the Defender Alledged, that this Purſuer had no intereſt to Reduce that Service: which Alledgance was Repelled, and the ſaid Purſuer was Found to have Intereſt to Reduce the ſaid Retour, albeit he was not neareſt of Kin to the Defunct, ſeing he was Infeft, and in Poſſeſſion of the Lands of *Pitſligo*, and his Father and Guidſir before him, whoſe Right might be drawn in queſtion by that Retour, and Service: Likeas thereupon Action of Reduction and Improbation was Intented, at their Inſtance againſt him, for Production of his Evidents of the ſaids Lands; and whereby the *Lords* Found, that he had Intereſt to Reduce the ſaid Service, which was the Ground of the Purſuit Intented againſt him. Actor. *Advocatus*, *Nicolſon* & *Mowat*. Alter. *Stuart* & *Lawtie*. *Gibſon* Clerk.

Sir *John Scot* Supplicant, *July* 24. 1630.

THis day Sir *John Scot* gave in a Supplication to the *Lords*, making mention, That all Summons of Error and Reduction of Retours has been by Ancient Cuſtom uſed to be Exped at the Chancellary, and Written in *Latine*, and under the Quarter Seal, whereas now lately many are Written in *Scots* by the Ordinar Writers to the Signet, albeit there is an expreſs Act of Parliament, Ordaining, *That the Order of the Chancellary ſhould not be broken*; Therefore he deſired the *Lords* to make an Act in their Sederunt Books, that no Summons of Reduction of any Retour ſhould be Exped, but as ſaid is, in *Latine*, and in Parchment, under the Quarter Seal, and by the Director of the Chancellary his Deputs and Servants, and that no Proceſs ſhould be granted in time coming upon any Summons, otherwiſe raiſed. The *Lords* Ordained this to be done, and Found, that the ſame ought to be obſerved in all Summons, for Reducing of Retours, which were Principally called to be Reduced, but not where other Writs were principally to be Reduced, and Retours to fall in Conſequence: And where Retours were called principally to be Reduced, they thought the ſaid Order ſhould be kept, albeit the Summons concluded no Error, and albeit the Perſons Aſſyſers, were neither deſired to be puniſhed for wilful Error, nor yet that they were called in the Proceſs; But only that the Purſuer deſired the Retour, to be Reduced againſt the Direct Party Served, or ſome Repreſenting him. For the *Lords* Found, that ſuch Actions concerned the *Aſſyſers*, who, albeit they were not Purſued, to be puniſhed, for wilful Error, yet by *Act* of Parliament there is Ignorance Alledgable againſt them, and ſo for Ignorance their Deed

being quarrelled, the same ought to be Tryed by Order of the Chancellary antiently observed, but the matter was thereafter Ordained to ly over till further Advisement. *Vid. Feb.* 12, 1628. *Mark. Ker.* &c.

La. *Maxwel* contra her Tennents, *July* 28. 1630.

IN a Removing La. *Maxwel* contra her Tennents, one of the Defenders Alledging, that he was Rentalled by the Pursuer, in the Lands Lybelled, during his Lifetime, and by vertue thereof in Possession. The Pursuer Replying, that the Rental bore a Clause and Provision, *That if the Rentaller Disponed his Lands to any other Person, it should be null,* and that he had Disponed it to his own Bairns, who were in Possession of the Lands. The Defender Duplying, that the Disposition to any of his Bairns made it not to fall, seing that Disposition could not be Repute, as if he had Disponed his Rental to a Stranger, which behoved to be the only Meaning and Interpretation of that Clause of the Contract, specially seing he and his Bairns, to whom the Disposition was made, remained in Houshold, and dwelt together, and Possest altogether. The *Lords* Found, the Exception and Duply Relevant, and Found the Disposition, made by the Rentaller to his own Bairns, not to be such a Deed, as to make the Rental fall, specially seing he retained the Possession with his said Bairns, whereas if he had not been in Possession, but only the Bairns to whom he Disponed, the Matter would have been the more Disputable. *Vid. Feb.* 26. 1630. *Lockhart* of *Carstairs*, Actor. & *Douglas*. Alter. *Hay* Clerk.

L. *Freeland* contra Sheriff of *Perth*, *Eodem die.*

ONe of the L. *Freeland's* Tennents being Unlawed in his Baron-Court for Blood, & being therefore lawfully Convict, and having payed the Unlaw; this Tennent being thereafter conveened for the same Blood before the Sheriff, and it being drawn in Dispute before the *Lords*, if that Conviction and payment conform thereto, done in his Masters Court, should liberat him, seing the Sheriff Alledged it ought not to free him, because albeit the Baron might Convict his own Tennent, in his own Court for Blood, yet that Right is only competent to the Baron, where both the person Committer of the Blood, and the other Party, whose Blood is drawn, are both Tennents to the Baron; and so where they are both subject to the Court, or else where, and when the Fact is committed upon his own Ground; but being done upon the Ground, pertaining to another Heretor, the Baron had no power to cognosce thereupon. The *Lords* Found, that seing this Fact was not done upon the Barons Ground, and that both Parties were not his Tennents, neither did the Party hurt, complain to the Master in the Masters Court, nor seek reparation there, *quo casu* the Master might claim the Proces, if it had been so proceeded, albeit the Committer was his Tennent, yet that the Sheriff was only Judge to try the same; and that the tryal made by the Master did not liberat him, but that the Sheriff might proceed, and ought to be preferred.

L. *Carnousie* contra *Meldrum*, *Penult July*, 1630.

WHereof mention is made 22 *July* 1630. the Heir desiring Defalcation against the Executors of the Wife of the Defunct, of the Defuncts Moveables, for Sums owing by the Defunct by Heretable Bonds, which the Heir Alledged ought to be payed for the Heirs relief, out of the readiest of the Moveables; and the Executor Alledging, that the Heir ought to have no relief for Debts owing by Heretable Bonds, upon the Defuncts Moveables. The *Lords* Found, that the Heir ought to have no relief against the Executor, nor upon the Defuncts Moveables, for any Sum owing by Heretable Bonds; and Found, that Obligations bearing the Debitor to be obliged, to pay Annualrent for the Money borrowed, albeit not bearing a Clause of Infeftment, were Heretable

retable Bonds, which the Heir was lyable to pay, and not the Executor; for the *Lords* Found, that Heretable Bonds ought to be payed by the Heir, & Moveable Bonds by the Executor; so that albeit the Creditor may seek payment either from the Heir or Executor, as he pleased, yet betwixt the Heir and Executor, when any of them seeks their relief off others, they are obliged to relieve others of the Debts, as said is. Also the *Lords* Found, that where the Debitor by an Heretable Bond, dies before the Term of payment after the which the *Annualrent* begins to take effect, to be payed as use is, that *eo casu* albeit both the Debitors Heirs and Executors be obliged in the Sum to the Creditor, yet in the relief betwixt the Heir and Executor, the Heir ought to have relief thereof off the Moveables; and in that case the Moveables are properly lyable therefore, even as when the Creditor dies before the Term of payment in an Heretable Bond, the same will pertain to his Executor, and not to his Heir; but if where the Debitor dies before the Term of payment, and the Money ly over after the Term divers other Terms, and that the Creditor exact his Principal Sum, and Annualrents from the Heir; albeit by this Decision the Heir will get his relief off the Executor for the Principal Sum; yet it is a doubt, if he can get relief off the *Annualrents* payed by him; which appears ought not to burden the Executor, who can be subject in no further, but what was owing by the Defunct, the time of his decease; and which, as appears, cannot make him lyable for the course of Annualrents running after his decease. Actor. *Nicolson* & *Baird.* Alter. *Mowat* & *Burnet. Gibson* Clerk. *Vid. 7 March* 1629. *Falconer* contra *Blair. 17 December* 1633. *Geills Shaw. 18 March* 1630. *Hart*, 22 *July* 1630. *Salmond. 11 July* 1631. *Lighton.*

Johnstoun contra *Hope, Eodem die.*

A Bond of borrowed Money granted by *Johnstoun*, being desired to be Reduced, because it was granted by him being Minor, and to his Læsion, and was Revocked *infra annos utiles*, and the Action foresaid of Reduction intented thereupon; and the Defender Alledging, that it was not Reduceable, because after his Majority he had payed Annualrent to the Creditor for this Sum, whereby he had Ratified the same Bond. The *Lords* Found this Alledgance Relevant for payment of the Annualrent by him after he was Major, was found to be a Ratification of the Bond, which excluded all Action of Reduction upon Minority and Læsion, albeit the *Annualrent* was payed, for obedience of Letters of Horning upon that Bond, which bore an obligment of Annualrent, which the Pursuer Alledged he had necessity to obey, and that it was not a voluntar Act, which was not respected, seing he might have Suspended the Charges, which not being done, was a Ratification of the Bond. *Actor. Lawtie* & *Taylor.* Alter. *Mcgill* & *Gilmor. Hay* Clerk. *Vid.* 16 *Novem.* 1630. *Murray.*

Brown contra *Lamb, Novemb.* 9. 1630.

ONe *Lamb* Officer having Poynded Goods at *Andrew Livingstons* instance, as pertaining to *Brown* for Debt owing by *Brown* to *Livingston*, and at the time of the Poynding, *Brown* Pursuer of the Spuilzie Compearing, and offering to make Faith, that the Goods pertained to him, and not to the other *Brown*, against whom the Poynding was Execute; notwithstanding whereof the Officer Poynded, who being therefore conveened for Spuilzie thereof, he Alledged, that the Pursuers self immediatly after the Poynding, the morn thereafter intrometted with the Goods, by the which intromission, after the Alledged Spuilzie, the Officer ought to be liberat of any Spuilzie, seing it is neither Libelled, nor can be Alledged, that the Officer after the time of the Pursuers Intromission, ever meddled with the Goods, or did any Act to prejudge the Pursuer thereanent. And the Pursuer Replying, that that Intromission was both

momentaneous and ineffectual to him, seing *Livingston*, at whose instance the Poynding was led, within 48 hours after the Pursuers Intromission, took back again the saids Goods, and Disponed thereupon; which being done by him; in respect of the foresaid Alledged Poynding unjustly, first done by the Officer who proceeded, notwithstanding of the Pursuers Compearing to make Faith therefore, the Exception ought to be Repelled. The *Lords* Repelled the Exception, in respect of the Reply; for they Found, that the Officer having done once wrong, by Poynding of another mans Goods, who offered to make Faith, he was not fred of that wrong by the Parties subsequent Intromission, & which being momentaneous, & made ineffectual by the Creditors Intromission thereafter, albeit no deed was done thereafter by the Officer, yet that the first wrong of Poynding was not Found Purged; but the said Poynding being the ground of the Creditors taking away again of the Goods from the Pursuer, the said away-taking depending upon that Deed of the Officers, was sustained to maintain the Spuilzie against the said Officer, seing he had also after the Spuilzie received from the Creditor a Discharge, upon the Receipt from him of the said Goods Poynded. Actor. *Stuart.* Alter. *Mowat* & *Dunlop. Hay* Clerk.

L. *Limpitlaw* contra *Aikenhead*, *Novemb.* 11. 1630.

IN a Pursuit by the L. *Limpitlaw*, for the Mails and Duties of a Lodging, pertaining to *Alexander Aikenhead*, Compryled by *Limpitlaw*, wherein Mr. *James Aikenhead* compeared, and defended himself by an anterior Compryling, which was expired; and the Pursuer Answering, that the seven years were not expired, and that yet he had place to pay the Money, for which it was Compriled, seing albeit there were seven years past, since the date of the Compryling, yet that time ought not to be compted to run, nor the Prescription to take place, but after the expiring of seven years, after that the Compriling was Allowed by the *Lords*, and after Seasin thereupon; by the which Deeds the Compriling began to be made publick, & from that time only it should take the beginning of the Prescription of the seven years, specially when the Question is betwixt two Con-creditors, and not betwixt the Creditor and Debitor; For albeit the Prescription began at the date of the Compriling, against the Debitor, against whom it was Deduced, and who could not be ignorant thereof, but that he ought to Redeem within the seven years, after the date thereof; yet it was not alike to an other Creditor, who cannot be compted *in mora*, if he offer to Redeem within seven years, after it became a perfect and publick Act, which is not before the *Lords* allowance, at the least before taking Seasin thereon; specially seing the one Creditor, who Alledges the Compriling to be Irredeemable, wants nothing, whereas his whole Debt and Expenses is paid to him, and the other Creditor is in an hard estate to want all: The *Lords* not the less Sustained the Exception, and Found the Prescription of the seven years, after which Compriling are not Redeemable, takes beginning against whatsomever person, either Debitor or Con-creditor, or others, from the date of the Compriling, and neither from the time of the Allowance, nor from the time of the Seasin; for if it were never allowed, the Compriling not the less being otherwise good, is sufficient, seing the Allowance is only, that Charges may be direct against the Superiors of the Lands, to give Seasin; and if Compriers may get Seasin, without such Charges or Allowance, the Party needs not to seek Allowance; and if the Compriser delay to take Seasin after his Compriling, the Con-creditor has the more advantage, if upon his Compriling, albeit posterior, he obtain the first Infestment. Actor. *Nicolson, Cunningham & Dunlop.* Alter. *Stuart* & *Aikenhead. Gibson* Clerk. *Vid. Feb.* 6. 1629. La *Berthwick.*

L. *Clackmannan* contra *Allardes*, *Novemb.* 16. 1630.

IN a Poynding of the Ground, of the Lands and Barony of L. *Balnamoon*, for an Annualrent, which was Disponed to *Clackmannan* by *Balnamoon*, to be up-

uplifted out of the Lands and Barony of *Balnamoon*, or any part thereof, conform to his Charter and Contract, of this Tenor, and Seasin thereon; which Seasin bearing in the Clause *acta erant*, to be done *super fundo dictarum terrarum*; the Defender being a Creditor to *Balnamoon*, and who had Comprised certain particular Lands from him, after the Pursuers Infestment foresaid, The said Defender Alledged, That the said Seasin could not extend to these Lands, which were not specially affected with the Pursuers Annualrent, these Lands not being specially insert in the Pursuers Charter or Seasin, nor no Seasin taken at these Lands; but only making mention, *That the Disposition was out of the Lands of* Balnamoon, whereby no other Lands could be affected: And albeit it was called the Barony of *Balnamoon*, yet that Designation could not make the same a Barony; for although that before the Pursuers Right, the Pursuers Author had Acquired the Lands from another, by a base Right, bearing, *To be holden in free Barony, and that the King had Confirmed that Charter*; yet that Confirmation could not make the same a Barony, seing a Barony cannot be granted after such manner, but by a specifick Erection and Creation, done by the Prince *scienter*, when that is intended by him, and cannot be done by a Subject to take beginning from his Deed, as in this case; and albeit it were a Barony, yet he Alledged it cannot extend to these Lands Excepted on, they not being specially Disponed, nor no Seasin taken thereon, except that the Lands by the King's Charter had been so United, that that place had been appointed to be the place, whereat Seasin should have been taken for all the Lands: Notwithstanding of the which Alledgance, the Action was Sustained, and the Exception Repelled, and the Charter and Seasin of the Annualrent Libelled, was Found to Affect all the Lands contained in that Charter, Confirmed by the King, bearing to be holden *in libera Baronia*; which Lands lay contigue together; but not to Affect these which lay discontigue; and Found, seing there was no special place designed, whereat Seasin should be taken, that for these Lands lying contigue, Seasin taken at any of them, served to affect all the Lands lying contigue, & ought so to be Found in all Lands of any Barony: Likeas, many of the *Lords* thought the same ought to hold in sundry Tenements also, albeit not Unite in a Barony, that where they ly contigue, Seasin taken of one of the Lands, should stand to the Heretor for Seasin of the rest, which I think hard to allow (but it was not the proper Case then Disputed) and specially here, where the Seasin was not of Land, but of an Annualrent out of the Land: And the *Lords* Found, That the Charter granted by the Vassal to his Son of Lands, which pertained to him as an half Heretor of the Barony, for the Land of the whole Barony of *Menmuir*, pertained to *Balnamoon*, and some other Heretors, and *Balnamoon* had the half thereof, the Lands of which half he Disponed, as said is, to his Son, by a base Right, to be holden *in libera Baronia*, and which Charter was Confirmed by the King, which Confirmation here in this place was Found to be equivalent to the Erection of a Barony, and Dis-membring it from the other whole Barony, as if it had been particularly done by the King. Actor. *Advocatus* & *Mowat*. Alter. *Stuart* & *Burnet*. *Hay* Clerk. *Vid. July* 23. 1628 La. *Ednem. Feb.* 10. 1631. E. *Galloway*.

Murray contra *Cochran*, *Eodem die*.

IN a Suspension of Charges upon a Bond of 40 merks made to *Murray* by one *Cochran*, upon reason of the Debitors Minority, the time of the Subscribing of the Bond, he being then within 18 years in his Fathers House, and Subscribing with his Umquhile Father, with whom he is bound conjunctly and severally, and getting neither benefit of the Money, alledged borrowed, nor benefit by his Fathers Decease, being a poor young Man; Likeas, he has Revocked that Bond, *debito tempore intra annos utiles*, in respect of his Lesion. This Reason was not Sustained, to be received by way of Suspension, albeit both betwixt poor Parties,

ties, and a small sum, in respect that the Suspender had not intented *debito tempore intra annos utiles*, a Summons of Restitution *in integrum*, to be Reponed against the said Bond, nor Reduction upon the said Revocation and Minority; and Found, that this Reason of Suspension upon that Revocation, albeit done *debito tempore intra annos utiles*, Interrupted not. Actor. Alter. *Nairn. Vid. penult July* 1630. *Johnston.*

Pride contra *Thomson*, *Novemb.* 20. 1630.

ONe *Thomson* being Pursued as Heir of Provision to her Sister, for Registration of a Bond of 500 Pounds, made by her said Umquhile Sister, to *Thomson* her Brother, whereto one called *Pride* was made Assigney, and who Pursued that Registration. The Defender who was conveened as Heir of Provision to her Sister the Debitor, Alledging, That the general Heir ought to be first Called and Discust. This Alledgance was Repelled, because the Cedent who was Creditor, was that person, who would have been general Heir, and he Compeared and Renounced to be Heir, albeit he was that person, who in Law would have been general Heir, if he had pleased to Serve himself general Heir to her, and assisted his Assigney in this Pursuit; So that the *Lords* Sustained the Process against the Heir of Provision. And it being further Alledged, That albeit he Renounced to be Heir, yet thereby he ought not to be free of this Debt, but the Pursuit therefore was proper not the less against him, and not against this Defender, because he had Intrometted with the Defuncts Goods and Gear, whereby he being Vitious Intromettor, he ought to be lyable to the Defuncts Creditors for their Debts, in respect of his Vice, and consequently he could Pursue none other but himself therefore, whereby the same was confounded. And the Pursuer Answering, that albeit a Creditor have Action in Law against the Intromettors with the Debitors Goods, to make him thereby answerable to pay the Debts, yet that ought not to be Received by way of Exception, to Alledge the Creditor, when he is Pursuing for his Debt, to be Intromettor, therethrow to Exclude his whole Debt, albeit he had Intrometted (which is not granted) with a smal quantity, which would not satisfie the half of his Debt. The *Lords* Found this Alledgance of Intromission Relevant, only for such quantity as the Excipient would condescend upon, and prove was Intrometted with by the Creditor, to Compense the Debt acclaimed *pro tanto*, and no further: And Found that it could not be received thereby, to make him as a Vitious Intromettor lyable for the whole, if the Intromission would not extend to so much, albeit he might be Pursued that way; by another Creditor of the Defuncts *in solidum* for the whole, by way of Action, which was Found, ought not to be Received by way of Exception. Actor. *Gibson.* Alter. *Dunlop. Hay* Clerk. *Vid. July* 21. 1630. *Fairly* contra *Fairly.*

Upon the 17 of *January* 1632, *Stuart* contra *Stuart*, one of two Daughters, only Bairns to their Father, of two sundry Wives, having Pursued her Elder Sister, as Charged to Enter Heir to her Father, and upon her Renunciation, having intented Adjudication against her, the Process of Adjudication and the said Decreet was Sustained, albeit the Eldest Sister was only Called, seing the other Sister Pursuer, could not Pursue her self, and she Renounced to be Heir also; which was Found upon both their Renunciations; this being proponed by another Creditor of their Father, who was seeking Adjudication also against them, in which Process the said Creditor Compeared; and it was Found, that her Process should go on with this Creditors *pari passu.*

Rutherfoord contra *Halcro*, *Eodem die.*

IN a Suspension of a Bond of 48 Pounds, made by *Halcro* to *Rutherfoord*, because it was made by a Woman, *stante matrimonio*, with the Husbands consent, so that if any Execution should be thereon, it ought to be against the Husbands

Ex-

Executors, and not against her. The *Lords* Sustained the Charges against the Relict, maker of the Bond, because it was offered to be proven by the Relicts own Oath, that the Bond was given for Aliment, furnished to her, she being here Imployed in doing of her Husbands Affairs, and for supply of her necessity; Which the *Lords* Sustained, and Found it not necessary, that the Charger should pursue the Husbands Heirs or Executors therefore, but reserved Action to the Relict, to seek her Relief against them for the same, *prout de jure.*

Smith contra *Gray*, *Novemb.* 23. 1630.

ONe *Gray* being Pursued as Intromettor with his Fathers Goods, to pay a Debt owing by his Father to the Pursuer; after the which Pursuit, the Defender Confirms himself Executor to his Father, as a Creditor, to the effect he might be satisfied of Debts, wherein he was Cautioner for his Father; which Confirmation was Exped within year and day after his Fathers Decease, and in respect thereof, Alledging that he ought to have Retention of the Goods Confirmed, for his own Relief of these Debts, wherein he was Cautioner for his Father, and which would exhaust the Testament Confirmed, and so he Alledged, that he ought to be Liberat of this Pursuit; and the Pursuer opponing the priority of his Diligence, by Intenting of this Cause before the Confirmation, after which Diligence he could do no Deed in his prejudice, to prefer either himself as a Creditor, or any other Creditor, so that every Creditor ought to be respected, according as they have done Diligence; and he not being Pursued, nor Distressed by his Fathers Creditors, as Cautioner, or otherways by any legal manner, his own voluntar Act of Confirmation cannot give him preference to the Pursuer, *qui prius provocavit.* The *Lords* Found, That albeit this Confirmation was expede within the year, after the Defuncts Decease; yet being done after the Intenting of the Pursuers Cause, it could not give him preference before the Pursuer for these Debts, wherein he was Cautioner for his Father, he not being pursued therefore, for Relief whereof he could not Intromet at his own hand, to pay himself totally, and thereby to exclude any other Creditors more timeous Pursuit, and so Found, that the Goods should proportionally receive division betwixt him and the Pursuer, conform to the quantity of their Debts. Actor. *Primrose*, Alter. *Mowat. Hay* Clerk. *Vid. July* 14 1626. *Smith* contra *Gray. vid. infra Decemb.* 8. 1630. *inter eosdem.*

Miniman contra *Ramsay*, *Novemb.* 25. 1630.

William Miniman Pursuing *David Tindale* and *Elizabeth Ramsay*, as Executors or Intromettors with the Goods of *John Fullertoun*, Burges of *Dundee* his Debitor, to pay him his Debt: *Tindale* Alledging that he could not be Pursued as Intromettor, because *Ramsay* the other Defender Called, was Executor Confirmed to the Defunct, in respect whereof, albeit the said Testament was Confirmed *post ceptam litem*, and after expiring of a year, and much more after the Defuncts decease; yet seing it was a Testament *Testamentar*, made by the Defuncts own Nomination of *Ramsay* his Relict, to be his Executrix, and that she was also called in this same Process, whereby the Pursuers Action would proceed against her; Therefore the *Lords* Found no Process against the other Party, who was called as Intromettor, seing he was lyable to the Executor, and the Executor to the Creditor. Actor. *Russel.* Alter. *Vid. July* 22. 1630. L. *Carnousie.*

Thomson contra *Rig*, *Eodem die.*

THe Lo. Thesaurer & *George Thomson* writer, having pursu'd one *Rig* before the Exchequer, for some Moneys owing by him to *Robert Philip*, who was found to have Intrometted with some of the Kings Majesties Taxations in *Dumfreis*, and the Debt owing by *Rig* to *Philip* being referred to *Rigs* Oath, and he Summoned

moned to that effect, and holden as confest, and Decerned: He Intents Improbation of that his Citation, by Action before the Session, wherein the Thesaurer, and *George Thomson* Alledged, that he could not be heard to Improve that Execution, because they referred to the Improvers Oath, that the Execution was the proper hand Writ of his own Father, all Written by his Fathers own hand, and Subscribed by him, and stamped with his stamp, and so he ought not to be heard now after his Fathers Decease, to Improve that Deed, whereby to make him infamous, and to lacerat the Name and Fame of his Father after his Death, which is against all Humanity & Christianity, for a Son to do to a Father, thereby to accuse him of such a Fault, for the which his Father, if he were living, might be Criminally Accused and Execute, to an ignominious Death; which Accusation in all Law, Civil and Christian is denyed to a Son against the Father, specially ought it so to be Found in this Case, seing he offers to prove, that the same Party Improver, got a Copy of the same Summons, whereupon he was holden as confest, sent and delivered to him, which came to his hands, & whereupon he compeared before the Exchequer, and produced the Copy out of his own hands, and sought Protestation against the Summons, and offered him ready for the cause; so that he cannot be heard to Improve the same, having acknowledged his Citation, as said is. The *Lords* notwithstanding of the Alledgance, which they Repelled, Found that he might be heard to Improve this Citation, seing it tended only to Repone the Party, to give his Oath upon the Debt; or the Party might prove the Debt otherways than by his Oath, as he best might. Actor. *Nicolson* & *Burnet*. Alter. *Stuart* & *Cunninghame*. *Vid. July* 2. 1630. E. *Hume* contra *Francis Stuart*.

Fullertoun contra *Kennedy*, *Novemb.* 26. 1630.

ONe *Kennedy* Relict of *Dalrymple* of *Stairs*, being conveened as Intromissatrix with her Husbands Goods, to hear her Husbands Obligation granted to the Pursuer, upon a certain Sum Registrat *hoc nomine* against her; The *Lords* Found, that she as Intromissatrix, was not holden to pay the same, in respect that her Husband died Rebel, and his Escheat was Gifted, and declared at the Instance of *Kennedy* Donatar thereto, to whom she was comptable for her Intromission; which Exception was Found Relevant, albeit it was Replyed, that her Intromission going along before the granting of the Gift of Escheat and Declarator, that preceeding vitious Intromission, could not be purged by the subsequent taking of the Gift of Escheat, specially seing her own Brother is Donatar thereto, and that she has ever keeped the Possession since her Husbands Decease, and was never unquieted by the Donatar: which Reply was not respected, for the *Lords* Found that the Donatar would be preferred to the Creditor, and that the Relict would be comptable to the Donatar, and respected not the Conjunction of the Relict with the Donatar, seing the Relict might have taken the Escheat to her self, *proprio nomine*, her Husband being dead, seing a Stranger might have done it, and so might she to her own use; and as there could not a Testament be Confirmed valiably of the Rebels, whereby his Gear might be Claimed, either by the Relicts Bairns, or Executors, in respect of the said Rebellion, no more can the Intromissatrix be lyable for the Gear to any but to the Donatar.

L. *Lawder* contra L. *Colmslie*, *Novemb.* 27. 1630.

A Contract of Marriage betwixt the L. of *Lawder* & a Daughter of *Colmslie*, dated 1565. & registrat that same time, being desired to be Transferred in the parties representing the Contractors: The *Lords* Found, that the same could not be Transferred, but that it was prescribed, conform to the 28 *Act*, 5 *Par. Ja.* 3. because no Pursuit, nor other Document following by Execution or legal Deed was done thereon within 40 years after the date, nor after the Registration thereof; for albeit the Registration of the same done at the date thereof, made it a sentence,

tence, yet lying over since, that was not Found to interrupt the Prescription; and albeit it was a mutual Contract, and also a Contract of Marriage, whereupon Marriage had followed, yet it was found to be as an Obligation, which came under the Prescription of 40 years; and albeit the Pursuer, who craved the Transferring, to the effect that the sum of 600 merks might be payed to him, which sum by the Contract, is appointed to be payed to his Predecessors, to the end it might be imployed upon Land, for the Heirs mentioned in the Contract, whereby he Alledged that it was an Heretable Right, which came not under that Act of Parliament, but by the Act of *Prescription* in the Parliament 1617. there was 13 years granted after the date of that Act, to prosecute such Heretable Rights, within the which time also the other Party representing the other Contracter, obtained Execution against this Pursuer, for fulfilling of their part of the Contract to him, which was done *Anno* 1624. whereby he Alledged, that it was not equitable that the one Party should have Execution thereupon, and the other Party to be prejudged thereof; Yet this was Repelled, and the Prescription Sustained, seing this Pursuer had not *debito tempore* sought Execution, for his part Contracted in his favours; for when Execution was sought against him for imploying of that Sum, appointed by the Contract to be laid out, and it was Competent to have been then Alledged by him, that he could not Imploy that sum, which they were obliged to pay to him, before he had received payment thereof, and being then omitted; it was probable that the Sum was payed, & he could not thereby seek Implement thereof, not being then neither Alledged, nor no Pursuit made within the time of Prescription, to Interrupt the same before this Pursuit, which was not moved before the expiring of these 13 years, granted by the last Act, as said is. *Vid. Dec.* 23. 1630. Lo. *Ogilvie* contra *Ogilvie*. *Feb.* 26. 1622. Sir *George Hamilton*. *March* 17. 1629 *Zeoman*. *Jan.* 26. 1622. Captain *Herring*. *July* 21, 1629. *David Morreis*. *Decemb.* 10. 1630. *Nisbet*.

Dowglas contra *Johnston*, *Eodem die*.

MR. *Thomas Dowglas* of *Stainypath*, Pursues one *Johnston* for Reduction of a Bond made of a Sum of Money to *Johnston*, by *Joseph Lermonth* the common Debitor, with the Compryfing Deduced thereon of the Debitors Lands, because the same was done after a Bond made of borrowed Money to the Pursuer, and Inhibition thereon; In which Process it being Alledged, that the Pursuer could not seek Reduction *in totum* of the whole Compryfing of all the Lands, seing the Lands were more worth than would pay both the Parties whole Debts, and the Pursuer ought only to have Reduction, for so much of the Lands as might pay himself, that the Defenders Right might stand to him for the rest, seing the Defender being but a poor man, and his Debt being of a less Sum, the Pursuer who was of greater Substance, and whose Debt was twice as great as his, it were more reasonable, that he should be payed by the Pursuer of his Sums, than that he should be compelled to pay the Pursuer his greater Debt, which he had no power to do, specially the Land being more worth than both their Debts. This Alledgance was Repelled, and the Pursuer was found to have good Action to Reduce the Bond, and all that had followed thereupon *in totum*, ay and while he were payed of his Debt, & that he was not holden to pay the Defender his Debt, albeit the Land might satisfie them both. *Hay* Clerk.

La. *Williamson* contra *Cushnie*, *Ult. Novemb.* 1630.

AN Advocation being sought from the Sheriff of *Aberdene*, upon this Reason, that he admitted an Exception of Improbation of a Writ, produced before him for the Pursuers Title, whereas Inferior Judges are not competent Judges to Improbations, but only the *Lords* of Session, seing Inferior Judges are only Judges to Improbation of Executions and Citations, used in Process Deduced

ced before themselves. This Reason was not sustained, for the *Lords* Found, that all Inferior Judges are Judges to Improbations, of whatsoever Writ used by Parties, and produced in any Process Pursued before them, where the Improbation is proponed by way of Exception or Reply, and where the direct manner is extant, but not otherways, nor by way of Action, nor where the direct manner is not extant; and if they Repell any such Alledgance of Improbation, the *Lords* Found it iniquity, and being verified to be a just cause of Advocation. Actor. *Mowat.* Alter. *Hay* Clerk.

Dowglass contra *Wardlaw, Eodem die.*

James Dowglass Macer, being Donatar to the Escheat of Mr. *John Wardlaw*, and pursuing Declarator thereon, the Defender Alledged, that the Horning was null, because before the Denounciation the Party had made payment of the Sums Charged for, so that thereafter he could not be lawfully Denounced; and the Party having payed, he needed not have Suspended, having in due time obeyed the Charges. This Exception was not received *hoc loco*, to stay the Declarator, being proponed by way of Exception, to take away a Horning standing summarly, which could not be taken away, but by an ordinary Action, whereto the Kings Advocat and the Party Charger behoved to be called, and wherein tryal must be taken upon the true date of the Acquittance of payment, which is not proper in this Process; therefore Action of Reduction was reserved to the Party upon that Reason. *Gibson* Clerk.

Ramsay of *Cockpen* contra L. *Conheath, Decemb.* 1. 1630.

IN an Improbation of the Charters, Seasins, and other Writs of the Lands of made to *Conheath*, by the umquhile Lady *Cockpen*, Pursued at the Pursuers instance, as having Right by a Bond made to him by the said umquhile Lady his Mother, containing an Heretable Disposition of the saids Lands. The *Lords* Found, that the Bond (no real Seasin following thereon in the Pursuers favours) could not furnish him Action to call for Reduction and Improbation of the saids real Writs of the saids Lands made to the Defender. Actor. *Hart.* Alter. *Gibson* Clerk. *Vid. 4 Feb.* 1630. E. *Kinghorn*, and the Cases there.

Gibson contra L. *Corsbie, Eodem die.*

IN a Spuilzie of an Horse, Action was sustained, albeit the Defender Excepted against the same upon a lawful Poynding, conform to a Sentence, seing it was Replyed, that the Horse was a Plough Horse, and there was other Goods Poyndable pertaining to this Pursuer, more than would satisfie the Debt; which Reply was sustained, And the *Lords* Found it not necessary, that the Pursuer should be astricted to say, that the Horse was Poynded at the very time when he was Labouring in the Plough; but that it was sufficient to Reply and Prove, that the Fact was done in the ordinar season of Plowing, which was Libelled to be in *February*, and which was sustained in that part, and that he was in use diverse days immediatly preceeding the taking away of the Horse, and continually all that Season in Labouring time, to work in the Plough; neither was it found necessary, that the Pursuer should be astricted to Libel or Reply, that he shew to the persons, who came to Poynd at that time, the other Goods which he had then Poyndable, but Found it sufficient to Reply, that he had Goods then Poyndable as said is. But the *Lords* reserved the modification to themselves. Actor. *Hart.* Alter. *Craig.* *Gibson* Clerk. *Vid.* 15 *Novemb.* 1627. *Gullan* contra *Dunmuir.*

The Feuars of *Chappeltoun* contra the L. *Ernock, Eodem die.*

THir Feuars having acquired a Right of some Lands from *Marjoribanks* of *Ratho*, to the which *Ratho* the L. *Ernock* was obliged to do certain

tain deeds concerning these Lands; and thir Pursuers having acquired *Ratho's* whole Right of the Lands, as singular Successor to him in his Right, Pursues *Ermock* for Registration of that Bond; wherein the *Lords* Found, that thir Singular Successors could not Pursue Registration of the said Bond, as their Author might have done, but that they ought to Intent an ordinary Action, for Implement of the same, as accords, & not to seek so summar Execution, by Pursuit of Registration, which the *Lords* would not sustain; but the Pursuit was sustained at their instance, as Heirs to these persons, to whom *per expressum Ermock* was obliged to do the deeds; for *Ratho* had Feued these Lands to the Pursuers Predecessors for a Feu-duty, and thereafter he had Disponed his Superiority to *Ermock*, who then obliged himself to these Feuars, to Discharge them and their Successors, of a part of the Feu-duty for ever; and this Bond was craved to be Registrat by the Pursuers, as Heirs to them, to whom the Bond was made. Actor. *Lawtie.* Alter. *Robertson.* *Scot* Clerk. *Vid.* 19 *March* 1631. *Crichton* contra *Wallace.* 25 *July* 1626. *James Stuart.* 29 *January* 1628. L. *Whittinghame* contra *Spence.*

Dick contra *Lands*, *December* 7. 1630.

Lands Pursuing *Dick* for Deforcement, in staying an Officer to Poynd upon a Bond Registrat in the Books of the *Cannongate*, and Conform to the Act and Warrand direct by the Magistrats thereon to the Officer, to make open Doors; the Defender Alledged, that this Bond Registrat in the Books of the *Cannongate*, and the forefaid Act to make open Doors, could not be a Warrand to bring the Party under so dangerous an Action of Deforcement, except that before that Act to make open Doors, there had been first a Precept of Poynding direct upon the Sentence, and that Precept had been Execut by the Officer, and Reported again to the Magistrats, shewing, that he could find no Goods Strenziable, that thereafter that Precept to make open Doors, might have been Directed, which not being done, that Decreet of Registration, and the Act thereon, to make open Doors, could not be a Warrand, whereon the Officer might Poynd. And this Defender finding that he wanted a Warrand, might stay that Un-orderly Poynding, and for doing whereof cannot be Conveened as a Deforcer. The *Lords* Found, no Poynding could be Execut, while the Officer had recovered a Warrand to make open Doors. *Item*, The *Lords* Found, the Land-lord of the House might stay the Poynding, while he were Satisfied of a years Meal, owing for the House, in doing whereof he committed no Deforcement; but that he could not stay the Poynding upon pretence, that any mo Terms were owing to him; and albeit he at the Poynding stayed the same, upon Alledgance, that three Terms Maill were owing to him, yet the *Lords* Found no Deforcement thereby, albeit he might not stay the Poynding in Law, for any more Terms Mail but a year only, seing the Party Poynder offered not security to him, for that years Mail, for which he might have stayed the same; and the offer to pay a Terms Mail by the Poynder was not Found enough. *Gibson* Clerk. *Vid. Novem.* 24. 1629. *Downie* contra *Brown.* *Decem.* 5. 1633. *Souter* contra *Crammond.* *

Earl of *Carrick* contra *Duke* of *Lennox*, *Eodem die.*

A Decreet being given after Letters Conform to a Pension granted by the Duke to the Earl, of Silver to be payed out of the Lordship of St. *Andrews* against the Granter, and the Chamberlains of that Lordship, after the which Decreet, the Duke Granter thereof, and against whom the Sentence was given, being deceast: and the present Chamberlain to this new Duke of *Lennox*, being Charged to pay the Pension, for the years owing since that Sentence. The *Lords* Found, that no Charges could be granted against this Duke, while Letters Conform were first Transferred in him; For this being a Pension from

a Laik, it ought not to be Respected as a Pension flowing from an Ecclesiastical Person. Actor *Stuart.* Alter. *Burnet. Hay* Clerk. *Vid. Jan.* 20. 1627. *Weyms* contra Duke of *Lennox*.

Smith contra *Gray*, *December* 8. 1630.

IN the Action before mentioned, *Novem.* 23. 1630. of *Smith* contra *Gray*. The Defender, who was Confirmed Executor as a Creditor, Alledging, that he had Retention of the Goods Intromitted with by him, since he was Confirmed Executor, for the which he ought not to be Comptable to the Pursuer, notwithstanding of this Pursuit before the Confirmation, because he was Cautioner for his Father to diverse of his Creditors, who had Decreets of Registration of thir Bonds, before he was decerned Executor, and Confirmed, and whose Terms of Payment of their Debts was also come before he was Confirmed, and before which Confirmation also he had payed them their said Debts, and Reported their Discharges. And some other of the Defunct's Creditors, to whom also he was Cautioner, had Registrat their Bonds, the Terms of Payment whereof, and the time of the Registration preceeded also his Confirmation, which albeit the same were not payed, yet he was Debitor, and Decreet given against him, and whereby he behoved to pay, so that he ought to be preferred to this Pursuer for these Debts, seing he had no Intromission before he was Decerned and Confirmed Executor, as said is: In respect whereof albeit this Pursuer had Intented his Action against him, before these Sentences, and before any payment made by him to his Fathers Creditors, yet the same being done, as said is, before he was Executor Confirmed, he might lawfully Confirm for his Relief, which should give him Preference to any other Creditors, *Quia sibi vigilavit*: The *Lords* Found this Alledgance Relevant for Liberation of the Defender, for so many Debts as were Decerned against him, and payed by him after Decreet, and whereof the Terms of payment were then past, being all done before he was Executor Decerned, albeit the Decreets were obtained, and Payment made by the Defender, after Intention of this Pursuers Cause, against him as Intromettor, seing he denyed any Intromission, before the time of his being Decerned Executor, after which time the *Lords* Found, notwithstanding of the Prior Pursuit of this Party, he then having no Intromission, he might provide for his own Relief, by the said Confirmation of himself as a Creditor, and then lawfully Intromet, which subsequent Intromission could not be a Ground to produce this Action. But the *Lords* Found, if the Pursuer would astrict himself to prove, that the Defender Intrometted before the Confirmation, they would prefer him, and that being proven, that he behoved to pay the Pursuers Debt as vitious Intromettor; which was not purged by the subsequent Confirmation, and this was so Found, albeit it was or might have been Alledged, that after this Pursuers Intention of the Pursuit, the Party Defender could do nothing in his Prejudice, to make his Action worse to him, and better to himself, specially by a Deed voluntar of his own (as this Confirmation was) except this Pursuer had been lawfully cited thereto, *cum lite pendente nihil sit innovandum*, which was not Respected; and as for the other Debts obtained, Registrat against the Defender, as said is, albeit the Terms of payment were past, and Decreet of Registration obtained before his Confirmation, yet seing they were not payed by the Defender also, before the Confirmation, the *Lords* would not sustain the Alledgance for these Debts, in respect of the Pursuers Action Intented before, as said is; but I conceive not the Reason of this Difference betwixt the Debts payed and un-payed, Decreets being given, and the Terms being past, which makes all in alike Case, for the Cautioner seeking Relief, *Partibus ut illic Comparentibus*.

Nisbet contra L. *Newlands*, *Decem.* 10. 1630.

JAnet *Nisbet* being in her Contract of Marriage with her first Husband called *Thomson*, Provided to a Liferent of an 28 shilling Land of and according

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ing thereto Infeft therein, after the decease of her said first Husband, she Contracts Marriage with a second Husband; and in this second Contract of Marriage, Dispones that Liferent Right, which she had by the first Marriage, to that second Husband, and to the Heirs to be gotten betwixt them. The second Husband deceasing, the Heir Served of that Marriage Dispones the Right of that Liferent to an *Assigney*, who Pursues the Tennents of these Lands for the Duties thereof. And the Relict Compearing, Alledged the Contract to be null, because it was only subscribed by one Nottar; which Alledgance was Repelled, because that Disposition of her Liferent, albeit subscribed only by one Nottar for her, yet was contained in a Contract of Marriage, whereupon Marriage followed, and so taking effect as an Homologation of the Contract, was not quarrellable for that defect, neither was it Respected, that the Defender Duplyed, that the Marriage could not make that Act, anent the Disposition of her Liferent, to stand good, being an Act of a several nature, and not necessar to the Marriage, which might have taken effect, albeit that Liferent had never been Disponed, which the *Lords* Repelled, and also Found it not necessar to take the Womans Oath, upon the Verity of the subscription, and of the command given by her to the Nottar, to subscribe for her; which the *Lords* Found not needful; but Marriage having followed, and this being done *intuitu*, and in Contemplation of the Marriage, the same Contract was sustained. Actor. *Gray*. Alter. *Vid. Penult. March* 1626. *Grieve* contra *Cant. Ult. June* 1625. contra *March.* 11. 1628. *Muir* contra *Craufurd. July* 9. 1630. *Veiteh. Decem.* 23. 1630. *Ogilvie.*

Hunter contra *Hardie*, *Eodem die*.

ONe *Hunter* being Infeft in the Lands of *Haggs* by L. *Spotswood*, which L. of *Spotswood* had long before given an Heretable Infeftment of his Quarter of the saids Lands to *Hardie*, and *Hardie* at the same time having granted back to *Spotswood* a Reversion, making mention, that whereas, he had that same day, received Heretable Infeftment from him, of his Four Merk Land of *Haggs* (for so designed the Reversion the Lands, albeit his Infeftment designed the Alienation, to be of his Quarter of the Lands of *Haggs*) yet he granted the Four Merk Land to be Redeemable, by payment of a Sum, and a 15 years Tack of the Land, after the Redemption; according to the which Reversion, *Thomas Hunter* using the Order, and pursuing Redemption, and Consigning a Tack of the Four Merk Land of *Haggs*. The Defender Alledged, that this Redemption could not extend but to a Four Merk Land, and could not be Effectual to Redeem the whole Quarter Land, as the Pursuer craved in his Order and Summons of Redemption, but only for a four Merk Land: seing he was Infeft in a whole Quarter, which consisted of a seven Merk Land and a half, and the Reversion, which he gave back, was but only of a four Merk Land; Notwithstanding of the which Alledgance, The *Lords* Found, that the Reversion extended to all which was contained in the Charter; for albeit the Charter was of the whole Quarter, and the Reversion designed only the four Merk Land, yet being done all at one time, in one day, and before the same Witnesses; and the Reversion making mention, that for somuch as he had obtained then instantly an Heretable Charter, and Right of the four Merk Land, there being no other Charter, nor Right but that Alledged, wherein it was called a Quarter. The *Lords* Found, that the Reversion extended to all which was Disponed, and so to the whole Quarter. And whereas the Tack Consigned by the Pursuer bore, *a Tack of the four Merk Lands*, according to the Words of the Reversion. The *Lords* Found nevertheless, that this Tack should not extend to the whole Quarter, but only to so much of the Quarter of that Land, as was possessed by him, the time of the acquiring of that Heretable Right, and sensine, and not to any more of the Land, seing the Defender bruiked only a three Merk Land and a half of that Quarter,

and the other four Merk-Land was bruiked sensine by other two Tennents, who never acknowledged the Defender nor his Right, nor never payed *Duty* to him. The *Lords* Found, that this Tack should extend to be a Tack of that which he Possest, *viz.* whereby to bruik the three Merk Land, and an half, and no more: and so by this Decision, albeit the Reversion be to *Redeem* the four Merk Land, and the Heretable *Right* was of the whole Quarter, and that the Quarter consisted of a seven Merk and half Merk Land, & that the Reversion appointed a Tack to be given of the four Merk Land; yet because the Defender possest only three Merk and an half of that Quarter, and had no Possession of the rest; it was Found, that the Wodset extended, and was effectual for no more than that proportion which he *Possest* then, and continually sensine; and that the Tack should comprehend no more, notwithstanding of any thing contained in the Reversion and Wodset, albeit also the other Tennents had a Contract of the Pursuers Author, whereby they bruiked the rest of the Quarter, *viz.* the other four Merk Land, and which being Personal, defended not against the Pursuer, who was a Singular Successor, and which Right of theirs, and Possession, this Defender present also allowed to them. *Actor. Baird.* Alter. *Hart. Hay* Clerk.

Ogilvie contra Lo. *Ogilvie, December* 15. 1630.

A Creditor to Mr. *David Ogilvie* of *Pitmowies* having Compriſed a Contract, whereby the Lord *Ogilvie* was obliged to Infeft Mr. *David* in an yearly *Annualrent* out of his Lands *Redeemable*, pursues the Lo. *Ogilvie*, to pay the bygone Duties owing to him. The *Lords* Found, that the Pursuer, by vertue of that Compriſing, had no Right to the bygones of the Annualrent owing before his Compriſing, seing his Compriſing would not extend to the same, they being Moveable, subject to Arrestment, and not to Compriſing. *Vid.* 23. *December* 1630. betwixt these Parties.

Stirling contra Tennents, *Eodem die.*

JEan *Stirling* being *Provided* by her Contract of Marriage, to an Annualrent out of the Lands of *Temple-land*, by her umquhile Husband, whereto her umquhile Husbands *Father* was a Consenter in the Contract: after her Husbands decease, she Pursuing the Tennents for Poynding of the Ground for that Annualrent, by vertue of her Seasin following upon that Contract, and the Tennents Defending with Tacks, Set by the umquhile Father of her Husband; so that they Alledged, they could only poynd the Ground for the Duty of the Tack, specially seing the Husband, who was the Author of her Right to the said Annualrent, was never Infeft, but the Father, who *Set* the Tacks. The *Lords* Found, that seing the Father consented to the said Contract of Marriage, and that the Tacks were Set after the date of the Relict's Contract and Security, that the same could not stay the Poynding of the Ground, for the whole Annualrent, whereof she was not prejudged by the saids Tack Set sensine, as said is, albeit her Husband was not Infeft, in respect of the Consent foresaid of the Father, before these Tacks were *Set*. *Scot* Clerk, *Vid. July* 23. 1628. Lady *Ednem.*

Lo. *Yester* contra *Eodem die.*

THe Lord *Yester* being Barron of Pursuing a Declarator of Non-entry, of the Lands of which were lybelled in his Summons, to be Parts and Pertinents of the said Barrony. And it being questioned, if it was necessar before Sentence, to prove that the Lands forefaid, whereof Declarator was sought, were Parts and Pertinents of that Barrony; seing the Pursuers Seasin of the Barrony Produced, made no mention of these Lands. The *Lords* Found no necessity to prove, that they were Part and Pertinent, but Decerned without that Probation, which I think strange, for the Sentence must affirm the Summons to be proven, albeit nothing be used to prove that Part. Actor. *Stuart.* Alter. *Hay* Clerk.

Relict

Relict of *Ker* contra *Ker*, *Decem.* 16. 1630.

ONe *Weir* Relict of umquhile *John Ker*, being made Assigney to a Bond, made by the said umquhile *John*, Pursues *Ker* of *Cavers*, as behaving himself as Heir to him, by Intromission with his Heirship Goods, for Registration of the Bond; and the Defender Alledging, that these Goods were contained, and Confirmed in the Defunct's Testament, and that he bought the same from the Executor Confirmed, whereby he could not be lyable for the Defuncts Debts, as Heir, having another Title for his Intromission, albeit the Goods might be found Heirship, seing he Intrometted not with the same as Heir, but by another Title. The *Lords* Repelled this Exception, and Found, that the Confirmation of the Heirship Goods, which were not in Law Confirmable, except the *Heir* had offered Collation thereof to the Executors, that he might have been partaker with them of the Defuncts Goods; and the buying of them from the Executor, could not liberat this Defender from being Answerable for the Defuncts whole Debts, he being that Person who was Heir of Blood, and appearand Heir to him, and who ought to have adverted to his own Case and danger; this was done specially seing the Pursuer offered to prove, that the Testament was Confirmed by the Travel and Expenses of this Defender; and that the Executor Confirmed was his own actual Servant, whose name he had used, and interponed in the Confirmation, to his own use and behove. Which the *Lords* sustained, and admitted it to Probation, to infer *ut supra*. Actor.
Alter. *Trotter.*

Ramsay contra L. *Conheath*, *December* 18. 1630.

ONe *Ramsay* Son to the L. *Cockpen*, Pursuing the L *Conheath*, by a Summons upon six days Citation, to Remove from the House of without any preceeding Warning, or other Order of Removing used before the Term of *Whitsunday*; and it being Alledged, that that Order so Summar without Warning, could not be sustained, seing the Defender Alledged, that this House was not a Tower or Fortalice, wherein such Summar *Actions* are only sustained, and had neither Fosse, nor Barmkin-wall about it, nor Battelling, but was only an ordinary House. The *Lords* nevertheless sustained the Order, and *Found* no necessity of a Warning, seing this was an House not necessar for Labouring the Ground, but was a Great House, bigged for the Heretors proper use. So the 8. of *Novem.* 1631. A Supplication at the L. of *Whittinghams* instance, against the Lady, for Summar Charges of Horning against her, to deliver the *Place* of *Whittingham* was granted, without necessity to pursue therefore; and before the like was done also by Bill to the L. of *Halton*.

Stark contra L. *Airth*, *Eodem die.*

IN an Action by one *Stark* against the Director of the Chancellary, and the L. of *Airth*, making mention that the Pursuer by Contract betwixt him and the L. *Airth*, had taken the Laird of *Airth* obliged to Infeft him in the Lands of which the Laird of *Airth* held of Sir *James Cleland* of *Monkland*, and that the Pursuer had Denunced the Laird of *Airth* Rebel for not doing thereof. Likeas Sir *James Cleiland* had Resigned his Superiority in the King's hands, according to the universal Order taken by the Submitters, concerning *Kirklands*, and therefore that the Pursuer ought to have Precepts out of the Chancellary, for Infefting of him to be holden of the King; this being referred to the *Lords*, if this Action should be Sustained, The *Lords* Sustained the same, and Found, that there was no necessity to Summon Sir *James Cleiland* to this Pursuit, it being Libelled in the Summons, that Sir *James Cleiland* had Resigned his Superiority in the Kings hands, which the *Lords* Found should be proven, and being proven, his Interest ceased, and so he needed not to be Summoned, neither need-

ed any further Action to be Pursued, before these Precepts out of the Chancellary were directed against the L. *Airth* the Pursuers Author, to obtain himself Infeft, that thereafter the Pursuer might be valiably Infeft, seing the Pursuer had upon the said Contract Denounced the L. *Airth* Rebel, for not Infefting of the Pursuer, which the *Lords* Found sufficient, and to comprehend that into it, *viz.* to Infeft himself, that so the Pursuer might be valiably Infeft, without the which the Pursuer could not be valiably secured; and so the Action was Sustained upon these two Grounds, but any further, *viz.* upon the L. of *Airths* being at the Horn, for not Infefting of the Pursuer, to be holden of Sir *James*, and his Resignation of the Superiority; for if Sir *James* had upon refusal of Precepts out of the Chancellary, disobeyed to have Infefted his Vassal, the King as use is in such cases, would have Infeft the Vassal in place of the immediat Superior disobeying, *quo casu* the Feu-duties and other Casualities would appertain not the less to the immediat Superior of the Vassal, and not to the King, who but supplyed the fault of the immediat Superior; even so the Resignation made by the L. *Airths* immediat Superior ought to produce the same effect. *Gibson* Clerk. *Vid. Decem.* 15. 1629. *Young* contra Baillies of *Montrose*.

L. *Corsbie* contra L. *Polwart*, *Decemb.* 21. 1630.

IN a Transferring of an old Instrument, which *Corsbie* desired to be Copied, and Doubled under the Clerk Registers hand writ, and to make as great Faith as the Principal; and the Defender Alledging it to be null, because it bore *a Disposition made only under form of Instrument*, and was neither Subscribed by the Parties, nor by a Nottar for him, but only under Form of Instrument; notwithstanding whereof the same was ordained to be Doubled, seing the Doubling made it neither better nor worse, and no more was desired; And the *Lords* Found, that the Nullity could not be Received to be Discussed in this place, but reserved the same to be Proponed and Discussed, when the said Instrument or the Transumpt thereof should be used in Judgment against the Defender, in any Action moved thereupon. Actor. *Craig*. Alter. *Stuart*. *Gibson* Clerk. *Vid. Decemb.* 21. 1629. *Cunninghame* & *Clark*.

L. *Johnston* contra E. *Annandail*, *Eodem die*.

THe *Lords* Found that Witnesses, which *ex officio* were ordained to be Examined before the *Lords*, *ad informandum animum judicis*, might be received and Examined, albeit there were lawful Objections proponed by the Party, which might have Repelled them *a testimonio*, if they had been produced as ordinary Witnesses in the Cause, to prove against the other Party; but the *Lords* Declared that after they were Examined, they would consider what their Depositions should work *in causa*, in respect of the just cause to decline them. Act. *Stuart*. Alt. *Advocatus Scot* Clerk. *Vid. March* 11. 1630. *L. Lochwabany* con. *Rollock*. This same was done the same Month before, in an Action betwixt the Earl of *Cassils* and *Alexander Barclay*, wherein Witnesses were ordained to be Examined *ex officio*, at the desire of the Earl of *Cassils*, albeit there were lawful Objections otherwise to decline them. In which Process also a Woman was Found might be Examined *ex officio*, *viz.* *Alexander Barclay* the Pursuers Wife.

Hume contra Sheriff of *Berwick*, *Decemb.* 23. 1630.

THe L. of *Rentoun* as Sheriff of *Berwick*, being Charged by *Hume* of *Law* to take *L. Wedderburn* Rebel for Debt, and he Suspending, that the time of the Charge he being imployed by the Lords of Council to try certain Witches, and do Justice upon them, he was at that time actually in Judgment sitting, doing Justice, in executing of that Commission, within the Kirk of *Eymouth*, where a great number of the Countrey people were conveened for that effect, and which being

being of greater importance than the other, wherewith he was Charged, he could not desert the same to do the lesser, and thereby to disappoint the Service, wherein he was intrusted, and was executing; This Reason was not Sustained, because the Charger offered to prove that the Rebel was at that time of the Charge then present conferring with the Sheriff, and sitting close in Judgment beside him; at which time he did no manner of Diligence against him, to apprehend him, as he then ought and might have done, and could Alledge no Cause, why he might not have offered then some obedience to the Charge by some sort of Diligence. Actor. *Craig.* Alter. *Scot* Clerk.

Hart contra *Chisholm*, *Eodem die.*

MR. *William Hart* being made Assigney by *Davidson*, who was Assigney by *Elliot* to a Contract, for the sum of 700 merks, adebted to the said *Elliot* by *Chisholm*, and to all that followed thereon, craving Transferring in him as Assigney foresaid of the said Registrat Contract, and of an Act of Caution, found by the said *Chisholm* in a Suspension of the Charges raised by *Elliot* his Creditor, upon the said Contract *activè*; In which Action of Transferring, the Cautioner was only Summoned thereunto, and not the principal Debitor, who was Charged & had Suspended; This Action of Transferring was Sustained, albeit the principal Party Charged and Contracter, and who suspended, was not Summoned, but only the Cautioner, in respect Protestation was admitted against that Suspension, whereby the Suspension was not standing undiscust; for as the Principal Creditor who was Cedent, might after the Protestation have Charged the Cautioner, and miskend the Principal, even so his Assigney might seek Transferring against the Cautioner after Protestation, and misken the Principal. Actor. *Præsens.* Alter *Burnet. Gibson* Clerk. *Vid. July* 1. 1623. L. *Covingtoun* contra Capt. of *Crawfurd.*

Ogilvie contra Lo. *Ogilvie*, *Eodem die.*

A Creditor to Mr. *David Ogilvie* having Comprysed an Heretable Contract, whereby the Lo. *Ogilvie* was Obliged to pay the said Mr. *David* a sum of Money, and to Infeft him in a yearly Annualrent therefore; having pursued the Lo. *Ogilvie* for payment of the bygones owing before that Compryfing, and yearly thereafter; The *Lords* Sustained this Action against the Lord *Ogilvie*, for personal payment of the Annualrent, albeit by the Contract he was not obliged to pay the same personally, but only to give Infeftment of that Annualrent out of his Land, whereby the Defender Alledged, that he could not be Conveened thereupon for payment personally, but only to grant Infeftment, which being first obtained, that he had thereupon Action to Poynd the Ground, or personally to pay, which was Repelled; for the *Lords* Found that Clause Obligator, to give Infeftment of an Annualrent, was alike as if he had obliged him to pay the same yearly; *Item* The *Lords* Found that a Compryfing gave not the Compryser Right to the bygone Annualrents, owing before the Compryfing, but only to the Annualrents after the date thereof, and to the principal Sum, seing the by-runs falls under Arrestment or Escheat, and are moveable, and so not Compryfable; but because there were no other Creditors, nor other party who compeared, to claim Right to these bygones; and also that the Donatar to Mr. *David Ogilvie* his Escheat, which was also Declared, compeared in this Process, and concurred with the Compryser for the saids bygones, and that the Defender who was Debitor, had no Right to retain them; Therefore the *Lords* Sustained the Pursuit, and ordained the Pursuer to find Caution, to Liberat him thereof at all hands, who might have Interest thereto, and to refound the same to him, if ever he should be Distressed by any other therefore. And this Contract being Alledged to be Prescribed, as not being pursued, or Documents taken thereupon, within fourty years after the date thereof, the *Lords* having considered the date thereof, which was dated *Anno* 1590. and was blank both in the

Day and Month, seing the Defender could Alledge nothing, wherefore the Contract might not stand and be sufficient, if it had been any Day of the last Month in that Year, wherein it was dated, which Day and Month if the same had been filled up in the Contract, the Prescription would not have had place, seing 40 years was not run betwixt the last day of the last month of that year, and the time of the Calling of this Cause, whereby Documents were taken, & which were Called and brought in Judgement, about three quarters of a year before 40 years outrun, compting as said is, from the last day of the last month of that year wherein it was dated; and which date the *Lords* Found in this Computation, might be ascribed to this Contract, nothing being Alledged by the Party, to qualifie why it might not be of that date, which the *Lords* Found ought to receive such construction, where the same may congruously stand and subsist with the Writ controverted, for the maintainance thereof, and to save from Prescription, which in it self is odious, and so which ought to be straitly compted, and ought to be clear before it can have place; and albeit the Pursuer Alledged, that this Contract was a Contract of Marriage, and whereupon Marriage had thereafter followed, and thereby that the Prescription of 40 years could not be admitted against the same, although it had run, yet this Alledgance was Repelled: For the *Lords* Found, albeit it was a Contract of Marriage, yet for the sums and other conditions therein, the Argument of Prescription might competently be proponed against the same: Also the *Lords* Found, that albeit the Contract comprysed contained a greater Debt than was addebted to the Compryser, yet that the Compryser ought to have Sentence for all that was Comprysed; but he being payed of the true sum, for which he had Comprysed, and of his Charges and Annuelrents, conform to the Act of Parliament, that then he should be heard to exact no more, for then the force of his Comprysing should become extinct, and the rest pertain to the just Creditors, or others who should be found to have best right thereto. *Actor. Nicolson. Alter. Peirson & Baird Hay* Clerk. *Vid. Jan.* 17. 1628. Sir *George Hamilton. Decemb.* 15. 1630. betwixt these parties. *Novemb.* 27. 1630. L. *Lawder* contra *Colmsly*, and the cases there. *Decemb.* 10. 1630. *Nisbet. March* 14. 1628. *M'math* contra Baron of *Brughtoun*.

Barclay contra E. *Cassils*, 13 *January*. 1631.

IN this Cause Witnesses being ordained to be Examined *ex officio*, as is noted 21 *December* 1630. and a Commission being granted to Examine *Alexander Barclay*'s Wife, and ordained to be reported at a day assigned to that effect: The Defender being urged by the Pursuer at that day, to produce the Report; and he Alledging, that he could not be compelled to produce the same, seing the Commission was granted in his favours, and he had either power as he pleased, to Use and Execute the Commission, or to desert the same, or if he pleased, albeit it was used, he could not be compelled to produce the Report, but might keep it up, and the Pursuer might take all advantage thereby, which he might in Law, for furtherance of his Process, seing he was content that Process should be granted in the Cause, without respect thereto. The *Lords* nevertheless Found, that seing the Commission was granted *ex officio*, to try the matter controverted, that thereby the *Lords* might be informed, that the Party ought to produce the Report, and that he ought not to keep up the same.

Houstoun contra *Houstoun*, *Eodem die*.

IN a Pursuit for payment of 500 merks, against the Executor Dative, to the Maker of a Bond Decerned and Confirmed, whereby the Maker was obliged to leave to the Pursuer 500 merks, to be payed by his Executors after his decease. It was Found, that the Bond of this Tenor was but as a Legacy, and so that it behoved only to affect the Defunct's part of the Goods Confirmed, if it

it extended to that Sum, and was not respected as a Bond to make up a full Debt, which would affect the whole Goods of the Testament. *Vid. infra* 26 *January* 1631. Betwixt these Parties. 2 *March* 1624. L. *Currihill*.

Salmond contra *Ore*, *Eodem die*.

THe deceast *John Ore* having sold a Tenement by Contract to *Salmond*, with absolute Warrandice therein, the said *Salmond* Pursues the Heir of umquhile *John Ore*, to hear him Decerned and Declared to warrand the said Disposition: And the Defender Alledging, that he ought not to be Decerned to warrand, seing there was no Distress qualified, and also that he had a Reduction Intented, for Reducing of that Disposition. The *Lords* nevertheless Decerned to warrand, seing in effect that was but a Declarator of the Warrandice, but superceeded all Execution, while the Pursuer were lawfully distrest; and Found, that this Decreet should not be prejudicial any ways to this Defender, to pursue his Action of Reduction of that Disposition as accords. Actor. Alter. *Gibson*. *Scot* Clerk.

Helen Sharp contra Mr. *John Sharp*, *January* 14. 1631.

MR. *John Sharp* on the one part, and Sir *William Sharp* his Brother on the other part, by Contract betwixt them, with consent of their Father Sir *John Sharp*, Subscribed by him and the saids Parties, having Contracted and obliged them, and their Heirs ilk one to others, that what Land any of them should be provided to by their Father, or which they should Conquish by any Moneys, which they shall be provided to by him, that they should Resign the same *habili modo*, for Infestment to be made of the same to them, and the Heirs gotten, or to be gotten of their own Bodies, which failzieing to the other Brother surviver; and failzieing of the Bairns of the Body of the Brother surviving, to the Heirs of their said umquhile Father: Which Contract thereafter the said Brethren Ratifies by another Contract, after the death of their Father. After this first Contract, the Father having provided these Sons to certain Lands in his own lifetime, & thereafter dying, Sir *William* being a Son of the said umquhile Sir *John*, by his second Wife, and having sundry Sisters-German begotten by his Father, upon the same common Mother to them, and Mr. *John* being a Son begotten upon his Fathers first Wife, and so being Brother to Sir *William* by one Father, but by divers Mothers; Sir *William* thereafter being Married, and Deceasing, leaving one only Son behind him, who also thereafter dying, the said Mr. *John* thereby craving the benefit of the Tailzie, contained in the said mutual Contract, against the Sister of the said Sir *William* then living, *viz.* the Relict of *Robert Bruce* of *Pitlethie*, and against the Bairns of *Robert Dumbar*, who were begotten by him upon the other Sister of the said Sir *William*, being Wife to the said *Robert Dumbar*, she being deceased; and which persons as Heirs to the said Sir *William*, were Pursued for fulfilling of the said Contract to the said Mr *John*, in respect of the Existence of the said condition of Tailzie, through the decease of the said Sir *William*, and that there were no Bairns extant begotten by him; this Contract of Tailzie being desired to be Reduced by the said Sister of the said Sir *William*, & by the Bairns of the other Sister deceased, as Heirs of Line to him, as said is, upon divers Reasons of Reduction Pursued against the said Mr. *John*; the Matter and Compend of all which Reasons, resolved in thir Heads, *viz.* That the said Contract of Tailzie was not lawful, seing the same was a Paction *de futura successione*, which was prohibite in Law; and that it was also *pactum nudum*, Remaining in the naked Terms of an intention, not Vested with any Act following thereupon, nor no Deed done by either of the Parties, which might make it to have the force of any perfect Security, which could be obligatory in Law against any of them; and that the nature thereof was so ineffectual to bind, that if Inhibition had

been ſerved thereon, yet notwithſtanding thereof, the Party Inhibite might ſell his Lands, or otherways Tailzie or Diſpone thereupon, as he pleaſed: In doing whereof, neither the Contract nor Inhibition could any ways prejudge the Doer or Receiver of any other Security of the Lands: Attour this was a Contract, which being *inter Contractus innominatos*, treated of in the Law, and of that nature as *facio ut facias*, either of the Parties hath place of repentance *antequam perficiebatur rei interventu*; for before ſomething be done by one of the Parties to the other, they may repent, and Reſile therefrom; and nothing being here done according to the Contract, as umquhile Sir *William* had place and liberty in his own time, and might Revock and Reſile, if he were living, ſo may the Purſuer his Heirs, who ſucceeded in his Univerſal Right. Likeas in effect both the ſaid Sir *William* and Mr. *John* hath Reſiled, and declared their repentance in their own times, by doing of divers Deeds deſtructive of the Tailzie contained in the Contract; for Mr. *John* hath ſince the Contract taken divers Infeftments of ſundry of his Lands to himſelf, and his Heirs whatſoever: Likeways Sir *William* hath done the like, whereby they in effect have manifeſted their will, that they had both Receded from the Tailzie; alſo this Contract was not Obligatory againſt Sir *William*, ſeing Mr. *John* having failzied, in keeping and fulfilling of his part of the Tailzie, and having done the ſaids contrary Deeds thereto, rendered the Contract void, that thereby he could not ſeek the Implement of any part Contracted to him, having broken that which he ought to have performed for his part: All which Reaſons being at length conſidered in preſence of the *Lords*, they *Found* none of theſe Reaſons Relevant, to Reduce the Contract of Tailzie, and Aſſoilzied *ſimpliciter* therefrom; For the *Lords* Found, that albeit a ſimple Tailzie made by any perſon in favours of another, that other not being Contracter with the Maker of the Tailzie, and the Tailzie not depending, nor being done upon any neceſſar or onerous preceeding Cauſe, which might have produced the ſame, and compelled him thereto, but being done by a ſimple Bond, or by a voluntar Charter, alterable and changeable as often as the Maker pleaſeth, as *donatio mortis cauſa*, which is ay *Ambulatory*, during the Givers lifetime; yet that Tailzies done by way of Contract, and perfected and Subſcribed by two Parties *ſcienter*, and mutual on both Parties ſides, ſpecially the Fathers conſent adhibit thereto, and being Reiterat and approven by a poſterior Ratification, & which depends upon onerous Cauſes done therefore, or according to Contracts of Marriage, or amongſt Strangers, or Friends, on ſuch Cauſes, or for preſerving of the ancient Eſtate of their Houſes and Heritages perfected on both ſides, are not Revockable by any of the Parties Contracters their repentance, expreſſed after the perfecting and Subſcribing of the Contract; from the which the *Lords* Found the Parties Contracters cannot Reſile, but that the ſame Contracts are Obligatory againſt the Parties, and cannot be broken by one of them, except both the Parties conſent mutually, ſicklike to the Diſſolving, as they did joyntly together to the Making and Subſcribing thereof: And the *Lords* Found, that ſuch Contracts mutually Subſcribed by both Parties, were not unlawful, as *pacta de ſucceſſionibus prohibita* by the Civil Law of the *Romans*; but by the Laws of this Realm they were good and ſufficient Rights, and ought to be maintained as lawful; neither were they Found to be *nuda pacta*, but that they were good compleat Writs and Securities, which were Obligatory againſt both Parties, being Subſcribed by them; and alſo that they were not Innominat Contracts, which ſort of Securities are not to be found in the Laws and Practiques of this Realm; for theſe Writs mentioned in the Treatiſes of Lawyers and Doctors, of Innominat Contracts, are not agreeable to the Practique obſerved here; and ſo the Libelling thereupon, and the Argument of Repentance, and Liberty to Reſile was rejected, and not found to

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be competent to any of the Parties Contracters themselves, if they were both on life; far less *postquam conditio Tallia extitit*, was it Found to be competent to those Heirs, who are not begotten of the Parties Bodies, but are expresly secluded by the Will of the Contract; Neither was the Action of *Condictio, causa data causa non secuta*, found to have any thing to do with this Question of Tailzie, where either of the Parties were alike bound to others, and nothing was done on the one part more than on the other, for which the Condiction might take place in favours of one of the Parties, who had fulfilled his part, for the not fulfilling of the other Contracters part, which held not here, *ubi nulla res intervenit. sed utraque pars pari obligatione tenetur*; and as for any breach committed either by Sir *William* before his decease, or by Mr. *John*, whereby the Pursuer Alledged, that by these contrary Deeds they have both receded from the mutual Tailzie. The *Lords* Found the doing of these Deeds, contrair to their Obligation contained in the said Contract, looses not the Tailzie therein contained, but that notwithstanding thereof the Contract stands Effectual and Obligatory in it self, according to the Tenor thereof; and that Mr. *John* had good Action to seek Implement thereof, notwithstanding of the Deeds Alledged done by him against the same: seing no prejudice nor Interest can be qualified to be thereby incurred nor sustained by the Pursuers, to whom the Contract cannot be fulfilled for the part of Mr. *John*, who being obliged to Tailzie to Sir *William*, and the Heirs begotten of his body, by the not Existence of any Heirs of his body, is liberat from fulfilling his part: and thir Pursuers, as not being Heirs of Sir *William*'s body, are not capable of the perfecting to them of that Obligation, to the which they have no Right; and if Sir *William* had lived, and quarrelled the doing of the said contrair Deeds by the said Mr. *John*, he would have compelled Mr. *John* to fulfill the Tailzie. Likeas, there was place to the said Mr. *John* to have fulfilled the same, and to have amended the Failzie, by obtaining of Infeftment of Tailzie, conform to the Contract, which thir Parties hath no interest to seek; and albeit they could not break this Tailzie, except both Parties had consented thereto: Yet the *Lords* Found, that in thir cases the Contracters may Sell and Annailzie the Lands at their pleasure, notwithstanding of the Contract of Tailzie; for this Contract, or other like Contracts, extends not to prejudge the Parties, or any of them, in any liberty which they had before the Contract, except only concerning the Succession to their Right, wherein they having agreed upon an Election of their Succession, and the manner thereof, that was not alterable by them, but by consent as said is; and these Contracts extends to no other thing; so that as they might Dispone on their Lands, if these Contracts were not made, and could not be quarrelled by their lawful succeeding Heirs therefore, even so the Substitute Successors by the Tailzie, who can be no better than the Principal first Person institute, or the lawful Heir, where there are no Tailzies, cannot hinder nor Impugn these Deeds; for these Contracts extends only to give the Right of Succession to the persons appointed by the Parties, that they may succeed after the decease of the Contracters, upon the conditions contained therein; so that if there be nothing to succeed to, there can nothing be sought by them: But it may be thought, that by this Liberty permitted to any of the Parties to Sell, they may Elude the force of the Contract *in totum*, by making Alienations to a Stranger, yet to the behove of another Successor, than that agreed upon in the Tailzie; But if such Fraud be Intended, it is in Law repairable. Actor. *Cunninghame* & *Burnet*. Alter. *Nicolson* & *Stuart*. *Gibson* Clerk. *Vid.* 6 *July* 1630. Mr. *James Aikenhead*. 8 *March* 1626. *Monro*. 4 *March* 1634. L. *Coldinknows*. 15 *July* 1636. Mr. *David Drummond*.

Houston contra *Houston*, *January* 20. 1631.

THe Bond whereupon this Pursuit was Intented, being Alledged to be null, because it was made by one *Scottsman* to another, and was not Subscribed by the Maker thereof, but only by the first two initial Letters of his Name, and Sir-name, which *non constat* to be written, and put to by himself, nor by two Nottars, before four Witnesses, as is requisit by the Laws of *Scotland*. The *Lords* Repelled the Exception, and sustained the Bond, having the two initial Letters of the Party Subscribed thereto, and done before Witnesses, and done in *Ireland*; neither was it Found necessar, that the Pursuer should be holden to prove, that the Party was in use to Subscribe after that manner. *Vid. Jan.* 19. 1631. betwixt these Parties. *Feb.* 14. 1633. *Grierson*.

The Creditors of *Brown*, *Eodem die*.

THe Creditors of umquhile *William Brown*, contending which of them should be Answered of their Debts *primo loco*, wherein some had done greater Diligence than others, and who had obtained Sentences, claiming Preference to others, who were not so far advanced. The *Lords* Found, that in this, and the like *Actions*, where the Debitors Goods were not sufficient to pay the whole Creditors, that they would not give such Preference to these, who had prevented others by Diligence, as to make them thereby Answered of their whole *Debts*, and whereby the rest of the Creditors might want all their Debts; for the one being as just Debt as the other, it were against Justice, that in these Cases, which concerns so many, that few should have all, and many more want, only because Diligence has been done more by one than by another; for some Creditors might sooner know the common Debitors decease, or might dwell in that same Town with him; and it were hard, that therefore they should be preferred to those who knew not so soon, or, who dwelt in a more remote Place of the Realm. In this Process the Poor of the Hospital of *Biggar*, for a Debt owing to them, and the Relict of the Debitor, for her Conjunct-fee, were preferred to others of the rest of the Creditors, as more Priviledged than they; and some Creditors craving Debts owing to them, having nothing to qualifie the Debt, but the Confession contained in the Debitor's Compt-Books, in some Articles thereof, written by his own Hand, but not Subscribed by him. The *Lords* Found these Articles were not sufficient to constitute the Party Debitor, thereby to exhaust the Gear, to the prejudice of others, the rest of the Creditors, who had Legal and Formal Securities perfected to them upon their Debts, except that the saids Creditors, claiming the said Debt, will prove that the Particulars contained in the said Compt, were truly and really payed, and delivered to the Defunct, who was the common Debitor to them, and no other ways. Actor. Alter. *Nicolson*, *Russel* & others. *Gibson* Clerk. *Vid. Feb.* 26. 1633. *Rutherford*. & *Feb.* 11. 1642. *Monteith*.

Gordon of *Grange* contra E. *Galloway*, *Eodem die*.

A Decreet for payment of Rental Bolls obtained by the Earl against *Grange*, *in foro contradictorio*, the Defender Compearing, and proponing his Defences, whereof some were admitted, and some others Elided by Replyes, being desired to be Reduced by the Defender, upon this Reason, that he had recovered some Writs, newly come to his knowledge since the Sentence, whereupon he was ready, and offered to make Faith, and which he Alledged would have Elided that Pursuit, if he had known thereof, and timously had proponed his Defences thereon, and which he Alledged ought now to be received, albeit after Sentence, the Writs being made by the Pursuers self, who now was Defender in the Reduction, and Subscribed by him, and done betwixt him and another Party, whereby the Party now Pursuer his Ignorance thereof is probable and excusable,

able, being *in facto alieno*: And the Defender Alledging, that *post rem Judicatam*, after Sentence so given against the Pursuer, then Compeaning, this Reason ought not to be received; for it were a dangerous Practique to Reduce a Sentence *super Instrumentis noviter repertis*, which should make all pleyes endless, The *Lords* Found, that after Sentence so given *in foro contentioso*, the Party being then Compeand, ought not to be heard to Reduce that Sentence, upon the foresaid Reason of Instruments and Writs, newly come to his Knowledge; and therefore Assoilzied from that Reason and Pursuit. This is agreeable to the Civil Law, *L. sub specie Cod. de re judicata & l. sub pretextu Cod. de transactionib: & l. Imperatores, ff. de re judicata; & quamvis l. admonendi, ff. de jurejurando dicat, ex Instrumentis novis repertis sententiam latam ex juramento retractari posse, tamen hoc obtinet quando sententia lata est, ex juramento suppletorio & necessario*, viz. *quando ob defectum plenariæ probationis judex defert rem juramento partis; non vero sic in juramento judiciali & voluntario, quod parti ab adversario defertur; sed non capio rationem differentiæ*, viz. *Cur Leges negent Restitutionem adversus rem Judicatam ob nova Instrumenta reperta, & tamen propter eadem reperta concedunt restitutionem adversus judicatum, ex juramento suppletorio, cum videatur magis esse negandam Restitutionem, ubi intervenit Juramentum*; But in this Case the Exception was sustained, for not admitting of the Reason upon the Writs newly come to Knowledge; seing it was much questioned, and doubted, if the same being proponed before Sentence, would have been Relevant or not. And if the same might have been now received, the Writs should have been more clear to have produced the Pursuers intention than these were; so that here they were not admitted. *Vide L. unicam Tit. 9. lib. 10. Cod. de sententiis adversus fiscum latis retractandis, quæ lex dicit has sententias intra triennium retractari posse & post id tempus ex prævaricatione & fraude, sed hoc in fisco.* Actor. *Nicolson* & *Gilmore*. Alter. *Stuart* & *Neilson*. *Gibson* Clerk. *Vid. June* 9. 1624. L. *Touch* contra E. *Hume*. *June* 8. 1627. *Craufurd* contra *Cunninghame*.

L. *Clover-hill* contra *Modie*, *January* 22. 1631.

Clover-hill having Compriſed *Modies* Lands for Debt, and nevertheleſs Charging *Modie* by Horning to pay, & upon that Horning having Letters of Caption, *Modie* Suſpended, that the Compriſing ought to ſtay Perſonal Execution, or els that the Creditor ſhould Renunce the ſame. The *Lords* Found, that if the Suſpender would enter the Charger to the Poſſeſſion of the Lands Compriſed, to be bruiked by him, conform to the Compriſing, that either he ought to accept the ſame, *quo caſu* no Perſonal Execution of Caption ought to be granted againſt the Debitor, albeit that the Debitors Wife was Infeft in the Lands, and that ſhe would not Renounce her Right in favours of the Compriſer, which the *Lords* Found the Debitor could not be compelled to obtain; but without her conſent, Found the Compriſing and Poſſeſſion ſufficient; and if the Compriſer would not accept of Poſſeſſion, that he ought *eo caſu* to Renunce his Compriſing; for they Found, that he ought not to keep both, *viz.* both to uſe Caption, and to retain the Poſſeſſion and Compriſing, but that he had his choiſe of any one of them. Actor. Alter. *Gibſon*. *Gibſon* Clerk. *Vid. Penult. Jan.* 1628. *Andrew Meldrum*.

Rough Miniſter at *Innerkeithing*, contra *Ker*, *Eodem die*.

MR. *Robert Rough* Miniſter at *Innerkeithing*, whereto the Kirk of *Roſyth* was Annexed by Act of Parliament, 1618. having charged *John Ker*, to Remove from the Gleib of *Innerkeithing*, which was deſigned to him, who Suſpending, that he had the Gleib of *Roſyth*, and ought not to have two Gleibs, ſince both theſe Kirks by Parliament were united in one, ſpecially where there was never of old a Gleib in *Innerkeithing*; which if ever it had been, he would not have con-

tended, but the Minister ought to have two, but there never being one there, and the Minister now having a Gleib, he ought not to have that Gleib at *Rosyth*, and another now at *Innerkeithing*, where there was never any. The *Lords* Found not this Reason Relevant, but Found, that notwithstanding of the Union of the Paroch-Kirk of *Rosyth* to *Innerkeithing*, at the which Kirk of *Rosyth*, there was a Gleib; and albeit that that Gleib was Posseſt by the Minister, and altho there was never a Gleib at *Innerkeithing*, yet there was no Cause to exclude the Minister from seeking a Gleib, for the Paroch-Kirk of *Innerkeithing*, seing the same being a Paroch Kirk, and Kirk Lands therein, by the Act of Parliament ilk Paroch Kirk ought to have their own Gleib, and the Plantation of Kirks in *anno* 1618. whereby these Kirks are United, provides the Ministers so, by and besides their Gleibs, and was Ordained for bettering of the Ministers and Kirks, and not to prejudge them, and that Commission gave no warrand to take the Gleib from the Kirks, as *in facto* they did not. Actor. *Stuart*. Alter. *Baird*, *Gibson* Clerk. *Vid. infra Feb.* 11. 1631. betwixt these Parties.

Hardie contra *Mᶜcaula*, *Eodem die.*

HArdie being Charged to make Payment of a Sum in a Bond, Suspended, that he was Interdicted the time of the making thereof, and done without the consent of the Interdictors, whereupon he had Reduction ready to be discust, and which Interdiction was also known to the Charger, at the granting of the Bond, and before. The *Lords* Found the Letters Orderly Proceeded, notwithstanding of the Interdiction, and the Parties knowledge thereof, in respect of the Bond standing un-Reduced; but Suspended the Execution of the Sentence to a certain day assigned to the Suspender to do Diligence, to obtain his Reduction discust. *Hay* Clerk. *Vid. Decem.* 11. 1622. *Seaton*, and the Cases there cited. *July* 11. 1634. *Bruce*. *March* 15. 1637. *Broun*.

Houston contra *Maxwel*, *Jan.* 25. 1631.

HOuston as Heir to umquhile *Helen Murdoch*, pursuing *Maxwel* for Reduction of an Heretable Alienation of some Land, made to the said *Maxwel* by the said *Helen Murdoch*, upon this Reason, because at the time of the said Disposition, she was Minor, and received not a Competent Price for the said Alienation, neither was there any Just or Lawful Cause, which may sustain the said Alienation, nor no Sentence of any Soveraign Judge Interponed finding the said Alienation necessar, and to be a warrand to Authorize the same, without which the same cannot be sustained, the Woman being within 14 years of Age, and greatly prejudged. And it being Excepted for the Defender, that this Reason ought not to be sustained, in respect of the Bond of Alienation produced, which bears the Womans Receipt of the Money therein contained, for the Alienation, & which is more than the Just Worth thereof, and so she could never alledge Lesion, no more can her Heir do; seing he offered to prove by Witnesses in fortification of the Bond of Alienation, that he had really payed the Sum upon her great and instant desire, when she was travelling to *England*, so that there needed no Decreet, it been given to her truly, as said is. The *Lords* Found the Reason Relevant, and Repelled the Exception; for the *Lords* Found the Alienation could not be sustained, albeit it bore *Payment of the true Price of the Land*. And albeit the Defender offered to prove the real delivery thereof to her; seing the payment made to her self being then of 14 years at most, neither being Authorized with the Sentence of a Judge, and no ways qualified, converted to her utility, nor consigned to be given to her, as a Judge should appoint; nor given to her Curators, if she any had, could not exoner the Defender; but the Minor was Found thereby Circumveened, and so the Alienation could not be sustained in Law; this is conform to the *L.* 24 § *Restitutio ff. de Min.* 25. *annis si adversus venditionem Minor restituitur, emptori pretium esse reddendum, nisi emptor tunc*

tunc pretium ei dederit, cum eum perditurum non ignoraret, nam sicut pecuniam mutuans minori eam consumpturo, non potest pro pecunia agere, sic emptor non agit pro pretio sic soluto, nisi quod parcius hoc servetur in venditione, quia ibi as alienum solvitur, quod solvere necesse est, credere autem non est necesse, quare si necesse fuit pretium solvi, non omnino talis emptor damno est afficiendus, sed in casu predicto non potest doceri de pretio vere soluto, et utcunque fuerit solutum, tamen communiter tenetur, ut est in glossa in dicto § si pecunia pro pretio minori soluta salva sit, tum est restituenda emptori, alias non. And the *Lords* also Found, that this Disposition should be Reduced, from the beginning, and not from the time of Litiscontestation only, as the Defender desired, seing this Reduction and Restitution is the restoring of the Cause, and the Party, to the same estate wherein they were before the Alienation. *Hay* Clerk. *Vid. December* 11. 1629. *Gordoun.*

L. *Gadgirth* contra L. *Affleck*, *January* 26. 1631.

L. *Gadgirth* Pursuing the L. *Affleck*, for transferring of a Bond, Registrat against his Father in the Defender, as behaving himself as Heir to him, by Intromission with his Heirship-Goods, and for verifying thereof, produces a Decreet given against him at another Parties Instance, *hoc nomine* as behaving himself by the said Intromission with the said Heirship Goods as Heir, which being proven in that Process, by sufficient Probation of Witnesses, and so Found and Decerned, that *D*ecreet standing Un-reduced, the same must prove him Heir in all other Process pursued against him *eo nomine*. And the Defender Alledging, that that Decreet cannot prejudge him, but in that Process only, where it is so Found, and cannot prejudge him of his Defence, to Alledge here, or in any other Action, that his Intromission cannot make him Heir, because his umquhile Father being such a Person, that in Law would nor could have any Heir, which was not proponed in that Process, wherein he compeared not, and Decreet was given against him then absent. The *Lords* Found that that *D*ecreet, albeit done upon Probation, should not prove the Defender Heir *extra illum processum*; and therefore permitted the Defender to purge that *A*lternative, whereby he was Conveened as behaving himself as Heir; which the *Lords* Found he might do, notwithstanding of that Sentence; for seing he might Reduce that Sentence, if there was reason so to do, against the Obtainer thereof, much more might he oppone that Reason, by way of Exception against another Party, user of the same against him; and albeit that Decreet, while it stands, might prove the Defender to have Intrometted with these Goods, which might have been Heirship Goods, of any Person, who in Law might have an Heir, yet the same will not thereby prove him Heir, if he may qualifie, that he was not that Person, who might have an Heir, albeit he had Intrometted therewith. Actor. *Miller*. Alter. *Nicolson*. *Gibson* Clerk. *Vid. July* 13. 1631. betwixt these Parties. *July* 16. 1629. *Murray* contra *Ross*. *Novem.* 20. 1629. *July* 10. 1630. *Whitelaw*, and the other Cases there. *June* 11. 1631. *Tailzifer*. *Jan.* 25. 1632. *Kaidstie* contra *Lauder*.

L. *Cloberhill*, contra L. *Lady-land*, *Eodem die.*

THe L. *Cloberhill* pursuing *Lady-land*, as Heir to his Father, who was Cautioner for the Principal Debitor, to make payment of the Principal Sum, and Annualrents thereof, of all years since his Father was denunced Rebel for not payment of the said Sum, the Tenor of the Bond bearing, *That the Principal and Cautioner were bound as full Debitors to pay the Sum to the Creditor*, and not bearing them to be bound conjunctly and severally. The *D*efender Alledging, that in respect of the Tenor of the Bond, he was not lyable, as his Father also was no more lyable, but to pay the equal half of the Sum. The *Lords* Repelled the Alledgance, & Found him also lyable to pay the whole Sum without division, seing the Principal was bound in the whole, and he was his Cautioner, and the

Tenor of the Bond bore, *that they were bound as full Debitors*. Which the *Lords* Found to oblige each one of them, and their Heirs *in solidum* for the whole; And the Defender further Alledging, that he could not be conveened as Heir upon the Act of Parliament Lybelled, *anno* 1621. but only to pay Annualrent from the time of his Fathers Rebellion, to the time of his Decease, and no more Terms since; This was Repelled, and he as Heir Found subject to pay ay and while the re-payment of the principal Sum. Actor. *Mowat*. Alter. *Cunninghame*. *Gibson* Clerk. *Vid. June* 13. 1629. *Inglis* contra *Frazer*. *July* 2. 1629. *Purveyance* contra L. *Craigie*. *July* 8. 1642. *Huntley* and the cases there.

Grahame contra *Stuart*, *Jan.* 28. 1631.

IN a Contract betwixt the L. of *Lethindie* and *John Grahame*, proporting the Wodset of diverse Lands, Disponed by *Lethindie* to *John Grahame* under Reversion, and because some of these Lands Wodset were possessed by *Scrymzeor* of *Fordel*, who had a Right thereof to endure for three years after this Contract, therefore *Lethnidie* obliged himself to pay to the said *John Grahame* 40 Bolls of Victual yearly, during these three years, ay and while *Fordel* Renounced his Right and Possession, and that the said *John Grahame* Entred thereby to the Possession of these Lands. After the expiring of the three years of *Fordel's* Right, Mr. *John Stuart* and *William Stuart* his Brother, who had after the foresaid Contract Acquired the Right of Reversion of these Lands, which were Wodset by the Contract to the said *John Grahame*, grants a Bond to the said *John Grahame*, in the Narrative whereof mention is made of this above-written Contract; which Narrative proports, that by that Contract *Lethindie was obliged to pay the saids* 40 *Bolls of Victual to the said John Grahame yearly, during the not Redemption of the Wodset*; albeit the Contract it self bore only as said is, *That the same should be payed, during the three years of* Fordel's *Right*; and after this Narrative, the said Mr. *John* and *William Stuarts* Ratifies that Contract, and further *for diverse Pleasures, Gratitudes and good Deeds payed to them by the said* John Grahame, *they Bind and Oblige them to pay the* 40 *Bolls of Victual yearly, during the not Redemption and paying of the Sum*, whereupon the Lands were Wodset to him by *Lethindie*: Thereafter the L. of *Drumkilbo* being made Assigney by the said *John Grahame* to the said Bond, and whole preceeding Securities granted to him, Pursues the said Mr. *John* for payment of the said Victual of all years preceeding, not only during the space of *Fordel's* Right, but ever since and in time coming, during the not Redemption; wherein the Defender Alledging, that the last Bond depending upon the first Contract, and being relative thereto, ought only to be Obligator, according to the Tenor of the prior Contract, and no further, which being only for the said space of three years of *Fordel's* Right, what ever other relation is made in the last Bond, differing from the truth of the said prior Contract, the Obligation given upon that false Cause, ought to be no further effectual, but according to the truth of the said Contract, specially seing after the expyring of the 3 years of *Fordels* Right, *Jo. Grahame* became in peaceable Possession of the Lands, which before were possest by *Fordel*, wherein he and others in his name has continued Possessors since; and the Pursuer Answering, that whatsomever Narrative be insert in this posterior Contract, that ought not to derogat to the force of this Obligation since, granted to *John Grahame*, which bears to be granted *for Gratitudes, and good Deeds done, and so for onerous Causes*, and done *scienter & inter majores*, which cannot be inverted upon the Alledged Narration therein contained, whether true or false, this being a new security made by another Party, and for onerous Causes, as said is; and whatever Possession he has had of the Lands, that ought not to be respected, seing he bought the Right of the Lands from diverse parties, *viz.* one from the Donatar to the Liferent, and a Comprysing and Infeftment following thereon, from an other Party condescended

ded on, either of which Rights were of that strength, which would ever in Law debar him from his Possession, and would have been preferred to the Right Acquired by that prior Contract; these Rights being anterior thereto, and whereon he is content to Dispute; and which if the Partie can yet Eleid, he is content that Decreet be given against him; The *Lords* notwithstanding of this Reply, Found the Exception Relevant, and that the last Obligation should be no further extended, but according to the Tenor of the prior Contract, in respect of the Narration, which is insert in the Bond, which repeats a different Tenor from the Writ, which is therein related; and which the *Lords* Found ought to be ruled as the Writ proported, whereto it made reference, and that the Parties Bond following thereon, ought to be thereby ruled and limited: And sicklike sustained the Alledgance upon *John Graham's* Possession, albeit the Rights which he Acquired had been more valid in Law, than the Wodset procured from *Lethindie*, seing he was never pursued thereon by them in Law, nor was ever excluded nor debarred by these Rights. Actor. *Advocatus* & *Nicolson*. Alter. *Stuart* & *Lermonth*. *Gibson* Clerk.

Hume contra *Hume*, *January* 29. 1631.

ELiz. *Hume* Relict of umquhile *Rob. Hume* of *Corsrig*, who, & her Husband for his Interest, had obtained Decreet against one *Hume* her Fathers Brother, for payment of certain Goods and Gear, pertaining to her by her Fathers Testament, wherein this *Hume*, who was decerned Executor Nominat and Confirmed, and who had also accepted a Factory from the said *Elizabeths* Tutor, the said *Hume* being deceast, and also the Pursuers Husband, she now Pursues the Relict of the said Factor, as Intromissatrix and Executrix to her Husband, who before was Decerned and his Heirs, to make payment of the Annualrents and Profits of the Sums Decerned, of all years and Terms continually since the saids Factor's Intromission, and in time to come while the payment be made: wherein the *Lords* Found, that neither the Relict of the said Factor, nor his Heirs were subject in Law to pay the said Profit, the Sums being Intrometted with by the said Factor, by the space of 30 years since, or thereby, albeit Decreet was recovered in *anno* 1620, or thereby, against the Factor for the principal Sums; but Found, that her Action for the said Profites was competent to her against her own Tutor, and not against the Heir or Executor of the Factor. Actor. Alter. *Craig*. *Gibson* Clerk. *Vid. July* 24. 1629. *Bowman* contra *Wardlaw*. & *Febr.* 22. 1634. *Davidson*.

Porter contra *Law*, *Eodem die*.

A Relict being Charged to pay a Sum, which she and her Husband with her were obliged to pay to the Creditor; and she Alledging, that the Obligation being made by her with her Husband *ante matrimonio*, no Execution now after his Decease could follow against her, but only against her Husbands Heirs or Executors. The *Lords* Found the Reason Relevant, seing the Relict was not obliged in Law to pay the same, albeit the Charger Answered, that she was also bound, and that she was *praeposita negotiis* also by the Husband, which *praepositura* the *Lords* Found made not the Relict obliged; but would infer, that albeit the Husband had not been bound in the Bond, as he indeed was, yet the Husband's Heirs and Executors were conveenable therefore, and not the Relict; for that Prepositure made the Husband lyable to the Debt. Actor. *Cunninghame*. Alter. *Lermonth*. *Scot* Clerk.

Butler L. *Hirdmiston* contra *Vaus*, *Eodem die*.

THe Heretor after the Liferenters Decease, Charging Summarly, without preceeding Warning, to Remove from the Tower & Mannor-Place, & some other Houses pertaining thereto, wherein the Defender Alledging, that these o-

ther Houses, by and attour the Principal House acclaimed by the Pursuer, pertained not to the Pursuer's Predecessors, nor to these *Lands* wherein they were Infeft, but that the same pertained to the *Defender*, and stood upon the *Lands* pertaining to the *Defender* Heretably, which were lying contigue to the Pursuers *Lands*; and either of the Parties qualifying certain Arguments and Presumptions, whereby they Alledged these Houses controverted, to pertain to either of them, the *Lords* before having given Commission to two of their number, to visit the saids *Lands* and Houses, and to take tryal by Witnesses, and all other lawful manner, to which of the Parties *Lands* these Houses belonged. After Report made by the two *Lords*, and consideration of the *Depositions* of Witnesses taken by them, which were produced by either of the Parties, they finding the matter not to be clear, to which of the Parties they belonged properly, they ordained both Parties to produce before them an equal number of Witnesses, for qualifying of either of their Arguments, that after consideration thereof they might proceed and decide the Cause; and this was done, albeit it is not ordinary in this Judgment to take Witnesses for both Parties; but this was Ordained in this case, where the matter was perplexed & uncertain on both sides, for their Claims to the Houses controverted; and as their Probation should be found most clear and unsuspect, according thereto the *Lords* would Decern: and it was Found, that the Pursuer might lawfully use the L. of *Blauns* to be Witness for him, albeit he had sold the *Lands* controverted to the Pursuer, and was subject in Warrandice thereof, seing the same was sold under *Reversion*, to which Reversion he had made the Defender and his Authors Assigneys. Actor. *Nicolson*. Alter. *Stuart*. *Gibson* Clerk. *Vid. July 9. 1630. L. Rowallan.*

Calpie contra *Kennedy*, *February 1. 1631.*

IN an Action of Declarator for expiring of a Feu, for not payment of a Feu-Duty, conform to the Clause Irritant, contained in the Charter. The Defender proponing payment of all the Terms, for failzie whereof Declarator was craved. The *Lords* Found, that this payment was not probable by Witnesses, as the Defender urged that it was, seing the Feu-Duty was so small a matter, being 18 pounds yearly only, made at sundry times; and therefore as he Alledged, was probable by Witnesses; which the *Lords* Found ought only to be proven by Writ, or Oath of Party, seing they Found, that the Setter of the Feu, having provided himself of that Clause by the Charter, the Receiver ought to have looked to the manner of Security which he Acquired, which could not be maintained to the Defender, nor subverted to the Pursuer, but by the Pursuers own Deed, which could not be made known, but by his Writ or Oath. *Gibson* Clerk. *Vid. March 18. 1629. Barclay* contra *Stevinson.**

Cunninghame contra *Williamson*, *Eodem die.*

Gilbert Williamson being Conveened as Heretor of a Tenement of Land, and the present Tennents and Possessors thereof, by *Henry Cunninghame*, for poynding of the Ground for an Annualrent, wherein he was Infeft out of the Land; wherein the Defender Alledging, that he who stood Heretably Infeft, and in Possession of the Land, not being Summoned to this Action, no Process ought to be granted therefore; for albeit the Pursuer Replyed, that *Gilbert Williamson*, who was conveened, was Heretably Infeft, so that he needed conveen no other but him & the present Possessor; yet he Duplyed, that his Right was under Reversion, so that his Author, who still remained Heretor, ought to be Conveened to Defend in this Pursuit, the absolute Right being yet consisting in his person. The *Lords* Found, that this Defender being Infeft, albeit under Reversion, there was no necessity to conveen any other alledged Heretor; for if it were so found, there were alike reason to conveen that Heretor's Author. And as to the Reversion, the

the Pursuer had no necessity to know the same; for it might be Discharged, or not, as they pleased amongst themselves; but if that person, or any other pleased to compear for his Interest, he might be admitted. Actor. *Cunninghame.* Alter. *Gibson* Clerk. *Vid. July* 9. 1630. *Fisher* contra *Brown*, and the Cases there, *Jan.* 19. 1636. *Pat. Oliphant. Dec.* 21. 1633. L. of *Weym.*

L. *Blaus* contra *Winraham*, *Eodem die.*

THe Heretor pursuing after the Liferenters decease, who died shortly after *Whitsunday*, for the other half of that years Duty, wherein the Liferenter died (for the *Whitsundays* Term pertained to her Executors, she surviving *Whitsunday*) *viz.* For the quantities Libelled, whereto the half of the third Sheaf extended, seing the Land was Set for the third Sheaf, which was all uplifted by *Helen Winraham*, Relict of umquhile Mr. *George Butler*, and she was Pursued for the equal half thereof; who Alledging that umquhile Mr. *Robert Winraham* her Brother Compriſed the Liferenters Right, and thereafter Set Tacks to her Husband, for payment of 40 pounds yearly, and she uplifting the Duties in name of the Tacks-man, her Husband's appearand Heir, she cannot be conveened for payment of any greater Duty this year, wherein the Liferenter died, than the equal half of the Tack-duty, no more than if the Liferenter had Set the Tack to the actual Labourer of the Ground for this Duty, *quo casu* the Tennent could not be conveened for any more: And the Pursuer Replying, that this Tack Set betwixt Good-brethren, could not prejudge the Heretor after the Liferenters decease, to seek the equal half of that years Duty, which justly befell to the Heretor, seing the Liferenter died within ten days after *Whitsunday*, whereby she could have no Right but to the equal half; and so she could Set no Tack, which could have any longer endurance than for that half year; and consequently the Compriser of her Liferent could Set no longer than her self, especially this Tack not being Set to the Tennent of the Ground, (whose case might possibly be favourable) but being Set to a third Person, who is conveened only for the just half of that, which was actually uplifted from the Tennent Possessor; and it was no ways reasonable that a Stranger should reap the whole years Duty from the Tennent, and that the Heretor should be excluded by such a simulat Tack, containing no Duty but this imaginary Duty, which makes the Tack null in Law for *Conductio quæ est in uno nummo est nulla, quia hoc donationis instar inducit, l.* 46 *ff. Locati. & l. si quis ante* § 2: *si quis ff. de acquirenda, vel amittenda possessione, ubi vid. Bart. de differentia inter locationem, quæ fit voluntarie, & eam quæ fit ex necessitate, de qua loquitur, l. si usufructus. ff. de Jure dotium.* The *Lords* Found, that the Tack Set by the Liferenter, and by the Compriser of her Life-rent, which was found alike, was sufficient to exclude the Heretors Pursuit, for any more or greater Duty to be payed to him, for these Lands of this Term controverted, except the half of the Tack-Duty; the half of the which Tack-Duty the *Lords* Found should suffice for the said Term, albeit the Liferenter died so soon after the Term of *Whitsunday*, and before *Martinmass*, which was the Term controverted; and Found, that the Duties of the Land that Term pertained to the Tacks-man, albeit the Tack was not Set to the Tennent, Labourer of the Ground: this Tack was also sustained, to defend against the summar Removing, Intented after the Liferenters decease, ay and while Warning were made. Actor. *Nicolson.* Alter. *Stuart. Gibson* Clerk. *Vid.* 9 *March* 1631. La. *Hutton-hall.* 16 *Feb.* 1628. *Thomson* contra *Merstoun*, 26 *July* 1628. *Mitchelson* contra *Ker*, & 13 *Feb.* 1630. L. *Romallan.*

This Action being called the 25 of *February* 1631. this same Decision was *de novo* Voted and Allowed, *me reclamante*, whereby it follows, that the Tacks-man to the Liferenter must also bruik the next year, in respect of the Act of the 22 *Parl. Ja.* 4. which Prohibites Removing till the next *Whitsunday*, at which also the Heretor will only get the Tack-Duty, and no more.

Ogrie contra *Murray*, *Feb.* 3. 1631.

THomas *Ogrie* as Heir to his Good-sir, being Infeft in *Anno* 1630, in the Lands of *Stobo*, Pursues *David Murray* of *Hallmyre*, Superior of the saids Lands, and who had intrometted with the Duties thereof, for payment of the same to him for divers years before his Seasin, & since the decease of his Good-sir; & the Defender Alledging, that the Lands being in his hands as Superior, in Non-entry for these years before the Pursuers Seasin, he had Right thereby to the saids Duties; and the Pursuer Answering, that the Non-entry was not declared. 2°. That he held the Lands Blensh, so that the Superior could have no other Duty by Non-entry before Declarator, but the Retour Blench-Duty. And the Excipient Duplying, that he being singular Successor to the Author, of this Pursuers Good-sirs Right, and by vertue of his Right in possession of the Lands, and neither the Pursuer nor his Good-sir in possession ever of the Land, his possession must be as sufficient to him as a Declarator. The *Lords* Found, that this Non-entry in Blensh-Lands was not sufficient to exclude this Pursuit, seing the Superior by the Non-entry could claim no more but the Retoured Blensh-Duties: for this is not alike as in an Annualrent, which the Heretor of the Land, out of the which it is payable, may bruik ay and while the Entry of the Annualrenter, because the Retour, and extent of an Annualrent is *quod valet seipsum*, and so the Superior may bruik it. Actor. *Mcgill.* Alter. *Nicolson.* Clerk. *Vid.* 23 *March* 1631. *Somervel* contra *Somervel.* 12 *March* 1630. betwixt them. 23 *January* 1630. *Peebles.*

Henderson contra *Henderson*'s Relict, *Eodem die.*

MR. *John Henderson* and umquhile *James* his Brother, being Confirmed Executors to their umquhile Sister; in which Testament *James* gives up a Debt of 500 pounds, adebted by himself to the Defunct, to whom he was one of the two Executors Confirmed; and the said *James* being deceased, nothing being done before his decease upon the said Testament, Mr. *John* the other Executor pursues the Relict of the said *James* as Executor to him, to pay the said Sum; who Alledging the said Sum to be Heretable, and so not to come under the Testament to be Confirmed, except the Pursuer would otherways instruct, than by the Testament, that the said Sum was Confirmable. The *Lords* Found, that this Sum being given up by the Executor himself, as a debt owing by him, he not making mention that he was owing it by Bond, it could not be Alledged by himself if he were living, nor now by his Executors to be Heretable, except that the Excipient would qualifie, and shew that it were Heretable, which if she did not, the *Lords* Found the Testament so proporting, given up by the Debitor's self, ought to work against the Defender, as it would have done against himself: And here it was questioned, if the whole Sum would pertain to this Pursuer the sole Executor surviving, the other not having Execute before his Decease, seing it was Alledged by this Executor, that there needed no more Execution thereof, he being Executor, and also Debitor, whereby it was in his own hands, and so the Debt confounded for the equal half, as Executor; but the Pursuer insisted only for the one equal half thereof, and no further. *Gibson* Clerk. *Vid.* 25 *July* 1634. *James Mathison.*

L. Glengairie contra Lo. *Lovat*, *Feb.* 4. 1631.

L. *Glengairie* Pursuing Improbation and Reduction against the Lord *Lovat* and L. *Foulis*, as Heir to the Lo. of the *Isles*, who had a Charter granted to his Predecessors of the Lands Libelled by to be holden of the Granter, in *Anno* 1463. and which was Confirmed by the King, for Reducing of the Right of these Lands made to the Defenders, or their Authors and Predecessors, by the Sons and Daughters of the Descendants of the said Lord of the *Isles*,

to

to whom the Pursuer was served Heir, for Reducing of any Right made by the King's *Majesties* Progenitors, either by the Resignation of these Descendants, or by Confirmation, because these Descendants Authors to the Defenders, were neither Heirs to the Lo. of the *Isles*, nor had ever acquired any Right from him. Wherein the Defenders opponing against the Pursuers Title and Interest produced, Alledged, that the said Charter granted to the Lo. of the *Isles*, which was but base, given to be holden of the Granter, and whereupon never Seasin followed, nor yet ever any Seasin since in the person of this Pursuer, or any other before, can be shown for authorizing of this Pursuit, and never any Possession by vertue thereof can be qualified, could not be any ground to sustain Action, to Reduce a publick Infestment, clothed with Possession; neither could it be a Title to sustain Action for production of publick Rights, flowing from the King, and the Confirmation made to the Lo. of the *Isles* Confirmed but the said base Right; for it was not given to be holden of the King, and so could not be found a sufficient Title. The *Lords* Repelled the Alledgance *hoc loco* against the Production, and Found, that the said base Charter Confirmed, and the Pursuers Retour, albeit no Seasin was either shown or Replyed on, nor yet Possession, gave sufficient interest to the Pursuer, to seek the production of all Writs flowing from the Descendants of the said Lo. of the *Isles*, and of the Rights made by the King and his *Majesties* Predecessors, of these Lands, which had dependence upon that Right of the Lo. *Isles*, flowing either upon the said Descendants Resignation, or otherwise upon the Confirmation of their Deeds. But the *Lords* Found, that by vertue of those Titles produced, the said Pursuer had no interest, to seek production of any Original Rights, made by the King to these Defenders, which depended not upon the said Right made by the Lo. of *Isles* to the said Descendants, seing there was nothing either shown or Alledged, that the Pursuers Author or Predecessors were Infest therein by the King, and the Confirmation foresaid of the said base Right alone, was not found such a sufficient Title to denude the King, as might give interest to Reduce any Posterior or Original Right, made by the King thereafter of these Lands, as if the King by that Confirmation had been then fully denuded of his Right: And the *Lords* reserved the foresaid Exception, which was Repelled against the Production, to be Discussed *in causa*, in the Dispute of the Cause, after Production. Actor. *Advocatus* & *Nicolson*. Alter. *Stuart* & *Lawtie*. *Gibson* Clerk. *Vid.* 4 *Feb.* 1630. E. *Kinghorn*. 20 & 26 *March* 1623. & 2 *March* 1627. Heirs of Lo. *Yester*. 8 *Feb.* 1628. Sir *James Dundass*.

John Inglis contra the Executors of umquhile *John Sharp*, *Feb.* 5. 1631.

THe Executors being conveened for 417 pounds, as the price of certain Clothes and Wares, furnished by the Pursuers to the said *John* in the years 1627, and 1628. for the Abuilziements of his Body; and the said Executors Alledging, that the said *Sharp* was Minor the time of the said Furnishing, and then had Curators, without whose consent or direction the said Furnishing being made, the Pursuer could not have *Action* therefore. The *Lords* Repelled this Alledgance, in respect the Minor the time of the Furnishing was 18 years of age, and that the same was made to him for his necessary Abuilziements, and that he being a young man of a good Estate, the Furnishing was not immoderat, the Defenders never Alledging, that the Minor was otherways Furnished by his Curators; and the Pursuer also offering to prove, that he had made the like Furnishing to the Minor in other preceeding years, for which he was satisfied; in respect whereof the Action was sustained, and the *Lords* Found no necessity, that the Minors Curators should be first discussed, before the Executors could be conveened. Actor. *Nicolson* & *Neilson*. Alter. *Burnet*. *Gibson* Clerk.

M'millan, &c. contra *Corsans*, *Feb.* 9. 1631.

Corsan the Father being bound in his Daughters Contract of Marriage with *John Mcmillan* her Spouse, that his said Daughter should have an equal portion of his Goods at his decease, sicklike as his other two Daughters shall have; and they two dying before the Father, and the Father having begotten other two Daughters upon a second Wife; after the foresaid Contract, the said *Corsan* and *John Mcmillan* after the Fathers decease, Pursues the saids two Daughters procreat in the second Marriage, as being Executors Confirmed to him, to make payment of the equal third part of the Defuncts Gear, *viz.* both the third part of her Bairns part, and the third part of the Defuncts part, conform to the Clause of the said Contract; which Action the *Lords* sustained, and Found that the Pursuer had Right thereto; albeit that the Defenders Alledged, that she had no Right to seek the same, seing the Contract gave her Right only to such part, as her two Sisters named in the Contract should have after their Father's decease; and they dying before their Father, they could have no part of their Fathers Goods, and consequently neither this Pursuer. This Alledgance was Repelled, for albeit these two Sisters were deceased before their Father, yet that Clause was not extinct, but that she should have her equal part with the Bairns surviving; and if he had no Bairns but the Pursuer, the whole would have befallen to her, far more this part which was less. Actor.

Alter. *Lawtie. Hay* Clerk. *Vid.* 19 *Feb.* 1631. Betwixt these Parties.

Barrens Dutch-man contra *Hutchison*, *Eodem die.*

THe Dutch-man Pursuing for a Debt, which he instructed by production of a Ticket, marked with two Initial Letters of the Defenders name; the verity of the which Subscription being referred to his Oath, and he Compearing, and by his qualified Oath granting the Subscription, but declaring that he had payed the Debt, the Ticket being dated 16 years since, and he never being Pursued therefore; the Parties contending, that this part of the Deposition should not be respected anent the payment, because it was not referred to his Oath; and that he ought not to Swear an Exception which he ought otherways to prove. And the Defender Alledging, that seing the Writ being imperfect, was supplied by his Oath, he might declare *qualificatè* upon the whole Cause, and upon the verity of the Debt, if it was yet owing un-payed. The *Lords* Found, that that part of the Oath, bearing payment of the Debt, ought not to be respected; and that the Defender was not fred thereby; but if he would propone an Exception of payment (which the *Lords* Found he might do, if he pleased, in the same state of the Process) that they would suffer him to propone the same, and that he ought to prove it, as accords of the Law, otherways than by his own Oath: Here the Ticket Libelled bore on the back, *payment of a part of the Debt*, and the presumption, that the rest was owing, was more considerable, than any thing shown to the contrary. Actor. *Craig.* Alter. *Russell. Gibson* Clerk. *Vid.* 1 *July* 1624. Lo. Conservator. 14 *Feb.* 1633. *Rankine.* 11 *Feb.* 1634. *Irwine.*

Provost of *Inverness* contra the Town, *Feb.* 10. 1631.

THe Town of *Inverness* having Imployed *Duncan Forbes* then their Provost, in doing of their Affairs, and an Obligation being thereafter given to him by fourteen persons, to pay to him for the Town a Sum, adebted to him by the Town, Debursed by him in doing of their Affairs; by the which Obligation these persons were not bound conjunctly and severally to pay the Sum, but were only all bound *in cumulo* together, and five of them who were Charged having offered their own proportional parts, and thereafter upon refusal to receive the same, Consigning and Suspending, that in respect of the Tenor of the Ob-

Obligation, they were not further obliged; for however the Town was Obliged *in solidum* for the whole, and that the whole 14 were obliged also for the whole, yet any one of them had not obliged themselves for the whole; wherefore seing they were not otherwayes bound, but ilk one for his own part, and that the Creditors had taken that Obligation of that Tenor, they could not be further obliged than they had obliged themselves; Notwithstanding whereof the *Lords* Found every one of them obliged *in solidum pro toto debito*, as the Town was obliged *in totum*. Actor. *Nicolson* & *Baird*. Alter. *Stuart* & *Gibson*. *Gibson* Clerk. *Vid. penult January* 1627. *Ker* contra Baillies of *Jedburgh*. *January* 24. 1642: *George Wilson*.

E. *Galloway* contra Burgesses of *Wigtoun*, *Eodem die*.

EArl of *Galloway* Pursuing Removing, against certain Burgesses of *Wigtoun*, from certain Lands, wherein he was Infeft by an Heretable Feu-Charter, upon the Resignation of *Mcdougal* of *Mathermuir*, who was Infeft in Feu therein also of before, by the Town of *Wigtoun*, to whom the Lands pertained in Burgage, as part of their Common-good; and the Defender Alledging that the said Heretable Feu was null, in respect by the 36 *Act*, 3 *P. Fa* 4. and by the 181 *Act*, 13 *P. Fa.* 6. It is Statute, *That the Burrows may not sett their Common-good for longer space than three years*. This Alledgance was Repelled; for it was Found, that this Right, which followed upon another prior Heretable Right standing, there being two Heretable Infeftments, could not be Found null *ope exceptionis*, being proponed in this Removing, and not being quarrelled by the Town, nor by any Party, who had any other better lawful Right: And it being Alledged, that the Seasin was null, for all the Lands Lybelled therein contained, except that Land only, whereat expres Seasin was taken, and was Recorded in the Clause *Acta erant hæc*, *&c.* The *Lords* Repelled the Alledgance, & sustained the Seasin for all the Lands lying contigue to the Land, whereat the Seasin was taken, seing that the same held of one Superior, and was one Tenor of holding; but it was not respected that the Superior had united them, and had appointed a Seasin taken at such a place, to serve for all the Lands, seing it was not Confirmed by the King. Actor. *Stuart* & *Neilson*. Alter. *Nicolson* & *Gilmor*. *Scot* Clerk. *Vid. March* 15. 1631. betwixt thir same Parties. *Novemb.* 16. 1630. L. *Clackmannan*. *January* 19. 1630. *Bruce* contra *Wardlaw*.

contra *Eodem die*.

COmmissar of *Brichen* having pronounced a Decreet betwixt two parties, which being Extracted, was Subscribed by the Commissar, who was Judge thereto, and not by his Clerk, and therefore was quarrelled as null, seing these being two distinct Offices, as the Clerk could not be Judge, no more could the Judge be Clerk, for as the Judge could not sit down and minut Proces, and Write his own Ordinances, no more could he Subscribe Decreets, notwithstanding whereof the Decreet was Sustained, seing it was the Custom of that Court, and divers other Inferiour Judicatures to do the same; But the *Lords* Found it a Custom unlawful, and not to be hereafter allowed, and ordained the Commissar to abstain therefrom in time coming, *Vid. Jan.* 10. 1623. *Mcdowgall*.

L. *Torrie* contra *Carnagie*, *Feb.* 11. 1631.

LAird *Torrie* being Conveened by *William Carnagie*, to hear an Obligation made by umquhile *James Wardlaw* to him, Registrat against this L. *Torrie*, as Successor to *James*, by accepting of a Disposition from the said *James*, for payment of his Debts, and of this amongst other Debts mentioned in the Disposition, wherein the *Lords* Found, that the Defender could not be conveened *hoc nomine*, for Registration of the Bond, but that the Pursuer might intent ordinar Action against him *eo nomine*, for payment of the Debt Lybelled, as accepting the said Disposition for payment thereof. *Gibson* Clerk.

Minister of *Innerkeithing* contra *Ker*, *Eodem die.*

THis Cause being mentioned the twenty two day of *January* 1631. The Minister Charging to Remove from the Manse, designed to him with his Gleib, and which Manse was acclaimed as being built upon the said Gleib, and consequently ought to pertain to the Minister, seing the Gleib pertained, as designed to the Minister, being the neareſt Kirk-land to the Kirk; The *Lords* Found, that albeit the moſt eweſt Kirk-lands to the Kirk, where there was no Parſon or Viccar-Manſe there before might be deſigned, yet that the Houſes being upon that Kirk-land, could not be deſigned lawfully, nor acclaimed by the Miniſter, if theſe Houſes pertained never to the Parſon nor Viccar of before, nor to no Miniſter ſerving the Cure at that Kirk; for ſeing there was not ſuch a Manſe bruiked by any Kirk-man of old at that Kirk, and that there was no Warrand for giving to the Miniſter a Manſe in theſe caſes, by any Act of Parliament. The *Lords* Found, that albeit the Miniſter might ſeek by Warrand of Act of Parliament *eo caſu* a Gleib, where there was Kirk-land within the Parochin, there being neither Parſon nor Viccars Gleib therein, yet that he could not thereby claim the Houſes upon that Kirk-land, as his Manſe; but that he might either deal with the Parochioners, for bigging of a Manſe to him, or purſue them therefore *prout de jure*; or otherwayes big his own Manſe, the expenſes whereof would be refounded to his Executors by the next Intrant, conform to the Act of Parliament. Actor. *Nicolſon* & *Baird*. Alter. *Stuart*. *Gibſon* Clerk. *Vid. July* 24. 1629. Parſon of *Dyſert*, and the caſes there.

Murray contra Lo. *Yeſter*, *Feb.* 12. 1631.

David Murray having Acquired the Heretable Right of the Lands of *Drumelzier*, from the Laird of *Drumelzier*, and being made Aſſigney by him to all the legal Reverſions of any Compryſings, of any of the Lands of the ſaid Barony of *Drumelzier*, Deduced either by the Lo. *Yeſter's* ſelf, or any other Creditors, Purſues the Lo. *Yeſter*, to hear the Lands Redeemed from him, not only for the Compryſing at the Lo. *Yeſter's* own Inſtance, but alſo for all other Compryſings Deduced by whatſomever other Creditor, the Right whereof is become in the perſon of the Lord *Yeſter*, by Aſſignation, or other Right made thereof to him, by the Compryſers of their Right; which Summons being ſo generally Lybelled and Conceived, and not bearing *the names of the perſons Creditors ſpecially who had Compryſed, nor yet the ſpecial Sums, for which theſe Creditors had Compryſed*, but only that *the Purſuer had Conſigned ſuch a ſpecial Sum, whereto he affirmed the whole Compryſing did extend*; and if the ſame did extend to any greater Sum, that he was content inſtantly to Conſign and pay the ſame, they being condeſcended on, and Inſtructed by the Lord *Yeſter*. And it being Alledged that ſuch a Redemption ought not to be Suſtained, and that the Defender could not in Law be compelled, to Inſtruct the Purſuer to Lybel a Purſuit againſt himſelf; for except both the Compryſers, and their Sums were ſpecially expreſt in the Order of Redemption, and Declarator intented thereon, he Alledged no Proceſs could be granted. The *Lords* Repelled the Alledgance, & Suſtained the Order and Action, in reſpect that the Purſuer offered inſtantly to Conſign all Sums, whereupon Compryſings were Deduced, whereof the Rights were eſtabliſhed in the Defenders perſon, if the ſame were more than the Sums Conſigned in that Order; and it was probable Ignorance in this Purſuer, not to know them all, being a ſingular Succeſſor, and the danger of the expyring of the Legal Reverſion, required in equity this Action to be Suſtained, which otherwayes might expire: Likeas, the Defender could have no prejudice, to receive compleat payment of all his Debts, for which the Compryſing was Deduced, as was offered; and if there was any other Compryſing, whereof the Right is not become in the Lord *Yeſter's* perſon, this Action would not extend thereto, nor prejudge the

the same; therefore the Action was Sustained, and the Defender was ordained to condescend and qualifie the particular Sums, whereto he had Right by any Compryfing, competent in his person, as said is. Actor *Nicolson* & *Baird*. Alter. *Stuart*, *Gibson* Clerk. *Vid. Feb.* 22. 1631. betwixt these parties.

Tacks-men to the B. of *Isles* contra *Brown*, *Feb.* 15. 1631.

Bryce Semple and *John Shaw* being Tacks-men to the Bishop of the *Isles*, of the Teinds of all Fishes taken and slain within the *Isles* of *Scotland*, and having upon their Decreet of Letters conform thereto, Charged *George Brown* in *Edinburgh*, to make payment to them of the Teinds of certain quantities of Fishes slain in the *Isles*, which were received and intrometted with by the said *George*, who Suspending, that he was not subject to pay the saids Teinds, he having bought the same from the Takers thereof, so that they who took and slew the same, ought to be conveened for the Teind thereof, and not he who bought, as said is: And it being Answered by the Charger, that the Receivers and Intromettors with the said Herring and Fishes, whether they slew them or not, has been in use to pay Teind therefore, to whatsoever Sea-Port they were Transported, and that past memory of man. This Answer upon the Custom of payment made by the Buyers and Intromettors was Sustained, and Found Relevant. Actor. *Mowat*. Alter. *Gibson* Clerk. *Vid. June* 10. 1631. *Peebles*.

Mr. *Alex. Chrystison* contra Mr. *Alex. Anderson*, *Eodem die*.

The Kirk of *Auchtergiven* and the Kirk of being United by Act of Parliament 1617. in one, and one Minister ordained to Serve the Cure at both; the Bishop of *Dunkeld* being Bishop of the Dioces, appoints one of these Kirks to be served by the one Minister, and the other Kirk by the other Minister foresaid, and divides the Stipend betwixt them, the whole being 80 Bolls of Victual only, and appoints, with advice of the Presbytrie, *Anderson* who was then actual Minister at *Dowallie*, to be Transported from that Kirk, where he was provided to the said Kirk, which was so divided; and the saids two Ministers by Contract perfected betwixt them, and delivered to the Bishop, Ratified each one to others, the provision of the said Kirks, and that each one of them should uplift the half Stipend, modified at the Uniting thereof; a year or two thereafter, the Bishop gives Presentation to *Christison* of both these Kirks United, and appoints him Minister at them both, whereupon in a Double-poynding, the two Ministers Contending for the Stipend, the one claiming the whole by the foresaid Presentation, and Letters conform thereon; and the other in respect of the Act of Transportation, done by the Presbytery and Bishop, which he Alledged to be as good as the Presentation of the Bishop, and in respect of the foresaid Contract, claiming the half. The *Lords* preferred the Minister presented, *viz. Christison* to the other for the whole Stipend, notwithstanding of the said Contract, and Act of Transportation; seing they Found, that a Kirk so united by Parliament, could not be Loused, Disunited, nor Altered by the Bishop, nor no other but by the Parliament, neither could the foresaid Contract oblige the Parties thereto, there being a posterior Presentation granted of the Kirks united to the foresaid *Christison*, after the foresaid Contract, and Transportation, and which was Authorized by Decreet, and Letters conform. Likeas *Christison* offered to prove, that the other *Minister* continued still Minister at *Dowallie*, where he was provided, and Served before, and still uplifted the Stipend of that Kirk; Which the *Lords* Found Relevant, and admitted to Probation; for it was not Found reasonable, that he should have the whole Stipend of his own Kirk, and seek the half of a small Stipend at another Kirk. Actor. *Stuart*. Alter. *Mowat*. *Gibson* Clerk.

Lo. *Cranston* contra *Scot*, *Feb.* 16. 1631.

Lo. *Cranstoun* Superior of the Lands of *Salwoodsheil*, Pursuing Declarator of Liferent against Sir *John Scot*, as Son and appearand Heir to his Father, who

was the Pursuers Vassal, wherein *Andrew Scot* Compearing, who had Compryſed theſe Lands, being a Creditor to Sir *John*, Alledged that he being Creditor to him before he was Rebel, and having Denunced the Lands to be Compryſed, albeit after he was Rebel, yet before he was Rebel year and day, and thereafter having compleated the Compryſing, and Charged the Superior to Enter him, that ought to ſtay the Declarator; The *Lords* repelled this Alledgance, and Found that his Compryſing, Deduced and Perfected after the Debitor was Rebel year and day, and a Charge following thereupon, could not prejudge the Superior of the Caſuality of the Liferent of the appearing Heir of the Vaſſal; in which Caſualities the *Lords* Found, that the Superior was not hurt by the foreſaid Denunciation, which preceeded the expyring of year and day, the Debitor the time of the ſaid Denunciation, being ſtanding Rebel un-relaxed, and ſo *in curſu*, but being expyred before the Compryſing was expede: for it was Found, the Superior ought not to want the Caſuality of his Vaſſals Liferent, except that either he had done ſome Deed himſelf in prejudice thereof, or that ſome Deed had been done equivalent thereto, as Compryſing, and Charge to enter and receive the Compryſer, & all done and Execute before the expiring of the year. Actor. *Nicolſon & Craig*. Alter *Gilmor*. *Gibſon* Clerk. *Vid. July* 17. 1630. L. *Lie* and the caſes there cited. *February* 18. 1631. betwixt theſe ſame parties; and *July* 24. 1632. *Rule*.

Williamſon contra L. *Balgillo*, *Feb.* 17. 1631.

MR. *David Williamſon* Miniſter Charging the L. *Balgillo*, to make payment of certain Duties, adebted to him by the Defender, for his Stipend of diverſe years bypaſt; & he Suſpending, that he had made payment to the Charger of the Duty, for the year condeſcended on; Likeas his umquhile Father had payed to him the ſame Duty theſe two years, which immediatly preceeded that year payed by the Suſpender, whereupon they had reported the Chargers three ſeveral Diſcharges of theſe three years, which payment preſumes in Law, payment of all years before the three years Diſcharged, and muſt produce Liberation to him of all the ſaid bygone years. The *Lords* Found, that this payment made of theſe three years, immediatly ſucceeding each one to other, without Interruption, or Intervention of any years betwixt them, & to be proven by three ſeveral acquittances, as the Party offered to prove, was ſufficient to produce Liberation to the Suſpender from all bygones before theſe years Diſcharged, the Charger not having excepted, nor reſerved no year therein: neither was it reſpected that theſe three Diſcharges were not granted to one and the ſame perſon, there being two granted to the Father, and one to the Son, now Suſpender, which was Found ſufficient, ſeing albeit the ſame were granted to diverſe perſons, yet they were granted by one perſon, *viz.* by him who now acclaimed the bygones, from which he was excluded by his own Deed, *L. quicunque lib.* 10. *T.* 22 *C. de apochis publicis: quod licet obtineat in negotiis publicis per dictam legem, tamen & obtinet quoque in rebus privatis. & Gloſ. ad Legem* 2. *de jure emphiteutico dicit, tenere in ſolutione Canonis pro prædio emphiteutico, ubi dicit hanc ſolutionem poſſe probari, vel per teſtes, vel per confeſſiones, vel per ſcripturam, idque dicit in margine teneri ab omnibus Doctoribus. Vid. Feb.* 19. 1631. L. *Moriſton.* & *March* 23. 1631. L. *Roſyth. March* 18. 1634. *Bothwel* contra *Douglas*.

L. *Clunie* contra L. *Hart-hill*, *Eodem die*.

Hart-hill being purſued to Remove from certain Lands of the Barrony of *Wairds*, which were diſponed to his Predeceſſors, by the L. of *Wairds* for the time, at the Inſtance of *Clunie*, who had acquired a Right to the whole Lands of *Wairds*, from the Earl of *Mar*: after that he had obtained a Decreet, Reducing the L. *Wairds* his Rights and Securities of the ſaids Lands, and *Hart-*

hill

bill Defending himself, with his Heretable Infeftment of the saids Lands granted to him, as Heir to his Father, who was also Infeft therein, by the L. of *Wairds* as Heir to his Father, the Defenders Guid-sir, who was also Infeft therein, as Heir to his Father the Defenders Grand-sir; and by vertue of these Three succeeding *Rights*, they were in immemorial Possession of the saids Lands, which he Alledged, was sufficient to Defend him in this Possessor Judgement, ay and while his Rights were *Reduced*. And the Pursuer Answering, that his Authors Right being Reduced, his behoved to fall, neither needed he to Reduce these, which fell *in consequentiam*, they depending upon his *Authors* Right, which was Found null and Reduced. And the Defender Answering, that he was not called to that Reduction of his Authors Right, and so could not be prejudged thereby. The *Lords* Found, that the Progress of the Defenders Heretable Right and Possession, Excepted upon by him, could not maintain him against this Removing, in respect his Authors Right was Reduced; which Decreet of Reduction extended also to *Reduce in consequentiam*, the whole Writs depending thereon; and Found that this *Defender* was not a necessar Party, to be called to that Reduction, neither needed the Pursuer to intent any special Action *de novo* to Reduce the same, for these being Rights only granted to be holden of the Giver, and so base not holden of the Superior, the Reducer had no necessity to know the same, neither had he necessity to *Reduce* these sub-altern base Rights; for if he should be put to Reduce these sub-altern Rights, it should be endless labour; for such Rights might pass from hand to hand, that it might prove impossible for any Pursuer to find them all out; and therefore these base Rights, not being acknowledged by the Pursuers self, nor becoming publick, the Pursuer needed not to know them, and so could not defend the Excipient. Actor. *Nicolson*. Alter. *Mowat*. *Gibson* Glerk.

Houston contra *Houston*, *February* 18. 1631.

IN this Cause, mentioned upon the 13. and 20 *Jan.* 1631. The *Lords* now Found the Alledgance, offering to improve that Bond, where it had the two initial Letters of the Makers Name, was not receiveable, but Repelled the same, seing it was made in *Ireland*, according to the *English* Law, conform whereto Bonds, which are Sealed by the Maker, and bearing, *to be Sealed and delivered in presence of Witnesses*, as this Bond bore, are valid, albeit not subscribed by the Parties: also the *Lords* Found, that this Bond, albeit repute as a Legacy, yet being extant in Writ, was not to be taken away by an Alledgeance of a posterior Nuncupative Testament, made by the Granter of the Bond, he being then upon the Sea within the Ship, whereby he revocked all preceeding Legacies made by him; and which the Defender offered to prove, by the Mariners present for the time within the Ship, who saw and heard the same, and which being *quasi Testamentum Militare*, *& Nuncupativum*, *licet non in scriptis*, the Defender Alledged was sufficient to evacuat this prior Bond, it being found of the nature of a *Legacy* only, which was Repelled; for they Found that this Bond in Writ, was not Revockable, by any such posterior *Deed*, to be proven only by Witnesses, there being no Writ to verifie the same. *Vid. July* 27. 1633. *Gordon* contra *Worley*.

Lo. *Cranston* contra *Scot*, *Eodem die*.

THis Cause is mentioned the 16 of *Feb.* 1631. and *Andrew Scot* the Compryser now Alledging, that the Rebel, whose Liferent was sought, nor his Father, was never Vassal to the Lord *Cranston* [for he bruiked by vertue of a Contract, the Right whereof he had Compriſed] and the Pursuer offering him to prove, that the Rebel, or his Father had accepted a Charter from him, whereupon also Seasin had followed. The Compriser Duplyed, that the Reply

was not Relevant, except he would say, that he was validly and lawfully Seased in the said Lands; for if the Seasin was null, [as indeed if any Seasin was taken upon that Charter, the same was null; for it was not Registrat, conform to the Act of Parliament, and had divers other nullities therein,] whereby there being no Seasin, or only a null Seasin, which was alike, as if there had been no Seasin, there could be no Holding, and consequently, the Superior could claim no Liferent by the Annual Rebellion of the Vassal. The *Lords* Repelled this Alledgance, and Found that the Seasin taken by the Vassal, albeit it had nullities, or defects in Law, especially where they flowed from the Fact of the Persons self, who was Seased, yet that notwithstanding the same was so null, that the Superior was not thereby prejudged of his Casuality of Liferent; for he being Vassal to the Superior, thereby also the Casuality fell to him: neither was this Alledgance Found the more Relevant, as being proponed by a Compriser, who *Alledged*, that he had Compriſed the Rebels Contract of Alienation of the Lands made betwixt him and the Lord *Cranston*, by vertue of the *Right* whereof he might Bruik against the Granter, as he did; and by the which *Right* no Liferent could fall to the Lo. *Cranston*, albeit he was *Rebel*; but the King would have *Right* thereto, if any Liferent fell. And so he Alledged, that he as Compriser might competently propone the nullity of that Seasin, which was *Repelled*. *Partibus ut supra.*

L. *Moriston* contra Tennents of *Eastnisbet*, *February* 19. 1631.

THe L. *Moriston* having Compriſed the Lands of *Eastnisbet*, and being Infeft, and Arresting the Corns in *anno* 1625. in the Tennents hands, after which they payed the *Farms* that year to *Eastnisbet*, from whom the Lands were Compriſed; and thereafter *Moriston* obtains Decreet before the Sheriff, against the Tennents not Compearing, for payment of that years Farms, and they *Suspending*, upon payment made to *Eastnisbet*, which, albeit it was made after the Chargers Arrestment, yet ought to be sufficient, to liberat the Tennents, by reason, that since the obtaining of his Sentence, the *Suspenders* has payed their Farms compleatly, of four succeeding years, immediately subsequent, to the year now acclaimed; the payment whereof they referred to the Chargers own Oath, and which payment so made, ought to import to them Liberation of that year, and of all preceeding years, as effectually, as if they had reported several Acquitances upon the payment thereof; and which, if they had obtained in Law, would have freed them, specially seing he never quarrelled the said payment made by them of that years Farm, nor never mentioned the payment thereof, when they payed to him the years Farm sinceſyne, & so he must be presumed to have allowed the payment made, otherwise he would have exacted payment of the eldest Debt, and not taken payment of the last year, and omitted the former years Farms. This Reason was not sustained, and the payment made by the Tennents after Compriſing and Arrestment was not allowed, nor they Found to be fred by the subsequent years payment made since, to the Charger, except they will say, that he expresly remitted to them that year, and prove the same by his Oath, or otherwise by Writ; for albeit *trium annorum apocha* presume *liberationem præteritorum*, that holds only where the Granter of the Discharges having given three in Writ, and made no Reservation in any of them, the Law presumes he had no more to crave, having made no mention thereof, when he made the Writ; but where payment was made without Writ, the Payer has followed the Faith of his party; so that if he shall say, that he received that payment, without prejudice of the preceeding years, as he now does, the Debitor remains still Debitor therein, notwithstanding of the subsequent payment of the other years, and of the payment made to *Eastnibet*, of the year acclaimed

claimed. Actor. *Nicolſon* & *Craig*. Alter. *Stuart* & *Gilmor*. *Gibſon* Clerk. *Vid. Feb.* 17. 1631. Mr. *David Williamſon*, *March* 23. 1631. L. *Roſyth*.

Corſan contra *Corſan*, *Eodem die*.

THis Cauſe being mentioned the 9. of *Feb.* 1631. And it being further Alledged by the Defender, that the Purſuer, by vertue of the Clauſe lybelled in the Contract, would have Right to no more, but to her Part of the Deads Part of his Goods and Gear, and could not acclaim a Portion natural thereof, with thir two Daughters Defenders; for albeit by that Contract, ſhe might have Right to her equal Part of all, both for Bairns-Part, and for the the Deads Part, with her two Siſters named in that Contract, now deceaſed, yet that might lawfully have holden, where both ſhe and theſe two Siſters were all forisfamiliat, before this Contract; but it is not alike, for thir two Defenders who are begotten ſince, and has received no Part of their Fathers Goods, and who wants their Portion Natural, ſo that of reaſon they ought to have their Portion Natural, as the Purſuer got, and as the two Defunct Siſters got; and after that the Purſuer might be partner of the reſt, otherwiſe if ſhe acclaimed to be Portioner of all the Defuncts Goods, ſhe ought to confer with the Defenders, that Portion ſhe got from her Father before. This Alledgance was Repelled, and the *Lords* Found, that the Purſuer ought to have her equal Part of the Defuncts Goods, with thir Defenders, without any Collation of that which ſhe received before, to which the *Lords* Found, that ſhe could not be compelled. *Vid. Feb.* 1. 1622. *Janet Elies*, and the Caſes there.

Finnie contra *Oliphant*, *Feb.* 22. 1631.

A Factor for a Tutor-Dative Purſuing the Mother for a Modification, to be given yearly to the Minor, for his entertainment; wherein the *Lords* Found, that albeit the Defender brooked no Ward-Lands of the Minor, and that the Minor had no Ward-Lands; yet ſeing ſhe was Liferentrix of all the Minors Means, *viz.* Houſes, and Annualrents of Money, that a Modification ought to be taken thereof: And albeit the Mother offered to keep and entertain the Bairn her ſelf upon her own Charges, yet that was not ſuſtained, ſeing ſhe was Married on a Husband, and the Tutor and his Factor was Found might nevertheleſs crave this Modification; but conſideration was had of the Moveable Heirſhip due to him, which proportionally bore a part of the Modification. Actor. *Nicolſon*. Alter. *Oliphant*.

Murray contra Lo. *Teſter*, *Eodem die*.

IN a Redemption of the Lands of *Drumelzier*, by vertue of the Legal Reverſion competent to the Lord *Drumelzier*, whereto the Purſuer was made Aſſigney by him from the Lord *Teſter*, having Right thereto, as is noted 12 *Feb.* 1631. The *Lords* Found, that the Concluſion of the Summons, craving the Defender to be Decerned to Renounce all Right and Title, which he had to the Lands any manner of way, ought not to be ſuſtained; and that no Sentence could follow, but to Decern the Defender to Renounce all Right which he had to theſe Lands, by vertue of theſe Rights, whereto the Legal Reverſion, which was the only ground of this Purſuit did extend, and no further: And the *Lords* did ſuſtain the Order of Redemption, albeit uſed at *Edinburgh*, and the Lands lay in the Sheriffdom of *Peebles*, where the Defender Alledged the Order ought to have been uſed, ſeing this was a Legal Reverſion, near expired; and ſo if the Order was found not good, the Compriſing ſhould expire before any other Order might be uſed. Likeas the time of the Order the Lord *Teſter* was not in the Countrey, and *Edinburgh* is *Communis Patria*. Actor. *Nicolſon*. Alter. *Stuart* & *Hay*. *Gibſon* Clerk. *Vid.* 12 *Feb.* 1631. Betwixt theſe Parties, & 4 *June* 1631. *Chryſtie*.

L. *Corsbie* contra *Acheson, Eodem die.*

Corsbie as Cautioner for Sir *G. Hume* of *Eccles*, having payed the Debt, and thereupon serving Inhibition, bearing, *That none of the Leidges directly nor indirectly bargain with Sir* George *anent his Lands Heretages, Alienations, Dispositions, or Contract thereanent*, &c. upon which Inhibition he Intents Reduction of a Bond granted thereafter by Sir *George* to *Gilbert Acheson*, upon some Debt of Moneys, whereupon he Compriſed, and was Inſeft. And the Defender Alledging, that this Inhibition of this Tenor, could not furniſh him Action to Reduce his Bond, albeit poſterior to the Inhibition, ſeing the Prohibition extended only to the Contracting anent his Lands, and contained no Warrand to diſcharge him, to grant Bonds on borrowed Money, or the Liedges to receive the ſame. This Alledgance was Repelled; for the *Lords* Found the Inhibition of the Tenor foreſaid, ſufficient to Reduce poſterior Bonds of Money, albeit not bearing Lands to be Diſponed therefore, in ſo far as theſe Bonds might be Grounds and Warrands, to Deduce Compriſings thereupon of the Parties Lands; but in ſo far as Perſonal Execution might be uſed againſt the Party upon that Bond, or Poynding, or Arreſtment, or other Execution upon his Moveable Goods, The *Lords* Found, that the Inhibition could not ſtrike thereupon, and that the Bond could not be Reduced, to want that ſort of Execution. Actor. *Craig.* Alter. *Nicolſon. Gibſon* Clerk. *Vid.* 8 *March* 1631. *Brown* contra *Murray.* 21 *January* 1629. *Scot* contra *Turnbull.*

L. *Freeland* contra *Murray, Feb.* 23. 1631.

L. *Freeland* as having Right to a Penſion of a Chalder of Victual, granted by the Provoſt of *Methven*, with conſent of the Prebendars, and of the Duke of *Lennox*, Patron of the Benefice, to Mr. *John Moncrief*, and which was Aſſigned by him to unquhile L. *Freeland*, to whom this Purſuer was Heir; and as Heir having ſo Right, Purſuing one *Murray* as Intrometter with the Teinds of the Lands of *Taſſoquhy*, which were ſpecially Aſſigned by the Penſion, for payment of the ſamine; after Inhibition ſerved upon the ſaid Teind-ſheaves, Purſuing them as Intromettors therewith, for payment of the years 1628, and 1629. And the Defender having acquired from the new Provoſt of *Methven* a Tack of theſe Teinds, being the Teinds of his own Lands, and by vertue thereof being divers years in Poſſeſſion, Alledging that this Penſion was null, becauſe by the 101 *Act*, *Parl.* 1581. *All Penſions Set by Beneficed Perſons under Prelats, in diminution of the Rental, and to the hurt of their Succeſſors, are null*; and this was of that nature. And the Purſuer Replying, that that Act meant only of Penſions granted by Inferior Beneficed Perſons, which were at the Kings Preſentation, & extended not, nor meant not of Benefices at the Preſentation of Laick Patrons, as this was. The *Lords* would not decide this while they were further Adviſed, ſeing it tended to annull all Penſions, and whatſoever Deeds done by Inferior Beneficed Perſons, as well Tacks as other Rights; for by Setting of Tacks, the Succeſſor was alſo prejudged, and the Rental of the Benefice diminiſhed. And albeit it might appear, that this Act could not receive ſo large extent of Interpretation, for thereby a Provoſt, albeit with conſent of the Chapter and Patron, might neither Set Tack, nor give Penſion; and by the ſaid Act, there cannot be any Penſion, which may ſubſiſt, but all are unlawful; notwithſtanding that by the Act of Annexation, Penſions Set by Inferior Beneficed Perſons, clothed either with Decreet or Poſſeſſion, are excepted therefrom. And by the 62 *Act* of the ſame 11*th Parl.* it is evident alſo, that ſome ſuch Penſions are lawful and valid; for if all were null, as the Act excepted upon bears, theſe other Acts made *anno* 1587, were needleſs, and would never been made. Likeas by the *Act*, 1594. *Tacks Set for longer ſpace than three years, without conſent of the Patron, are null*: Yet the *Lords* were almoſt all of one

one mind, that by the foresaid Act the Pension was null, but it was not Voted as said is; and they thought this nullity might be received, by way of Exception, without Pursuit of Reduction, and was receivable being proponed by this Tacks-man, whose Tack, albeit the Pursuer Alledged, it was also Set to the hurt of the Benefice, and so had the same fault which his Pension had; yet the *Lords* thought it was good enough to maintain the Possessor, being a Tack of the Teinds of his own Lands, and would defend against the Setter, who so long as he lived, could not quarrel his own Deed. Neither was it respected, that it was only now questioned betwixt the prior Pensioner, whose Pension was also clothed with divers years Possession, and the posterior Tacks-man; and that the Pursuer Replyed, that the Beneficed person had only place to quarrel his Right, and that not summarly, but by Pursuit of Reduction, seing it was clothed with Possession; in the which Action he might then qualifie (which is not proper to be done here) that there is no diminution of the Rental; and where he would Dispute, that the Rental is not to be considered, according to the Avail and Rent of the Benefice, as it may yearly yield, but according to a constant recorded Rental in Writ, given up and authorized for a Rental: Likeas he would then Alledge great difference, betwixt Pensions flowing from a Stipendiary Minister, or Titular, and a Beneficed Person, having Patron and Chapter consenting to his Deed, and which is *Ecclesia Collegiata, habens Capitulum & Præbendam cum dignitate*; but this was not Decided as said is.

L. *Garthland* contra Lo. *Jedburgh*, *Feb.* 26. 1631.

Garthland being Infeft in the Lands of *Swynside* by the Lo. *Jedburgh*, under Reversion; and Setting Back-Tack for a certain Duty, Pursues him and his Tennents, to hear and see Declarator upon his Heretable Right Decerned, and upon his Right to the Back-Tack-Duty, and that he may have Letters to Poynd the Ground therefore; and failzieing of Moveables, that he might Compryse the Lands, and *Right* of *Reversion* thereof: wherein the *Lords* Found, that the Pursuer could not have Action, to crave that part of the Conclusion of the Summons, anent the Poynding of the Ground, for the Back-Tack-Duty; for he being Heretor of the Lands, he could not seek that Ground, whereof he was Heretor himself, to be Poynded, albeit that his Heretable Right was under Reversion, and albeit he craved this Poynding, that he might Compryse the Reversion: for they Found, that he ought to seek Decreet for his Back-Tack-Duty, which being Decerned, he might Poynd the Tennents Goods, or these against whom he should recover Sentence, or Compryse the Reversion therefore; but that he could not seek the Ground to be Poynded, he being Heretor, for that Tack-Duty Set by himself as Heretor; but after Sentence obtained for that Back-Tack-Duty, he might Poynd, as said is. Actor. *Nicolson* & *Neilson*. Alter. *Stuart* & *Sandilands*. *Gibson* Clerk. *Vid.* 6 *March* 1632. Betwixt these Parties, & 2 *March* 1631. Betwixt them also. This Cause being again called *in præsentia Dominorum*, the Decision here noted was renewed, and it was Found, that the Heretor could not desire the Goods of his Tacks-man, nor of his Sub-tennents to be Poynded by this Pursuit for the Tack-duty, but that he might and ought to Pursue personally therefore, and Sentence being obtained thereon, he might then Poynd his Debitors therefore, as use is. *Vid.* 5 *March* 1630. Mr. *John Cant*, & 20 *July* 1633. E. *Annandale*.

L. *Garthland* contra Lo. *Jedburgh*, *March* 2. 1631.

IN the above-written Cause of the L. of *Garthland*, wherein he craved the Tennents to be Decerned to pay him his Back-Tack-Duty, Compeared Sir *James Ker*, who being Cautioner for the Lord *Jedburgh*, Author of the Pursuers Infeftment, was for his Relief and Security of the Sums which he had payed as Cautioner, Infeft in the same Lands by the Lord *Jed-*

burgh, by a Publick Infeftment, and Alledged, that the Purſuers Infeftment granted to him, was not Publick, but Baſe; and therefore contended that he ought to be preferred to the Purſuer, ay and while theſe Sums were payed to the Excipient; eſpecially ſeing the Purſuers Infeftment was granted to him *ex mera donatione*, without any onerous Cauſe, and could not be reſpected as gainſt the Right, made to the Defender a lawful Creditor, and for a moſt onerous Cauſe of Debt, the Purſuer being Son in Law to the Granter of his Right, and granted to his Son in Fee, who is Oye to the Granter, and ſo moſt conjunct perſons, and done voluntarily, *& ſine cauſa*, in prejudice of the Excipient a true Creditor, at the time of the Purchaſing of the Purſuers Right, whom he could not prejudge by any voluntar Deed, done gratuitouſly to his own Oye, for love and favour. The *Lords* Repelled the Alledgance, and Suſtained the Purſuers Infeftment, albeit Baſe; and albeit the Defender's was a Publick Right, and albeit it was done *inter perſonas conjunctas*, and without a cauſe onerous (for none of the Parties were in Poſſeſſion of the Lands, but now were Diſputing their Rights) ſeing the ſame was done for Implement of a Bond before the Defender's Infeftment granted to him by the Lo. *Jedburgh*, and whereupon he had ſerved Inhibition before the Defenders Infeftment, ſo that this Bond and Inhibition preceeding, was a ſufficient Warrand, to prefer that Infeftment depending thereon to the Excipients Right, acquired after that Inhibition, albeit the ſame was publick, and the Purſuers baſe, and albeit the ſame was done without an onerous cauſe; yet it was ſuſtained, & preferred to the other Infeftment Excepted on, given to the Creditor *ex cauſa oneroſa*, ſeing at the time of the granting thereof to the Purſuer, the granter was not then, nor yet is Bankrupt, neither was then unanſwerable to pay any Debt owing by him; ſo albeit that then, and at the time of the Purſuers Bond foreſaid, the Defender was his Creditor, yet the Donation voluntarly made by the Lord *Jedburgh* the Debitor, might validly and lawfully been made, and cannot be quarrelled upon that ground by the Creditor, he having done no Deed by Inhibition, to prohibite the ſaid Infeftment, and Donation, and Bond, albeit done for love and favour. Actor. *Neilſon*. Alter. *Sandilands*. *Gibſon* Clerk.

Hay contra *Mcmichael*, *March* 4. 1631.

THe Deceaſt *Thomas Mcquharg* having made a Bond of 2000 merks, in favours of *Alexander Hay* his Siſters Son, and failzieing of him by deceaſe before Majority, to *Katharine Mcmichael*, Mother-ſiſter to the ſaid *Thomas*; which being depoſitat by the ſaid *Thomas* in the cuſtody of the ſaid *Katharine*; after the ſaid *Thomas* his deceaſe the ſaid *Alexander* and *James Hay* his Father, Son to Mr. *John Hay* of *Kennet*, as Adminiſtrator to him, Purſues the Depoſitar for Exhibition, and the Heir of *Thomas Mcquharg* Granter, to hear the ſame Regiſtrat againſt him. After the Production thereof by the Depoſitar, the Defender Alledged, that the Bond could not be delivered to the Purſuer, nor Regiſtrat at his inſtance, becauſe it never became the Purſuers Evident, at any time before the deceaſe of the Granter thereof: And the Purſuer Replying, that it was put in this Depoſitar's hand, who was the perſon appointed to have Right to the Sum, in caſe of the Purſuers deceaſe before Majority, and to be delivered by her after the Granters deceaſe to the Purſuer. This Reply was Found Relevant, to be proven by the Oath of the Depoſitar, whoſe Oath was ſuſtained to prove the ſame, and it was not Found neceſſar to be proven by Writ, or Oath of the Party Defender, as the Excipient contended it ought to be; which was Repelled, eſpecially in reſpect the Party Maker of the Bond was dead, and that the Depoſitar was the Makers Mothers Siſter, and was the ſecond perſon appointed to ſucceed to the Sum by the Bond; and that it was never Alledged, that the Maker before his deceaſe did any Deed, or expreſſed any contrary Act to recall that Bond, or to derogat thereto,

thereto, or altered or changed his Will thereanent. Actor. *Stuart.* Alter. *Gibson* Clerk. *Vid.* 22 *January* 1624. *Lermonth* contra *Alexander.* 25 *Novemb.* 1631. *Lauder* contra *Dowglass.*

Chisholm contra *Mcdougall*, *March* 8. 1631.

IN a Pursuit at *Walter Chisholm's* instance, as Assigney constitute by the Goodwife of *Gallasheills*, and *John Hume* her Spouse, against Sir *William Mc. dougall*, for payment of certain Duties of Lands pertaining to her in Terce, intrometted with by Sir *William*, wherein Horning being produced against *John Hume*, Spouse to the said Goodwife of *Gallasheills*, in respect whereof he Alledged, that no Process could be granted at the Assigney's instance. The *Lords* Found, that seing the Assigney Declared that this Pursuit was moved, to the behove of his Cedent the Lady *Gallasheills*, albeit the Assigney was not at the Horn, yet the Cedents Husband being at the Horn, as the said Horning would have debarred her of it, if it had been Pursued at her own instance and her said Husbands, so it also should stay the Process at the Assigneys instance, being done to their use, as said is; which was so Found, albeit the Principal Party, *viz.* the Goodwife of *Gallasheills* was not at the Horn, and albeit the Horning was only produced by the Defender, who was neither Creditor nor Donatar; and that no Donatar nor Creditor used the same, and tho it was to stay Process for the Ladies means of her Aliment. Actor. Alter. *Nicolson. Gibson* Clerk. *Vid.* 6 *Decemb.* 1631. L. *Conheath* contra L. *Earlston.*

Brown contra *Murray*, *Eodem die.*

A Contract of Alienation of Lands, and Infeftment following thereupon, granted to *Murray* by his Author who was his Debitor, being desired to be Reduced *ex capite Inhibitionis*, Execute at *Brown* the Pursuers instance, who was also Creditor to the said Defenders Author of his Right, and which was Execute before this Contract and Infeftment desired to be Reduced; and the Defender Alledging, that albeit this Contract and Infeftment was after the Inhibition, yet seing there was a preceeding true cause of a lawful Debt, owing by the common Debitor to the Excipient, before this Inhibition, for satisfying whereof his Debitor had Contracted, and given him this Contract and Infeftment; so that albeit the same be after the Inhibition, yet depending upon a preceeding Cause of just Debt: as it was lawful for him to have taken payment of that preceeding Debt after Inhibition, so it was also lawful to him, to receive this Infeftment for satisfaction thereof. This Alledgance was Repelled, and the preceeding Debt before the Inhibition was not Found a cause, to maintain this Contract and Infeftment, albeit bearing, *to be given for satisfying thereof*, seing the said preceeding Bond of Debt bore not, that the Debitor was obliged to give the Creditor Infeftment of these Lands, *quo casu* the Infeftment so given, conform to that anterior Bond, might have been sustained, albeit subsequent to the Inhibition; but the Bond bearing no such Clause, the Infeftment and Contract could not be sustained, albeit bearing to be done for Implement of that Bond, and satisfying of the Debt thereof. Actor. Alter. *Gibson.* *Gibson* Clerk. *Vid.* 22 *Feb.* 1631. L. *Corsbie.* 3 *Feb.* 1635. *Robert Ross* contra *William Dick.*

Duff contra *Alves*, *Eodem die.*

ONe *Duff* as Assigney by one *Smith*, to whom a Sum was obliged to be payed by his Contract of Marriage, by one *Warrand* his Father in Law, Pursues *Alves* Relict and Executrix of the said *Warrand*, for payment thereof; and she Alledging, that all the Gear of the Testament was exhausted, by lawful Sentences obtained by Creditors, whereof she had made payment before this Pursuit. The *Lords* Repelled this Alledgance, because this payment

was not allowed in prejudice of this Pursuer, whose *Debt* the Defender could not misken, seing it was contained in the Defunct's Testament, and given up as a debt by himself, and which she had Confirmed her self, and was also known to her, she being a Contracter with her umquhile Husband in the Cedents Contract of Marriage; for the *Lords* Found, that she ought to have Suspended these Creditors Decreets, and Summon this Creditor thereto, that he might have been heard, to have claimed his part of the Defunct's Goods *pro rata*, with the rest of the Creditors; and albeit she *Answered*, that though she had Suspended, yet the Creditors who had obtained Sentence, would have been preferred to this Pursuer, who had done no Diligence, yet this was not respected; for the *Lords* Found, that she could not pay other Creditors, thereby to frustrat this Party. *Actor. Mowat.* Alter. *Gibson. Scot Clerk. Vid.* 16 *July* 1629. *Tailzifer* contra *Wilson.*

L. *Clackmannan* contra L. *Allardice*, *Eodem die.*

IN a Poynding of the Ground for an Annualrent, The Defender Alledging, that he was Infeft before the Pursuers Infeftment. And the Pursuer Replying, that the Defenders Infeftment was usurary, and so null; because it being an Infeftment Redeemable, the Defender had Set a Back-Tack of the Lands to his Debitors; the Duty whereof being certain Victual, yearly to be payed, and failizeing thereof, the Prices Liquidat in the said *Back-Tack*, which extended to more than ten *per cent*, so that the most he could crave to be preferred to, was only ten *per cent*; that the rest of the Profites of the Lands might pertain to other Creditors, of their said common Debitor: And the Excipient Duplying, that this Back-Tack was *Renounced* by his Debitor, whereby he had *Right*, by vertue of his Infeftment, to the whole Duties of the Land, which he might labour, either by himself, or Set to Tennents, as he pleased, and was not holden to take himself to Ten for ilk hundred, and to make Compt of any over-plus, to any other Creditor; for any Party having Interest might *Redeem* the Lands from him, if they found that he had advantage by this Wodset. And the Pursuer Answering, that albeit the common Debitor had *Renounced* the Back-Tack, yet being done after the *Pursuers* Infeftment, the same ought not to be Respected; for nothing could be done after the *Pursuers* Right, by the common Debitor, being *non solvendo*, which could derogat to his Right, and give advantage to the Excipient, and to make him have advantage in the whole Duties of the Lands, beyond his ordinary Profits, and thereby exclude the Pursuer from all Profite, and to derogat to the force of his Infeftment; for if this were lawful for him to do, it were also lawful for him to have discharged to the Excipient the Reversion, and so to make the Lands Irredeemable for ever, which were absurd to think he could do after his Right: notwithstanding whereof the Exception and Duply was sustained; for the *Lords* Found, that the Back-Tack being Renounced, albeit after the *Pursuers* Right, yet it was sufficient to give the *Defender* Right to the whole Profits of the *Lands*, and that none Infeft after him, could claim any thing thereof; And that he ought not to take himself to ten *per cent*, that the rest of the Creditors might obtain the rest; for the Back-Tack being Renounced *quocunque tempore*, the Security was found lawful *in toto*, and not to be Usurary, which appears hard enough. *Actor. Advocatus.* Alter. *Nairn. Hay* Clerk. *Vid. March* 18. 1631. betwixt these Parties.

The Lady *Huttonhall* contra L. *Morison*, and L. *Touch. March* 9. 1631.

LA. *Hutton-hall* being Liferentrix of *Hutton-hall*, after decease of her Husband, who died before *Martinmass*, and so thereby had Right to the half of that years *Duty*, and wherein she was preferred to the Lairds of *Morison* and *Touch*, who had Comprised these Lands from her Husband, as is Decided

March

March 8. 1622. years, in the Lady *Corsindaes Pratique*, she craving that Terms Duty, as the Land was worth, and as other Lands of the like quality, in that part of the Countrey actually payed, seing they were never Set past Memory of Man for Farm, but ever laboured in Mainsing by the Heretor thereof, untill the time that they were lately Set for Farm, by thir Defenders Comprisers. And they Alledging, that they could pay no greater Duties to her for this Term, but the equal half of that quantity, for which they Set the Lands that year, seing they Set the same for as great Quantity, as they could get for the same, and could get no more; and no reason that they should pay more than they got. The *Lords* nevertheless sustained the Summons for the half of that Duty, which should be proven others the like Lands payed; but Declared that they reserved to themselves, to consider in the advising of the Proces, what differences should be found betwixt the Quantity to be proven, and the Quantity, for the which the Land was Set by the Compriser, and which now is offered by them to the Pursuer, that they might know thereby, if the Compriser had Set the Lands near to the avail or not: and according thereto, they would thereafter Modifie and Decern. Actor. *Stuart* & *Mowat*. Alter. *Nicolson* & *Craig*. *Gibson* Clerk. *Vid. Feb.* 1. 1631. *Blauns* contra *Winruham*. *Jan.* 15. 1624. Viscount of *Annandale*. *Jan.* 21. 1629. La. *Aiton*.

Francis Stuart contra La. *Samelston*, *March* 10. 1631.

THe Abbot of *Coldinghame*, having Set a Tack of the Teinds of *Swinton* to *Hercules Stuart* and his Spouse, and the longest liver of them two *respective*, for their Lifetimes, and after their decease, to an Heir during that Heirs Lifetime, and thereafter, for 19 years to that Heir's, Heirs and Assigneyes; *Hercules*, first and Principal Tacksman being Forefaulted, the Gift of this Forefaultur is disponed to Sir *William Hume*, in so far as concerned this Tack, and by vertue whereof he is in Possession of thir Teinds; Sir *William* being at the Horn, the gift of his simple Escheat is granted to Mr. *Robert Foulis*, who having made *Alexander Hamilton* Assigney thereto, and he having transferred his Right to *Francis Stuart* Pursuer, Son to *John Stuart* of *Coldingham*, who, by vertue of the said Escheat of Sir *William Hume* claiming Right to the said Tack, as falling under the said single Escheat of the said Sir *William*, who was Donatar to the said Forfaultur, so far as concerned the said Tack, pursuing the La. *Samelston*, as Heir to the said Sir *William*, for the said Teind sheaves, which were Intromet-ted with by her: and she Alledging, that the said Tack being Set, for sundry Liferents, whereof there was one of the Liferent Tacksmen yet living, *viz.* the Heir of *Hercules Stuart*, it fell not under the single Escheat of the said Sir *William*, Donatar to the Forfaultures; for by the 15 Act Parliament 22. *Ja.* 6. 1617. *It is Statute that Liferent Tacks shall not fall under single Escheat*, and the Donatars Rebellion cannot cause that fall under Escheat, which of its own nature is not Comprehended under the same, as a Liferent Tack is; for albeit the Donatar to his Escheat might have Right to the Teind-sheaves, contained in that Tack, so long as the Rebel lived, yet now after his decease, his Heir must be in the full Right of the Tack, for all the space that was to run thereof, after the said Sir *William* his decease, by whose decease the Escheat cannot extend further, but must cease. The *Lords* Found, that albeit this Tack controverted, was Set for Liferents, whereby it could not fall under single Escheat of the Liferent-Tacksman, if he had been Rebel, conform to the Act of Parliament, yet the Tacksman being Forfaulted, and thereby the whole Right of that Tack devolved to the King, and to the Donatar of the Forefaulture, that Forefaultry was of that same force, as if the Tacksman had Disponed the said Tack, if he had never been Forfaulted, in which case, if he had Disponed the same, and that he had been Rebel, who received the Disposition, the same would have fallen un-

der this single Escheat, even so the Donatar to the Forefaultry, being Rebel, by his simple Rebellion, albeit not year and day Rebel, the *Donatar* to his single Escheat, had the full Right to the said Tack, as if the same had been Assigned; and Found that the Heir to the Donatar of the Forfaultry had no Right thereto, but fell by his Predecessors Rebellion totally, as said is; for the *Donatar* to the Forfaultry might have outlived the whole space of the Tack, so that thereby it is evident, that it fell under his single Escheat, and he might also have Disponed the whole Tack effectually, if he had not been Rebel. And therefore as his Disposition would have established the whole Right, to the Acquirer of the same from him, the like did his Rebellion to the King, and his Donatar, and therefore the foresaid Alledgance was Repelled, for *Hercules* might have Disponed the whole Tack. Actor. *Stuart* & *Chaip*. Alter. *Nicolson*, *Lawtie* & *Mowat*. *Gibson* Clerk. *Vid.* 25. *Fol.* of my other Notes, *Item July* 29. 1625 Sir *Robert Ker*. *July* 2. 1630. *Ross* contra Town of *Perth*, where there is some difference.

La. *Haddo* contra L. *Ludquharn*, *Eodem die*.

THe Laird of *Haddo's* Forbears Wodsetting some Lands to Mr. *Thomas Davidson*, Redeemable by payment of 5000 merks, and the said Mr. *Thomas* having Pursued upon that Infeftment, the Tennents of the Lands for payment of the *Duties* thereof, in which Cause the L. *Ludquharn* Curator to *Haddo* Compearing to *Defend* the Tennents, he taking burden upon him for *Haddo*, and the said Mr. *Thomas* submitting themselves amicably to two of the *Lords* of *Session*, who by their Decreet, Decerned *Ludquharn* to pay to Mr. *Thomas* the said *Principal* Sum, together with the Annualrents at 10 *per centum*, for so many Terms as he wanted the Profit of his Money, and Ordained him to Assign his Right to *Ludquharn*, for his security of the Money, to be so debursed by him, and him to be Comptable to his Minor, for the *Profits* of the said Wodset Land, wherewith he should Intromet, by vertue of the said Mr. *Thomas*'s Right, and that the Minor should *Redeem* the Lands from *Ludquharn*, by payment of the said Sum, and Annualrents thereof, which he should give to Mr. *Thomas*, and which accordingly he payed to the said Mr. *Thomas*; after which the Minor pursuing Redemption, by Consignation only of the Principal Sum. The L. *Ludquharn* Alledged, that no Redemption could proceed, except that the Annualrent which he debursed were also Refounded to him, conform to the said *Decreet* Arbitral; seing he had Profitably done the Minor's Affairs, by making the Lands Redeemable from the Wodsetter, by payment of the *Principal* Sum, and the ordinar Annualrents; whereas if the Wodsetter had up-lifted the Mails and Duties of the Lands, and which he would undoubtedly have obtained, if the Decreet-Arbitral had not Interveened, the same would have extended to a far greater quantity; so that as he could not have Redeemed from the Wodsetter, but by payment of his Principal Sum, and Annualrents, even so, before they be Redeemed from this Excipient, he ought to be re-inbursed of that which he has profitably debursed. The *Lords* Found, that the Pursuer needed not consign the Annualrents Debursed by the Curators, to the Wodsetter, albeit the Curator was content to accept the same now, and proponed not the same to cast the Order, but that the Lands ought to be Decerned Redeemed by Consignation of the Principal Sum, and *Reserved* his Claim for the Annualrents, to be given in, in an Article of the Curators Compts, of his Intromission with the Minors Estate, and there to be claimed by him; but Found, that in this Redemption, the Minor could not be compelled to pay the same, albeit that the Curator offered present Compt of his Intromission with the Duties of thir Lands, and that he Alledged, that in his Intromission with the Minors Estate, he was super-expended; and so the Curator, who had acquired the

the Wodsetters Right profitably, was put in a worse Estate, than if the Wodsetter had retained the same, whereby he might have exacted greater Profits and Duties of the Lands from the Minor. Actor. *Baird.* Alter. *Mowat. Gibson* Clerk.

Duff contra *Alves*, *March* 12. 1631.

THis Cause is mentioned *March* 8. 1631, wherein the Pursuit being moved at the instance of the Executor Dative, Decerned and Confirmed *ad omissa & malè appretiata*; and the Defender Alledging, that no Process ought to be granted upon the Confirmed Testament Dative produced, because the Principal Executor Confirmed in the Principal Testament, was not Summoned, nor called to hear and see an Executor Dative given and Decerned, as ought to have been done, when the Commissar Decerned the Pursuer Executor Dative. The *Lords* Found, the Commissars could not *D*ecern Executors Dative *ad omissa & malè appretiata*, except the Principal Executor had been first cited thereto, and that such Acts cannot be done, neither are they in use to be done, without such preceeding Citation; but because the *D*ecreet Dative was not produced for the Pursuers Title in this Pursuit, but only the Testament Dative Confirmed, they Found this Pursuit instructed sufficiently by this Testament, and that it was not necessar to produce the Decreet, Decerning him Executor, nor to Reply, that the Principal Executor was Cited thereto; but if the Defender would produce the Decreet Dative himself, whereby it might be known, if he was Cited or not, they would consider thereof, and have respect to the necessity of the Citation of the Principal Executor. *Partibus ut illic comparentibus.*

L. *Smeitoun* contra the Vassals of *Dumfermling*, 15 *March*, 1631.

THe Pursuer as Heir to his Father, who was Infeft in the Lands and Milns Libelled, Pursuing the Defenders for Improbation of their Writs of the saids Lands and Milns Libelled: And the Defenders Alledging, that this Seasin of the Pursuers could not furnish him Action, to improve any of the Defenders Writs of the said Milns, because the Precept directs Warrand to take Seasin *per expressum* of the Lands and Milns, *per terrâ & lapidis traditionem, nec non lie Clap & Happer super fundis molendinorum*: And the Seasin bears no tradition of the Clap and Happer, which are the ordinar Symbols for Seasin of Milns; likeas the Precept also appoints the same: This Alledgance was Repelled, and the Seasin sustained, seing it bore Seasin to be given both of the Lands and Milns, *per terræ & lapidis traditionem fundi hujusmodi terrarum & molendinorum, cum omni juris solemnitate*; which the *Lords* Found sufficient, and would not Annul the Seasin for that omission, albeit the Pursuer was not in Possession, nor none of his Predecessors, by vertue of the Seasin, but the Defenders were ever Possessors, which was not respected. Actor. *Nicolson.* Alter. *Hay* Clerk. *Vid.* 21 *Feb.* 1629. *Kennedy* contra *Grahame.* 23 *March* 1631. *Somervel* contra *Somervel.* 17 *June* 1630. E. *Wigtoun*, & 26 *July* 1630. L. *Herdmistoun.*

Fletcher contra *Kid*, *Eodem die.*

JAnet *Kid* in *Dundee* being Denounced Rebel at *Fletchers* instance, who was Tacks-man of the Customs, upon General Letters raised by the Customers, and she being by vertue thereof Charged to pay a particular Sum, contained in the Execution against her, and Denounced for not payment thereof, the Charge being on 12 hours; whereupon one taking her Escheat; the said *Fletcher* Pursues the Donatar to pay the Debt of the Horning, whereupon he had taken her Escheat; and the Donatar Alledging the Horning to be null, because she was Denounced upon General Letters, against the Act of Parliament, there being no Probation nor Trial, that she was adebted in that quantity contained in the Charge; and as the Party her self could not be compelled to pay the Sum Libelled,

belled, untill the time that it had been tryed, and ſhe found Debitor therein, even ſo the Donatar is far leſs ſubject; likeas he Renounced that Gift of Eſcheat. And it being Replyed, that the Donatar by vertue thereof Intrometted, ſo that he could neither Renounce, ſeing *res* was not *integra*; neither oppone any Nullity againſt that Horning, whereupon he had taken the Eſcheat, and intrometted. The *Lords* Repelled the Alledgance, and ſuſtained the Horning, in reſpect of the Donatars intromiſſion, whereby they Found, that he could neither quarrel the Horning, nor Renounce the Gift: Neither was it reſpected, that the Defender Alledged, that what ever Intromiſſion he had, the Horning being vitious, as ſaid is, and the Debt never conſtitute, that he would be in Law forced to pay the ſame back again to the Parties, having Right to the ſaid *Janet Kid*'s Goods, which was Repelled. Actor. *Burnet*. Alter. *Ruſſel*. *Hay* Clerk. *Vid.* 10 *June* 1631. *Peebles* contra *Scot*.

Item, The *Lords* Found, that the Donatar was not lyable for the Annualrent of the Money contained in the Horning, ſince the time of the Denounciation, as the Purſuer craved, conform to the Act of Parliament, which he Alledged was alike againſt the Donatar as againſt the Rebels ſelf, which was not ſuſtained, but Abſolvitor granted therefrom; for it was Found the Act of Parliament could not be extended. *Vid.* 8 *July* 1640. *Huntley*.

E. *Galloway* contra Burgeſſes of *Wigtoun*, Eodem die.

IN this Cauſe of the Earl of *Galloway*, mentioned *Feb.* 10. 1631. The *Lords* Found, that a Rental to a man and his Heirs, ſhould endure after the deceaſe of the firſt Rentaller, to one Heir for his lifetime, and ſhould not expire by the deceaſe of the Receiver, it being proven by other Rentals of the like Tenor, that the Setters have been in uſe to Set ſuch Rentals, and that the firſt Heirs have been in uſe to poſſeſs the ſamine, without queſtion therein made to them; after the which firſt Heirs deceaſe, the *Lords* Found the Rental ſhould expire, and endure no longer. *Item*, It was Found, that a Rentaller by Contract Excambing with another Rentaller, where the Rentals were both of alike quantity of Land, and where the Excambion took effect, by exchanging of Poſſeſſions conform thereto, that thereby the Rental was extinct, and the Parties had tint the benefit thereof; albeit in the Contract of Excambion, it was Provided, that if the Setter ſhould not allow of the Excambion, that the Contract in that caſe ſhould be null; for that Proviſion was Found to be Eluſory, and not to be reſpected, no more than if a Vaſſal of Ward-Lands had given Charter and Seaſin thereof to another, and had provided therein, that if the Superiors conſent ſhould not be obtained thereto, that it ſhould be null, which Proviſion could never ſave from the Recognition; even ſo after Poſſeſſion following upon that Contract, the Proviſion could work nothing againſt the Setter of the Rental: But becauſe the Defender, to maintain his Rental, Duplyed, that the Contract took never effect, ſeing he offered to prove, that either Party, notwithſtanding thereof, remained in continual Poſſeſſion of the Lands, contained in their own proper Rentals. This Duply was admitted, and the Excipient was preferred to prove his Poſſeſſion, for ſuſtaining of his Rental againſt the Purſuers Triply of Poſſeſſion, tending to annul the ſaid Rental. *Partibus ut illic comparentibus. Vid.* 6 *Feb.* 1633. *Gordon*. 13 *March* 1632. *Ahannay*. *Vid.* 26 *June* 1637. Betwixt theſe Parties. 5 *July* 1625. L. *Aiton* and the other Caſes there Cited. 26 *Feb.* 1630. *William Lokhart*, and the Caſes there.

Raguel Bennet contra *Bennet*, *March* 18. 1631.

THE Defender being Conveened as Heir to her Predeceſſor, or as Succeſſor to him in his Lands, or as lawfully Charged to enter Heir, and by ſome other

other Alternatives, as use is; and she for Eleiding of that Member, where she was Conveened as lawfully Charged to enter Heir, offering to Renunce; The other Replying, that she could not be suffered to Renunce, seing *res* was not *integra*, because she had behaved her self as Heir, by selling of the Lands of wherein her Father died Infeft, since his Decease: And it being Duplyed, that this Alienation, if it were true, yet could make her only lyable as Successor to her Father, but did not hinder her but she might Renunce to be Heir, and thereby she might by her Renunciation Eleid that Member; for this Deed, as said is, tended only to prove her Successor, which Alternative the Pursuer could never be heard to prove against her, because she being Conveened by the same Pursuer in an other Process *super eadem re*, as Successor to her Father, and the same being admitted to his Probation, he failzied to prove her Successor, and she is Assoylzied, so that he cannot be heard to qualifie the same; and this Alledged Disposition is only a Qualification thereof. The *Lords* Found, that albeit the Pursuer failzied, to prove this Defender *Successor*, yet that secluded him not, but that he might Reply upon this Disposition made by her of Lands, wherein her Father died Infeft, and seased, to whom she was appearand Heir, and that the Pursuer might be heard to propone and prove that Reply, notwithstanding of his failzying to prove her Successor; For the *Lords* Found this a several Member, which was now offered to be proven from that Member, whereby she was Conveened as Successor; seing to prove her Successor, the Pursuer behoved to produce where she was Infeft, and this Reply qualified her to behave her self as Heir to him, whereby she could not Renunce in prejudice of the *C*harge given to her to enter Heir, and the same was not alike, as if he had insisted thereby against her as Successor; But the *Lords* Found them distinct Members. Actor, *Hart.* Alter, *Trotter.* *Hay* Clerk.

L. *Clackmannan* contra L. *Alardice*, and others, *Eodem die.*

IN a Poynding of the Ground for an *A*nnualrent, wherein he was Infeft by *Balnamoon*, the Lands out of which the same Poynding was craved, being Wodset before the Pursuers Right of his Annualrent to this Defender, under Reversion; and the Wodsetter having set a Back-tack the time of the Wodset, to the Granter, for payment of a yearly Tack-duty of Victual; therefore the said Defender in respect of the Wodset Infestment Alledged, that that Ground could not be Poynded for the Pursuers Annualrent, Disponed as said is, after Infestment of Wodset: And the Pursuer Replying, that the said Wodset was affected with a Back-Tack, so that he could not stop the Poynding of the Ground, but he had his Action for the Duty of the Back-Tack, either against the Heretor, who received the Back-Tack, or otherwayes might seek the Ground thereof, as he best might of Law. The Defender Answered, that the Granter of the Wodset, to whom the Back-Tack was set, had Renunced the same; And the Pursuer Replying, that the Renunciation being after the Right of the Annualrent was acquired by the Pursuer, cannot be respected against him, he being a just and lawful Creditor before that Renunciation; which Renunciation being made of the Back-Tack, tended to prejudge the Pursuer of his Annualrent (if it should be maintained) and established the Property of the Land in the Defenders person, whereas if it were yet subsisting Un-renunced, as it ought to be Found, the most that the Excipient could claim, were the Annualrent of his Money, wherefore the Wodset was granted, and not the Back-tack-Duty, which is more than ten for the hundreth, and so is against the Act of Parliament 1597, and is Usurary; so that if the Back-Tack were standing, the Pursuer would get his Annualrent, and the Defender also the true Annualrent for his Money, whereas the Renunciation tends to prejudge all the Creditors, and to give the whole profits

of the Land to the Excipient, which is unreasonable. The *Lords* Found the Exception and Duply Relevant, notwithstanding of the Replys; For the *Lords* Found that the Back-Tack might be effectually Renunced to the Wodsetter, which was found might be lawfully received by the Wodsetter, albeit it was done after the Pursuers Infeftment of Annualrent; for after the Wodset, the Heretor, granter of the Wodset, being thereby Denuded of his Heretable Right, there remained no Right in his person, except the Right of the Reversion, so that he could not effectually grant Infeftment thereafter, of any Annualrent out of that Land, he being Denuded, as said is, of the Heretable *Right*; And it was Found, that he might give a Renunciation, and the other might lawfully take the same after the Infeftment of Annualrent, he who Renunced not being then Inhibit, nor Bankrupt; and the Back-Tack being so Renunced, the Party could not Alledge the *Right* to be Usurary. Actor. *Advocatus*. Alter. *Stuart* & *Nairn*. *Hay* Clerk. *Vid. March* 8. 1631. betwixt these parties.

Doctor *Scot* contra *Dickson* of *Headrig*, *March* 19. 1631.

A Declarator being sought by the Doctor against the appearand Heir of umquhile *Robert Dickson* of *Headrig*, who had borrowed 500 merks, to have been payed at *Yule* last, with Provision in case of Failzie of the *Reversion*, which the said Doctor had granted him before, for *Redeeming* of the Lands of *Headrig*, Wodset to him by the said umquhile *Robert*, by another anterior Bargain, should expire; and for not payment, the Declarator being sought, and a Creditor of the Defuncts compearing, and offering the Money instantly to purge the failzie. The *Lords* Found, that seing the Debitor, who borrowed the Money, died before the Term of payment, and that there was so little a space, *viz*, only two Moneths or thereby, which had run since the Terms of payment, that the failzie was purgeable, and that the Creditor of the Defunct might as well be admitted, to purge the same by present payment, as the Defunct, or his Heir; for albeit the *Lords* by an old Ordinance had Enacted, that they would abide by Failzies and Clauses of Penalties, conveened and agreed on betwixt parties in their Securities, and Decern according thereto: Yet that ought only to have place in Provisions, which depended upon Securities, conveened upon in that same Writ, which bore the Provision, and not where the Provision had respect to make other Securities to fall, which were not made by that Writ, bearing *such Provisions*, as in this case, where the Provision was set down in a Bond of borrowed Money, appointing a Reversion, contained in an other Writ and Security, made betwixt the Parties before, to expire, if the Money borrowed were not payed at the time appointed; whereas if the Wodset had been granted, and the Reversion given back again by this Bond of borrowed Money, and therein that the Parties had agreed upon this Clause now Lybelled, the same *eo casu* might have had place, if the Failzie had beed incurred. Actor. *Heriot*. Alter. *Craig*. *Scot* Clerk. *Vid. July* 8. 1636. *Cleghorn*.

Creighton contra *Wallace*, *Eodem die*.

David Crighton being Infeft in a Land in *Edinburgh*, by Right from umquhile *Hamilton*, his Author by progress, to which *Hamilton*, *Marion Wallace* gave a Bond, obliging *her to Ratifie his Right*; which Bond, the said Pursuer, as singular Successor, desired to be Registrat at his Instance against her. The *Lords* Found, that the Pursuer, as singular Successor, could not Pursue Registration of this Bond against the Defender, so summarly by Action of Registration, & as Heretor of the Land by Right, flowing from that person, to whom the Bond was made, but reserved to him his ordinary Action, which he as Successor *in rem* might *de jure* have thereon, either by Pursuit for Implement, or other wayes. *Scot* Clerk, *Vid. Decemb.* 1. 1630. Feuars of *Chappeltoun*.

So-

Somervel contra *Somervel* of *Drum*, *March* 23. 1631.

IN a Double-poynding of the Ground for an Annualrent, wherein the Pursuer was Infeft by Precept of the Heretor of the Land, Granter of the Annualrent, conform to the Charge upon a Retour, Execute at the Pursuers Instance, as Heir to the first Acquirer of the Annualrent, from the said *Hugh Somervel* of *Drum*; The first Annualrentars Seasin being quarrelled as null, because it bore not Seasin to be taken *per traditionem denarii*, which is a necessary Symbol required to Seasins of Annualrent, specially seing this is proponed to Eleid an Action upon an old Seasin, 36 years since, and never clad with any Possession, and therefore ought to be the more favourably received. This Alledgance was Repelled, because the Seasin bore, *the same to be given and done according to the Solemnities used in such cases*; And the *Lords* would not Annul the Seasin for this Defect Alledged. And the Defender Alledging further, that the Ground could not be Poynded for the years, betwixt the time of the Pursuer's Predecessors Decease, and the Pursuers Seasin, because the same during that space was in his hands as Superior, by Non-entry: And the Pursuer Replying, that he could not be heard, to alledge Non-entry, because he by the Contract of Alienation, made betwixt him and his umquhile Predecessor, was obliged to pay the said Annualrent, aswell not Infeft as Infeft. The *Lords* Found, that this Contract might be a ground to produce Personal Action, or Execution thereupon against the Defender, but that they would not thereupon Sustain this Action to Poynd the Ground, as a Title thereto: Actor. Alter. *Gray*. *Hay* Clerk. *Vid. March* 12. 1630. betwixt the same parties. *March* 15. 1631. L. *Smetoun*. *Feb.* 3. 1631. *Ogrie*.

L. *Rosyth* contra *Wood*, *eodem die*.

THe La. *Rosyth* & *Andrew Wood* her Spouse, having Charged for payment of a Victual Duty, adebted to them by the Laird, conform to a Tack of her Conjunct-fee-Lands, set to him, and that for the Cropt 1626, for the which they had recovered Decreet against him; and he Suspending, that since that Sentence he had compleatly payed the Cropt 1627. and the year 1628. conform to their Acquittances given thereupon; and also had payed the year 1629. except only 3 Bolls, which he had offered upon Acquittance, and was refused, and he is content presently to pay the same, and this must import to him Liberation of the year 1626. controverted, and all years preceeding, being *Appocha trium annorum*; The *Lords* Found this Reason no wayes Relevant, to Liberat the Suspender of the years Lybelled, because there was no Acquittance of the year 1629. But only there was produced certain particular Tickets, or some partial Receipts of some quantity of that years Duty, received at diverse times, and which being in sundry Tickets, and received to a compt of that years Duty, and being all Calculat together, made not up compleat payment, but there was resting a little part of the whole Duty, *viz.* 3. Bolls; and in respect thereof, they Found that the Suspender was not Liberat thereby of the year Lybelled, whereas if compleat payment had been made of all, and had been instructed by Acquittances, he would have been Liberat that year, notwithstanding of the Decreet that year in special therefore; for the Decreet made it only appear to be a Debt, which without that Sentence, would have appeared also by the Tack, if there had been nothing to have taken away the same. Actor. *Nairn*. Alter. *Gibson* Clerk. *Vid. Feb.* 17. 1631. *Williamson*. *Feb.* 19. 1631. L. *Morison*.

The Bishop of *Dunkeld* contra Lo. *Balmerino*, *March* 25. 1631.

IN a Reduction of a Right of the Patronage, of the Parsonage Teinds of the Kirk of *Cramond*, made by the King's Majesty, to this Lo. *Balmerino*'s Father, upon Resignation of these Teinds, made by Mr. *Peter Rollock*, Bishop of *Dunkeld*, of the which Bishoprick, the said Kirk of *Cramond* was a proper Patrimonial

trimonial Kirk, and the Bishop was not Patron thereof, but the same was a Mensal Kirk pertaining to him; the Reason was, that the Mensal Kirks could not be Disponed, and that there was no Dissolution thereof in Parliament from the Bishoprick, and that the Resignation thereof made by the Bishop, was not done with the consent of the most part of the Chapter, which was necessarly required thereto, and without which it could not be necessarly Disponed. And the Defender Alledging, that his Right of the Patronage of this Kirk could not be quarrelled, because in the *2d. Act, Par.* 1606. whereby the Bishops are Restored, special Exception is made of Patronages of Kirks, pertaining to Bishops, Disponed by lawful Titulars, and Confirmed in Parliament, and this Kirk of *Cramond* was Resigned, as said is, by Bishop *Rollock*, being then lawful Titular, in the Kings Majesties hands, and thereupon the Presentation and Patronage thereof were Disponed to the Lo. *Balmerino* by the King, which was Ratified in the same Parliament 1606. & Declared then by the Estates to be Reduceable upon no Ground or Cause, at no time thereafter; And the Pursuer Answering, that that Exception extended only to Patronages of Kirks, which Patronages were at Bishops Presentation, and not to the Kirks pertaining in Patrimony to Bishops, as this Kirk Lybelled, which was not a Kirk at the Bishops Presentation, but his own proper Mensal Kirk, and so fell not under the Exception; and further, albeit the Exception might extend thereto, yet that Exception must be understood of Kirks lawfully Disponed, and makes not Dispositions, which were not lawful, to become Valid, if they were Unvalid, or had Nullities before the Confirmation: *Nam confirmatio nihil novi juris tribuit.* Likeas the Act in that same Parliament, *Salvo Jure Cujuslibet*, gives warrand to Parties having interest, to claim their Rights notwithstanding of any Act done in that Parliament, to any privat persons prejudice; and by Act of Parliament 1617. *Fa.* 6 *It is Appointed, that the Lords of Session may Judge upon Writs Ratified in Parliament*, which they could not do, if that the Confirmation Supplyed the Defects and Nullities thereof. The *Lords* Found, that this Exception extended to Kirks pertaining to the Patrimony of Bishops, which were so Ratified in Parliament, as the Exception requires, alswell as to Kirks at Bishops Presentation, without Distinction; and also concerning the Nullity of the Right, Alledged Confirmed in Parliament, if the Confirmation excluded the Party to Propone any Nullity or not, They Found, that in respect of the Act of Parliament, which Declares the Lord *Balmerino*'s Right to be Irreduceable thereafter *ut supra*, they Found the said Right to be good, notwithstanding of the Reason Lybelled, founded upon the said Nullity, in respect of the Tenor of the said Act of Parliament, but the Bishop desired to be further heard herein. *Hay* Clerk.

Seaton contra *Hume*, *March* 26. 1631.

THe *Lords* Found, that Sheriffs are Competent Judges in Actions pursued against Defenders, as Charged upon 40 days, as use is, to enter Heirs to their Predecessors, and Repelled the *Alledgance*, whereby it was Alledged, that no Inferior Judge ought to proceed in such Causes, but that such Causes were only proper to be Cognosced, and Decided before the *Lords* of Session; for if the Defender should Renunce, it were not proper to Inferior Judges to Cognosce, if the Renunciation were sufficient or not, or what was or should be the Consequence thereof, or if the Party should be Reponed against the same, or not, but the *Lords* of Session were only proper Judges thereto, which was Repelled.

Winraham contra *Williamson*, *Eodem die.*

UMquhile *Thomas Williamson* dieing by Storm upon the Sea, the Ship and his whole Goods having Perished, immediately after the word thereof

thereof came to *Scotland*, *Gilbert Williamson* is confirmed Executor to him, to be payed of his own Debt, and thereby the said *Thomas* his other Creditors being prejudged, if he should be payed totally of his Debt. The Son of the said umquhile *Thomas*, being his only Bairn, Pursues Reduction of that Decreet Dative, Decerning him Executor; because he being neareſt of Kin, craved to be preferred: And the Defender Alledging, that his Confirmation could not be Reduced, except that the Son would offer him payment of his Debt, for the which only he was Confirmed Executor, which being done, he was content to Renunce the Office, or that it should be Reduced. The *Lords* Found, that seing the reſt of the Defunct's Creditors assisted this Pursuit of Reduction, and that the Defender had used *nimiam diligentiam*, by confirming himself Executor, within 14 days after the Rumor of the death of the Common Debitor, and that the Term of Payment was not then come, the Party having died, and perished with most of all his Goods, by Gods Visitation by Storm, and not by any Fact, or Misgovernment of his own, as a Bankrupt, therefore that the Defenders Testament should be Reduced, and Ordained the Defuncts Son to be Confirmed Executor, to the effect he might be comptable to the whole Creditors proportionably for their Debts, for which they Ordained him to find sufficient Caution: and in Disputation amongst the Creditors. The *Lords* Declared, that they would have Consideration as effiered of the Defenders Diligence, and what Preference he should have thereby. Actor. *Mowat*, Alter. *Burnet*. *Gibson* Clerk.

L. *Haddo* contra L. *Ludquharn*, *March* 29. 1631.

IN a Removing by the L. *Haddo* contra L. *Ludquharn*, from the House and Manner-Place of *Kellie*, and the Maines thereof, Pursued by the Minor, within the years of his Minority, against *Ludquharn*, being his Curator, standing *sine quo non*; It being Alledged by the Curator, that no such Action ought to be sustained, at the Pursuers Instance, seing he was not Seased in the Lands Lybelled. And the Minor Replying, that this Exception ought to be Repelled, as not competent to be proponed by the Curator, against his own Minor, who ought to have obtained himself Infeft; & the Curator Answering, that *stante curatela*, no such Action of Removing ought to be sustained at the Minors Instance, against his own Curator. The *Lords* Repelled the Exception, and Duply, and sustained the Action of Removing, at the Minors Instance, against his Curator *sine quo non*, *etiam durante cura*, and Decerned him to Remove, both from House, and Maines; seing the Minor was Married, and might crave his House to himself and his Wife to dwell in: but for Removing from the Land, I consider not the Reason thereof, that in Law the Curator might be Removed from the Maines, his Office standing, albeit if the Minor had wanted Maintainance, he might have had competent Action, to have a Portion of the Living, being Decerned by the Judge, to be Assigned to him, for Sustentation of himself and his Wife, but it was not Pursued *hoc modo*, and so the Curator before Compt and Reckoning, may Piece and Piece be Removed from the Minors whole Estate, which is hard in Law. Actor. *Baird*. Alter. *Mowat*. *Gibson* Clerk *Vid. March* 18. 1630. betwixt the same Parties.

Murray of *Halmyre* contra Lo. *Yester*, *Eodem die*.

IN an Improbation of a Horning, whereupon the Lo. *Yester* had taken the Laird of *Drummelziers* Escheat and Liferent; the Heretable Right of the said Lands was Disponed by *Drummelzier* to the said Improver, and the Improver at the Term producing one of the Witnesses insert in the Horning, named *Archibald Tweedie*, in *Drummelzier*. And the Lo. *Yester* Alledging, that that Person was not the right Witnes, but that he designed another Witnes of the same name, dwelling at the same time, in the same Place, who was now

dead. And the Improver contending, that the Witnes produced by him should be examined, seing the Officer, Executor of the Horning, was yet living, who was not presently in the Countrey, to design his own Witnes, and who only properly might design the Witnes, and who, if he should Compear, and declare, that the Witnes produced, was not his Witnes, then he was content, that the Deposition of this Person now produced, should not be Respected, but holden as not taken. The *Lords* Found, that this Person produced by the Improver, should not be examined, nor his Deposition taken, seing they Found, that the User of the Horning had the place of designing the Witness, where the Officer Compeared not to design them, albeit the Horning was not Execut at the Lo. *Yesters* Instance, but at the Instance of another Creditor; but they Found, that if the Officer should Compear, and design another Person to be Witness, then this designed by the Defender, at any time before the Conclusion of the Cause, *eo casu* they would receive his Designation. And if he should design this to be the Witness produced by the Pursuer, and that this Witness should happen then to be deceased, he should be holden as an Improver, seing the Defender upon his own Perril, opposed the Examination of this Witness, and designed another dead Witness, which perril the *Lords* declared to be as said is, that he should be holden as an Improver. Actor. *Nicolson*. Alter, *Stuart*. *Gibson* Clerk.

Chrystie contra *Jack*, *June* 4. 1631.

IN a Reduction of a Compryfing upon this Reason, That the Party Debitor, against whom the Compriſing is Deduced, was out of the Countrey, & by the Citation in the Denunciation, albeit it be used against him, as out of the Countrey, yet he is not lawfully Cited, being only Cited at the Mercat-Cross of *Dundie*, and *Forfar*, and Peir and Shoar of *Leith*, whereas by common consuetude observed, all Citations against Parties out of the Countrey, ought to be at the Mercat-Cross of *Edinburgh*, as *communis Patria*, and has been so done heretofore. This Reason was Found Relevant, and the Compriſing Reduced therefore, albeit the Party was Cited both at the Peir of *Leith*, and at the Mercat-Cross of that Burgh, where he dwelt with his Family, *viz*. *Dundie*, and also at the Mercat-Cross of *Forfar*, which is the Head-Burgh of the Sheriffdom, which the Defender Alledged to be a Citation, which might more probably come to his Knowledge, which is the end of all Citations, than if it had been done at *Edinburgh*; for albeit by custom, Citations of Parties out of the Countrey are used at the Mercat-Cross of *Edinburgh*, and being so used, are lawful, yet that permissive Custom will not infer any prohibitory consequence, that Citations otherways used, are unlawful and null; for albeit it be lawful to do the one, yet there is nothing in Law nor Practique, to make the other unlawful, except it might be shown, that there were either some warrand in Law, or by Sentence extant, to prohibit Citations to be otherways, except at *Edinburgh*; Likeas by warrand of the Letters, the Direction thereof appointed the Party to be Cited at *Dundie*, *Forfar* and *Leith*, which he has done, and so obeying the warrand of the *Lords* Letters, the Citation conform thereto cannot be Found unlawful, especially tending to annull a Compryfing, which is a perfect Act now 20 years after it is compleat, and clothed with Possession. Which Alledgance was Repelled, and the Reason sustained, in respect the Custom has been to Cite at *Edinburgh*, & all Citations otherways are unlawful, albeit there be no Sentence to warrand that Custom, and to disallow the other Citations in any contradictory Judgment, which was Found needed not, seing it was never questioned. And as to the warrand of the Letters, the same bore also, *To Summon at all other places needful*, and such Letters are granted always *periculo petentis*; but by the 32 *Act. Par.* 6. *Q. Mary*, Summons of Persons passing out of the Countrey

Countrey after citation are mentioned to be done, at the Mercat-Croſs of the Head-Burgh of the Shire. And by all other *Acts*, which mentions citations of Parties at Mercat-Croſſes, ever mention is made of the Head-Burgh of the Shire, & never of any other, as by the 86. *Act. Par.* 11. *Ja.* 6. of Charges of Law-Borrows, which are either Perſonal, or at the Dwelling-Place, and at the Croſs of the Head-Burgh, and the 33. *Act Par.* 6. *Q. Mary*, for Citation in Criminal Cauſes, and therefore no more in Civil; and the 66. *Act Parl.* 11. *James* 6. anent Summoning of High-Land-Men, never mentions *Edinburgh*. And as by the 119 *Act. Parl.* 7. K. *James* 6th. Inhibitions are Ordained to be Regiſtrat in the Clerk-Books of the Head-Burghs of the Shire, where the Party Inhibited dwels, or where his Lands lyes, where there is no word of *Edinburgh*. And ſicklick by the 268 *Act. Par.* 15. *Ja.* 6. The ſame ſhould be Execut at the Head-Burgh of the Shireffdom, or Regality, within which the Party dwells, far more may Citations be ſo uſed in Compriſings; for ſeing the Lands are Denunced at the Mercat-Croſs of the Head-Burgh, it would appear to agree with Reaſon, that the Party ſhould be Cited at the ſame Place; for albeit the Conſuetude, to Cite Parties out of the Countrey, had been uſually done at *Edinburgh*, and that ſuch Deeds done are lawful, becauſe that Conſuetude is permitted, and therefore Deeds ſo done are not quarrellable, yet there is no Probation, neither in Law nor Practique, or by Deciſion, to annull Deeds otherways done; for it were an hard Inference to draw from a Conſuetude Permiſſive, a Concluſion prohibitive of all Acts otherwiſe done, differing only in Circumſtance, for place of Execution, and not material to the Offence of the Acts; neither is it reaſonable, that the ſame ſhould be everted, for the omitting of an Act not ſo material, and neceſſar, as that Act which is uſed, *viz.* the Execution at *Dundie*, where the Party dwelt, and at *Forfar*, which is the Head-Burgh of the Shire, and which ſo Execut, was more probable to have come to his Knowledge, than if it had been made at *Edinburgh*; and that is the end of all Citations, that the Party may know thereof, the ſame is Ordainer in Executions, Charges and Denounciations of Parties to the Horn, Likeas Charges and Denunciations of Parties at the Horn done at *Edinburgh*, where the Parties dwells not in that Sheriffdom albeit paſſing by expreſs Contract, and conſent of Parties, by the 140 *Act*, *Par.* 12. *Ja.* 6. are declared null: But the Compriſing was Reduced, notwithſtanding of the Arguments proponed in the contrair, as is before Noted. *Vid.* *Jan.* 11. 1622. L. *Faldoun-ſide*. *Feb.* 22. 1631. *Murray*. *Jan.* 8. 1629. *Kinloch*.

Peebles contra *Scot*, *June* 10. 1631.

THe Creditor *Peebles* for his Debt owing by one *Peebles* deceaſed, and the Kings Cuſtomer for the Impoſt of Wine, owing by the ſaid Defunct, which the Defunct Entered, as pertaining to three perſons named particularly in the Ticket of Entry, and to himſelf as a Merchant thereof alſo, as the Entry Subſcribed by the Defunct proported, in a double Poynding contending for preference in the Debitors Goods; It was Found, that the Buyer of theſe Wines from the Defunct, the price whereof was reſting unpayed by the Buyer, might be ſought by the King's Officers, for ſatisfying of the Cuſtom, wherein they were preferred to the Creditors, who had Arreſted the ſame in the Buyers hands, except that it might be proven, that the ſaid Cuſtom had been payed, and that the King by his priviledge might either ſeek his Cuſtom from the Merchant, or any other Intromettors, who were full handed with the Wares, and had not payed therefore before to the Merchant; And it was not preſumed that the Cuſtoms were payed, except the ſame were ſhown; neither is the giving of Security for payment, which uſeth to be done at the time of the Entry, derogatory, but that the Kings Officers may either take him to that Security, or to the Merchant, or to the Wares, where they are extant unpayed for; and inreſpect of the Entry of the Tenor foreſaid, made of ſo many Wines, whereof

he gave himself up for one of four Merchants, owners thereof. It was Found, being questioned for what proportion of the Wines, and Customs thereof, the Defunct could be answerable, that he should be answerable at least for the 4*th* part of the whole Customs of that quantity Entered, except that the Party could show, that he was Partner of less, and could qualifie the same: But here the Party being dead, and nothing instructed otherways, he was Found answerable by his Ticket for the 4*th* part, in respect he confessed therein, that he was one of the four Merchants. Actor. *Advocatus* & *Lawtie.* Alter. *Mowat, Scot* Clerk. *Vid.* 15 *March* 1631. *Fletcher* and 15 *Feb.* 1631. *Bryce Sempill* for the first part of this Decision.

Tailzifer contra *Drummond, June* 11. 1631.

ONe *Drummond* being conveened, as lawfully Charged to enter Heir to Sir *Alexander Drummond* his Father, for payment of a Debt due by his Father, at the instance of one *Tailzifer* in *Edinburgh*; and the Minor Compearing by his Procurator, and Alledging the Debt to be payed, and Litis-Contestation being made therein, and a Term assign'd to him to prove the same: At the Term of Probation the Pursuer calling the Act, and desiring the Term to be satisfied; The *D*efenders Procurators *D*eclared, that they would pass from that Exception: And seing the Defender was conveened only as lawfully Charged to enter Heir, he offered to produce a Renounciation Subscribed by the Minor and his Curators, Renouncing to be Heir to him, *rebus integris*, seing he never had Intromission. *A*nd the Pursuer Replying, that *in hoc statu processus*, he cannot be heard to *R*enounce, after proponing of a peremptor of payment, and after the Term was past assigned to prove it; for he Alledged, that that made *rem non integram*; and it were dangerous to Rescind Litis-Contestation done *partibus comparentibus*, upon such an offer; for albeit after Sentence against a Party, as lawfully Charged to enter Heir, The *Lords* in Suspension will permit the said Party to *R*enounce, notwithstanding of the Decreet so given against him; yet it is not alike in this case, where there is an Exception Proponed and admitted, of payment of the Debt, which *perimit totam causam*: the *Lords* notwithstanding of the Act, Found that the Minor *in hoc statu processus*, might be heard to Renounce, for he might be heard, without all Controversie to Reduce upon that Reason, he being Minor, and before Sentence at the first Term, the *Lords* thought the Minor might be Reponed, without further Process; for a Major after Sentence is heard to *R*enounce, by Suspension of the Decreet given only against him as lawfully Charged, albeit he Compeared to Renounce before, and did it not. Actor. *Cunninghame.* Alter. *Primrose. Scot* Clerk. *Vid.* 13 *January* 1629, *Nisbet*, and the Cases there Cited. 10 *July* 1630. *Whitelaw.* 24 *Novemb.* 1632. *Annand.* 26 *January* 1631. L. *Gadgirth.*

Ramsay contra *Weir, June* 15. 1631.

IN a Removing from a Yard, conform to a Warning made 40 days preceeding *Candlesmass* last by-past, wherein the Defender Alledging, that no Process ought to be granted upon this Warning Libelled, because the same is made 40 days preceeding *Candlesmass*, to Remove at *Candlesmass*; whereas Warnings at such Terms hath no Warrand, but are against the Act of *P*arl. anent Warning of Tennents to Remove, which appoints the same to be done before *Whitsunday.* And the Pursuer *A*nswering, that this Warning being only made for a Yard, to Remove therefrom, may well and lawfully be made before *Candlesmass*, which is the proper time of Labouring of Yards; and such Warnings from Yards before *Candlesmass* are allowed, and *P*rocess granted thereupon before all Inferior Courts within this Kingdon. The *Lords* Found no Process upon this Warning,

Warning, and that the same ought not be sustained, seing it was not made before the ordinary Term of *Whitsunday*, to Remove at *Whitsunday*, as use is in other Warnings and Removings.

Chapman contra *Gibson* and *Fingask* her Spouse, *June* 17. 1631.

THe deceast *Thomas Gibson* having begotten a Daughter, the only Bairn of his first Marriage; after whose decease he having Married *Marjory Murray* his second Wife, who dying also before her Husband, *Chapman* her Executor Pursues the Bairn of the said first Marriage and her Spouse, to make payment of the equal half of the Goods, which the said umquhile *Thomas Gibson* had the time of the said *Marjory* her decease; wherein the *Lords* Found, that the said *Relict*, nor her Executors, had no Right to the half of the Goods, but only to the third part, seing there was one Bairn living the time of the Relicts decease, whereby her Husbands Gear could not fall in a two-fold Division, but in a three-fold *Division*. Neither was it respected, as the Pursuer *Replyed*, that this Bairn was not a Bairn of the second Marriage; And also he Alledged, that she is that person that is Heir, and hath gotten a great Inheritance, so that she cannot claim any part of the Moveables, being Heir by her Heirship. This was not respected, for it was Found nevertheless, that the Testament ought to have a threefold Division; and albeit she be Heir now since her Fathers decease, yet her Father being then living when *Marjory Murray* the second Wife died, she could not be then respected as Heir, but as a Bairn: For Heir she could not be, her Father being on life; and seing there are no moe Bairns but she, she ought to have a Bairns part also; tho it were proper to other Bairns, if any had been, to have excluded the Heir, as is not in this case. And it being also Alledged, that by Contract of Marriage betwixt the said *Thomas Gibson* and his second Spouse, it was Provided, that the Husbands Goods should pertain to him and his Executors, and the Wifes to her and her Executors, and none of them should seek or have Right to any of others Gear, but to their own allanerly. This Contract being Alledged not to be Obligator to prejudge the *Defunct*, nor her Executors, in her part of the Husbands Goods, because he Alledged it to be a Contract, *contra bonos mores*, *& contra leges*, *& consuetudinem Patriæ*, and against the Right and Division of Goods, observed ever in this Kingdom betwixt Man and Wife. This Alledgance against the Contract was Repelled, and the Contract found good and lawful, and the Alledgance thereon sustained. Actor. *Alter. Craig. Gibson* Clerk. *Vid.* 18 *July* 1634. *Henderson*. And for the last part of this Decision. *Vid.* 14 *March* 1634. *Gib.* 2 *Feb.* 1632. *Bartilmo.*

Prior of *Ardchattan* contra Captain of *Clanronnald*, 18 *June* 1631.

THere being a Decreet Arbitral betwixt umquhile Prior of *Ardchattan* and umquhile Captain of *Clanronnald*, pronounced by the Judges therein, and the umquhile Prior in his lifetime having Charged the eldest Son of the umquhile Captain, who was the other Party, to enter Heir to him; after which Charge, the Prior, at whose instance the said Charge was Execute, having made his Son now Pursuer, *Assigney* to the said Decret Arbitral, and to the Charge given by him to the Son of the other Party, to enter Heir, as said is: The said Pursuer as Assigney Pursues the said Son, as lawfully Charged to enter Heir, to make payment to him of the Sums contained in the said Decreet. And the Defender Alledging, that that Charge to enter Heir, given to him at the instance of the Pursuers Father, who is now deceased, cannot be a ground to sustain this Process against the *Defender*, at the said Pursuers instance; for the said Charge must expire, and become extinct, by the decease of him at whose instance it was given; for it is a personal Charge, whereupon nothing followed

in the lifetime of him, at whose instance it was given, and after his decease cannot be prosecute by his Assigney; but the Pursuer, if he would seek any Process against him, as representing his Father, he ought to Charge him *de novo* at his own instance. This Alledgance was Repelled, and the *Lords* Found, that the Assigney might insist upon that Charge given by the Cedent, after the Cedent's decease, as an *Assigney* to a Summons and Action Intented by the Cedent, may prosecute the same after the Cedent's decease. This hath its own scruple, for the Assigney cannot always prosecute the Act begun by the Cedent, after the Cedents decease, as if the Cedent had raised Letters of Horning against his Debitor, and after the Charge had died, his Assigney ought not to have Denounced the Debitor upon that Charge; neither can an Assigney to a Decreet, Execute or do any Deed upon that Decreet after his Cedents death, while the same be transferred in the Assigney, except the Assignation had been lawfully Intimat in the Cedent's lifetime, as was done 23 *January* 1624. *Stevinson.* Actor. *Mowat.* Alter. *Gibson.* *Gibson* Clerk.

Inglis contra *M'cubine*, *July* 1. 1631.

JOhn *M'cubine* by his Ticket being bound to *John Inglis*, to pay to him 300 merks, and being Pursued for payment, he Alledged the Ticket to be null, because it wanted Witnesses; And the Pursuer Replying the same to be Holograph, and so there was no necessity of Witnesses. The Defender Alledged, that it behoved to be proven, that it was his Hand-writ: And the Pursuer Answering, that there was no necessity to prove the same, seing the Ticket bore it all to be Written with his own Hand, and Subscribed by him, so that he needed not to approve the same; but in respect of the foresaid Tenor thereof, the Defender ought to Improve the same, or else it should have full Faith and Force. The *Lords* Found, that where the *Defender*, or his Procurator for him being so informed (if the Defenders self be not present) denyes the Hand-Writ in that Writ, whereupon Pursuit is moved against him, and where there is no Witnesses therein insert (which is a necessar Circumstance required to the validity thereof, and the ordinary mean whereby to improve) the Pursuer ought to prove the Writ to be Holograph, albeit it proported to be Written all with the Parties Hand-Writ, and Subscribed by him. *Scot* Clerk. *Vid.* 15 *Feb.* 1630. *Harper*, and the Cases there following. 12 *July* 1632. *Ramsay**

This same Question occurring the same day again, betwixt *Elliot* and *Elleis*, the same Decision was followed. And it being further Alledged by the Defender *Elliot*, who was Conveened for payment of a Sum contained in his Ticket, adebted by him to one *Elleis*, Factor in *Camphire*, at the instance of *James Elleis* Burgess of *Edinburgh*, Assigney thereto, that the said Cedent being the Defender's Factor, was full-handed with as many Wares pertaining to the Excipient, as would in price extend to far more than would pay this Sum Libelled, with which he was content to compense the Sum. The *Lords* Repelled the Alledgance, and Found the same had no Relevant Ground of Compensation, because the Defender Alledged not, that the Factor had Sold the Goods, and had the Prices thereof in his own hand, *quo casu* it being so, the Compensation was receivable; But the Factor having only the Goods to be sold, as occasion might offer, he was only obliged to the *Defender* to Compt; so that if the Goods were not sold, he could be no further obliged, but to deliver the same to the Pursuer again, and that could not compense the Defenders Ticket of a liquid Sum, to be payed at a precise time contained in the Bond. *Hay* Clerk.

contra Baillies of *Perth*, *July* 6. 1631.

THe Magistrats being Conveened by a Creditor, for payment of the Debt, because the Debitor being Incarcerat in their Tolbooth, they suffered

ed him to Eſcape: And the Defenders Alledging that the Rebel brake the Tolbooth in the night, and came out at the Roof of the Houſe, and ſo eſcaped, without the Knowledge, Conſent, or Acceſſion of the Magiſtrats, or any Fault on their part, the Houſe being a ſufficient Ward-houſe, where there was no Infirmity or Defect, and being ſufficiently Timbred and Sclated in the Roof, ſo that therefore it were hard to find the Magiſtrats lyable in the Debt, who had not failzied. This Alledgance was Found Relevant, being proven, to Liberat the Magiſtrats, ſeing neither they nor the Keeper of the Jail or Priſon, was Alledged to be acceſſory, or to know of the Eſcape, or that they had Failzied, or Alledged to have omitted to do any thing, which in ſuch caſes are incumbent to be done by them, in their Duty of their Offices, neither did the Party qualifie any inſufficiency to have been in their Tolbooth, out of the which the Rebel Eſcaped, but by the contrair, the Baillies offered to prove it to have been always ſure and ſufficient, as other Warding houſes are, for keeping of Priſoners, before this violent Eſcape done in the Night. Actor. Alter. *Chaip. Vid. July* 13. 1630. *Hay Novemb.* 21. 1628. *Lockie. Novemb.* 11. 1634. *Bower. Jan. penult,* 1627. *Ker.*

Campbel of *Ardchattan* contra Parochioners of *Kinnivar, July* 8. 1631.

IN a Spuilzie of Teinds at the Purſuers Inſtance, as Infeft upon the Erection of *Ardchattan*, Erected Heretably to the Purſuer's Father, in *anno* 1602. wherein the Defenders Alledging, that that Title of Erection was null, being granted in the year 1602. after the 119. *Act, Par.* 1592. *Which prohibits any Erection to be granted, and Declares all hereafter to be granted, to be null.* And the Purſuer Anſwering, that this *Act* meets not in this caſe, where the Spuilzie is not for Teinds of Kirk-lands, but for Teinds of other Temporal Lands, whereas the *Act* only *Prohibits Erection of Temporality, or of Teinds of Kirk-lands*, as thir Teinds are not. The *Lords* Repelled this Exception *hoc loco*, to Annul the Infeftment, Lybelled by way of Exception upon the Reaſon of the ſaid Act of Parliament; which Act, the *Lords* Found, as it was conceived in the Tenor, and Words thereof, and in the Prohibition therein, extends only againſt Erections of Temporalities, and Teinds of Kirk-lands: And albeit the meaning of the Act, and Rubrick thereof, would ſeem to be alike for all Teinds, yet the Tenor thereof being ſo ſpecifick, The *Lords* Found, that they could not enlarge the Act, but by Ordinance of the Eſtates; and ſo they Found, that the Exception ought to be Repelled in this place, and that the Nullity ought not to be Received, *ope exceptionis.* Actor. *Mowat.* Alter. *Primroſe. Gibſon* Clerk.

Wilſon contra L. *Tinto, July* 9. 1631.

A Defunct having Nominat Executors, and in the ſame Teſtament having left all his Gear in Legacies to his Bairns, one of the Bairns Purſuing the Executors for the Legacy, left by his Father to him for his own part: And the Defender Alledging, that he had Retention of a third Part thereof, conform to the Act of Parliament 1617. which gives that proportion of the Defuncts Third, to the Executor Nominat. The *Lords* Repelled this Alledgance, for they Found, that where any Defunct in his Teſtament, Nominats Executors, and in that ſame Teſtament leaves all his Gear to Legatars, others than the Executor Nominat by him; in ſuch caſes the Executor has only *nudum officium*, and has no Right by that Act, to any part of the Goods of the Defunct; In which caſes, the Act of Parliament foreſaid militats not, and cannot be drawn beyond the Caſes expreſſed in the Act, which provides for the Bairns of the Defunct, and the neareſt of Kin Pretermitted in the Defuncts Teſtament, wherein he had Nominat Executors, and Declared what quantities of the Goods *eo caſu* ſhall pertain to the Executor; for this Act of Parliament puts not the Executors in better caſe, than wherein they were before that Act, and before that Act when the Defunct

left his whole Goods in Legacy, the Executor then could have no part thereof; even so after the making of this Act, the same should stand; and as if the Debt should exhaust the whole Gear, the Executor by this Act could retain nothing to himself, *eo casu* the like Reason is where all is left to Legatars, specially to the Defuncts own Bairns: for in this case the Nomination of Executors, is but the granting of a naked Office and Burden, which the Executor has liberty to accept or refuse, as he pleaseth, and if he hold himself free, cannot be compelled to embrace the same, and needs not to Confirm, if he please to Renunce the Office. Actor. *Gilmore*. Alter. *Gibson* Clerk. *Vid. June* 11. 1629. *Neiving* and the Cases there.

L. *Hassington* contra *Bartilmo*, *July* 12. 1631.

IN a Contract of Marriage betwixt a man and his Wife, the Wife having Assigned her Debts to her Husband, and her self during their Lifetime, and what rested unspent thereof by themselves, to their Heirs, Executors, or Assigneys; Which Contract was Subscribed for the Wife by a Minister, Nottar for her; after her Decease, her Executors Pursuing for the half of the Gear, and the Husband surviving, Defending himself with the foresaid Contract, whereby he Alledged, that the Property of the whole Gear now pertained to him, she being dead, and there being no Bairns betwixt them, in respect of the words of the Contract, Disponing the Goods after their Decease to their Heirs, which Words (*Their*) must be only understood of the Mans Heirs, as being the Husband, & person most respected, and who draws the same, according to the Practique of this Realm, to his Heirs. And the Pursuer Alledging, that the Words (*their Heirs*) must import a Division betwixt the Husbands Heirs and the Wifes Heirs, specially in Moveables, whereupon this Question arose, seing this was not questioned upon an Heretable Infestment, where the Dispute might be more questionable, but this Question was not Solved, nor Decided: For the *Lords* Found, that so long as the Husband lived, the Wifes Executors had no Action for her Goods. And the Pursuer further Replying, that the Contract being Subscribed by a Minister, after the *Par.* 1584. & 133 *Act*, which Prohibits Ministers to be Nottars, except in Testaments, under the pain of Deprivation, and so that the same is null. The *Lords* Repelled this Alledgance, and Found not the Contract null therefore; For albeit the *Act* Prohibits Ministers to be Nottars, yet such *Acts* are not Declared null, done by them to the contrair, but Ordains another pain, *viz.* Deprivation of them; So that that Prohibition having a pain, specially annexed thereto, is not a simple Prohibition, which ought to Derogat to the Fact it self.

L. *Huttonhal* contra *Cranstoun*, *Eodem die*.

THE Laird of *Huttonhal* having Assigned the Right of the Tack, of the Teinds of *Huttonhal*, whereof he was Tacks-man, to his Wife in *anno* 1618. After his Decease, she Pursues for Exhibition and Delivery thereof to her; after Exhibition *William Cranstoun*, who had Comprysed both the Lands and Teinds from the Husband, for Debt owing by him, Alledged the Right of the Tack thereby pertains to him, and not to the Lady Assigney; for that Assignation was but *donatio inter virum & uxorem, Ante matrimonia*, done for Love and Favour, and was Revockable. Likeas, at the very day of the Assignation, she granted a Back-Bond to her Husband, whereby she Obliges her self to quite that Right, whensoever her Husband should require her, to him, his Heirs, or Assigneys, and the Right of the Back-Bond, And the Power which the Husband had thereby, to require her to quite her Right, and also the Husbands Power, which he had to Revock, he Alledged by the Comprysing from the Husband of his Right, was now Competent to the Compryser, and devolved in his Person, sicklike as if he had been made second Assigney by the Husband to this Tack; in which

which case, that first *Assignation*, made to the Wife, had been Revocked, and now the like must be in respect of the Compryſing, which is a Judicial *Assignation*. *And* the Lady *Answering*, that that Compryſing cannot be respected as a Revocation, neither has the Compryſer any Right of the Back-Bond, for Revocation must flow from some *Deed* of the Husband, either Expreſs, or Tacit, whereby his Mind may be underſtood, and that it was his will to Revock, and cannot be Collected from the Deed of a third Perſon, but by a Deed done by himſelf, whereby it may be preſumed, that his mind was to Revock. Likeas in the contrair, by a poſterior Deed, done in *anno* 1621, he Declared that he perſiſted in that ſame minde, and had no intention to Revock, in ſo far as by his Charter he Diſponed to her the Lands of *Huttonhal*, and alſo the Teinds thereof, in recompenſe of other Lands Renounced by her, at her Husbands deſire, and which he had ſold, and wherein ſhe was Conjunctfiar, and which were far more worth than both the Lands and Teinds contained in the Charter; which *Deed* being *donatio Remuneratoria & antenup.*, cannot be ſubject to any Revocation, but is Irrevockable in Law; and ſo the Compryſing, which is long poſterior to this Charter alſo, can give no place to this Compryſer, to quarrel this Aſſignation, or *Charter*. *And* the Compryſer *Duplying*, that this Charter had only one word of the Teinds in the Narrative, and was neither mentioned in the *Tenendas*, nor *Reddendo* of the Charter, and was not *habilis modus*, to give Right to the Teinds, the maker of the Charter never being Intelt, ſo that the Charter cannot make the *Aſſignation*, whereupon the Purſuit is founded to ſubſiſt, ſpecially againſt a Compryſer, for cauſes of juſt *Debt*, the Compryſing being Clothed with ſeven years Poſſeſſion; and this *Aſſignation* never being Intimat, nor Inhibition Served thereon, but being a privat *Act* betwixt Husband and Wife, never made manifeſt, but remaining obſcure and privat. The *Lords* Found, the Tack ought to be delivered to the Wife as *Aſſigney*, having Right thereto, notwithſtanding of the Compryſing, and Compryſers *Alledgance*, and Duply, which was Repelled: For the *Lords* Found, that the Compryſer had not Right to Revock, or to require by the Back-Bond, as the Husband had, ſpecially in reſpect of the Charter, which albeit it was not a Legal Right, to give her Security of the Teinds, which the Husband had not in Heretable Right; yet it was a Declaration, that he perſiſted in that ſame minde, and had no intention to Revock; and that it bore, *To be given to her in Recompenſe of Lands*, Renounced by her, as ſaid is, which the Purſuer offered to prove ſhe had done; and which Reply, bearing *ut ſupra*, The *Lords* admitted to her Probation. Actor. *Stuart* & *Mowat*. Alter. *Nicolſon* and *Craig*. *Gibſon* Clerk. *Vid. March* 24. 1630. *Maxwel*

L. *Gatgirth* contra L. *Affleck*, *July* 13. 1631.

THe Deceaſt L. of *Affleck*, as Cautioner for the L. of *Leſmore*, being Debitor by Bond to one *Campbel* in 1000 merks, the Right of which adebted Bond, by progreſs, being Aſſigned to *Gatgirth*, he Purſues Transferring *activè* in himſelf, and *paſſivè* in this Laird of *Affleck*, as behaving himſelf as Heir to his umquhile Father, by Intrometting with his Heirſhip-Goods: And the Defender Alledging, that he could not be Conveened *hoc nomine*, becauſe his Father when he died, was not that perſon, who could have an Heir, ſeing he was not then Prelat, Baron, nor Burgeſs; for he was lawfully Denuded of the Property of all his Lands, before his Deceaſe, in the Defenders favours, without any Reſervation of his Liferent: And the Purſuer Replying, that notwithſtanding thereof, he ceaſed not to be a perſon, who might have an Heir, ſeing he offered to prove, that his ſaid umquhile Father retained the Poſſeſſion of all his Lands, to the hour of his Deceaſe, notwithſtanding of the Right made to his Son. Likeas the Defender acknowledged him to be ſuch a perſon, as might have an Heir, and that he was his Heir, in ſo far as immediatly after his Fathers Deceaſe, he & the reſt of the

Defuncts Bairns, having Intromett with the whole Moveables, the Defender then put apart and distinguished the Moveable-Heirship, from the rest of the Moveables, and the rest of the Bairns Intrometted with all the rest, except the Heirship; which Heirship so Distinguished, was Intrometted with then by the Defender's self, which being then done by him, being *Major & sciens*, makes him lyable as Heir. Likeas, there is a Decreet standing obtained against him, albeit at another Parties Instance, as behaving himself, by Intromission with his Fathers Heirship, proven in that Sentence. And the Defender Alledging, that this Intromission foresaid with Goods, cannot be Found as Intromission with Heirship, where the Owner was not a Person who might have an Heir in Law, for the Reason Alledged; but the most he could be thereby subject in, was to make the same forthcoming to the Creditor, and not to make him lyable to all the Defuncts Debts; and the Decreet ought not to be respected, being given against him, not compearing; and now he compears, and propones this Defence, which would have Eleided that Pursuit; and this is a Decreet at the Instance of another Party, which cannot prove at the Pursuers Instance, nor worke in his favours. The *Lords* nevertheless Repelled the Exception, in respect of the Reply, which they admitted to the Pursuers Probation, and to be proven *conjunctim*; for they Found the Father's Retention of Possession, and the eldest Son's separating, and medling with the Heirship *scienter*, when he was Major, and the Decreet foresaid standing upon Probation, was enough to make him lyable for his Fathers Debt, as he who had behaved himself as Heir. Actor. *Stuart*. Alter. *Nicolson* & *Gibson*. *Gibson* Clerk. *Vid. January* 26. 1631. betwixt these parties. *March* 22. 1628. *Forsyth*. *July* 8. 1628. *Dumbar*.

Blair contra *Broun*, *July* 14. 1631.

THe deceast *Alexander Broun* being Adebted in a Sum to *Alexander Blair* Writer, he pursues this *Broun*, as lawfully Charged to enter Heir to the said umquhile *Alexander* for payment, and the said *Beoun* Compearing, and producing a Renounciation subscribed by him, whereby he Renunced to be Heir, whereupon the Pursuer obtains Decreet *cognitionis causa*, that he might have execution *contra Hæreditatem jacentem*, and thereupon Pursues an Action of Adjudication, wherein the rest of *Alexander Brouns* Creditors Compeared, and Alledged, that the Pursuers Decreet foresaid, obtained upon the Defenders Renounciation was null, because it was obtained before the expyring of year and day, after the Debitors decease, against the *76 Act Par.* 6. *Ja.* 4. and 106. *Act. Par.* 7. *Ja.* 5. Which prohibits any such Process to be granted before year and day be expired. And against the *Act* of *Session* made in *Anno* 1613. Which gives liberty to raise Charges within the year, but not to intent Summons. This Alledgance was Repelled, and the Process and Decreet sustained: For by the Party Charged his Renuncing to be Heir, by that voluntar Deed, he had renounced that Benefit and Liberty, which he had by the Acts of Parliament, to deliberat if he would be Heir, seing he resolved to Renounce; and that Renounciation behoved in reason to be as effectual to the Creditor, as if he had Retoured himself to be Heir, *quo casu* the Creditor would ever get Process as is usual, before the expiring of the year. *Hay* Clerk.

Grant contra *Grant*, *July* 15. 1631.

THe Relict of *Grant* of *Carron*, being Tutrix Testamentar left to his Bairns, which Relict being Married thereafter to a second Husband, more than a year after the decease of her said first Husband, whereby she ceasing to be Tutrix Testamentar, the neareſt Agnat is served Tutor lawfull, and sworn, and finds Caution; but before his Service be Retoured to the Chancellary, within a Moneth, or thereby after the Service, he dies; after whose decease, within the year after the Tutrix Testamentars Marriage with her second Husband, albeit long

long after the expyring of an year after *Carrons* decease, there is a Tutory *Dative* granted by the King, and exped; and after this Dative there is another, the next surviving Agnat served Tutor lawfull, which is exped within less than a year after the decease of the first Tutor lawfull, & within less than year and day after the Marriage of the Tutrix Testamentar: Which two Tutors contending for the Right, the Tutor lawful, albeit posterior, and albeit more than a year after the Defunct's decease, was preferred to the Tutor Dative, seing the first Tutor lawful, and also the second now contending, were Served within the year, after the Tutrix Testamentrix Marriage; and during the time of her Right of Tutory Testamentar, there was no place to any Agnat to claim to be Tutor lawful, so that the Tutory lawfull being exped within the year after her Marriage, at which time of her Marriage the Tutory began only to be competent, to be claimed by the nearest Agnat. The *Lords* sustained the same, and preferred the Tutor lawful, whom they Found only to have *Right*, and that the time of their Cessation to claim the Tutory, ought not to be compted from the time of the decease of the Bairns Father, but from the time of the Tutrix Testamentrix Marriage, within which space of one year thereafter, the Tutor lawful was served, as said is; and that the Tutor Dative had no Right to claim the same, except the Agnat Served, had ceased a year compleat, after the Relicts Marriage, seing she being Tutrix Testamentar, there was a mid impediment, to debar them from claiming to be Tutors lawful; wherefore the Cessation ought not to take beginning of Calculation, from the Husbands death, as if the year after expiring, and they not claiming the same, there should be place to a Dative; But the Compt of the years Cessation should begin at that time, when they might be Tutors lawful, which was after the *Relict*'s second Marriage, and no sooner; but because the Tutor lawful had not found a sufficient Cautioner, but a Person un-responal, The *Lords* Ordained him to find another answerable Cautioner for him, otherwise they would not Authorize his Gift of Tutory. Actor. *Gibson.* Alter. *Baird. Vid. Feb.* 22. 1628. *Colquhoun*, and the Cases there *June.* 29. 1632. *Irwin*, and the Cases there Noted. *December* 17. 1631. *Auchterlony.*

Forbes contra E. *Marshell, Eodem die.*

THere was an Action, *Forbes* contra E. *Marshell*, Disputed before the *Lords*. The Case thereof was this; *Forbes* had Married the only Daughter, and only Bairn of the Laird of *Troup*, whose Lands were Tailzied to the Earl of *Marshell*, failzieing of Heirs Male of his own Body. After the Fathers decease, the Earl *Marshell* Contracts with the said Daughter, and obliges him to Provide her to 10000 Merks, by Heretable security, in contentation of all Right she might claim, after which Contract she being Married on this *Forbes*, and there being a Bairn gotten betwixt them living, thereafter both the Mother and Bairn dies; after whose decease, *Forbes* the Husband claiming the Liferent of this 10000 Merks by the Right of Curiality; And the Earl *Marshell* Defending, that the Curiality could not have Place in this Case, where the Wife was not Successor to her Predecessor, *viz.* her Father, and where she was not Infeft in Lands wherein he died Infeft; but this was a Conquest, or such a Purchase, wherein Curiality had no Place, being an *Acquisition* made by the Womans self. And the Husband Replying, that this Provision came to her in place of the Lands, wherein her Father was Infeft; so that it was of the same nature, as if she had succeeded to her *Father*. This was not Decided, because 12 hours hindered the Decision thereof. But many of the *Lords* thought that Curiality had no place in this Case. Actor. *Stuart* & *Baird*. Alter. *Advocatus* & *Nicolson*. *Hay* Clerk.

E. *Kinghorn* contra *Strang, July* 19. 1631.

IN a Reduction of a Gift and Declarator, of Non-entry, and of a Comprising Deduced thereupon, at the Instance of the said *George Strang*, who was

ever in Possession of the Lands Compriſed ſinceſyne. The Declarator and Compriſing being Deduced in *anno* 1574. or thereby, and this Reduction being only lately Intented by the E. of *Kinghorn* Heretably Inſeſt in theſe Lands. The Reaſon of Reduction being, that the Barrony of *Kinghorn*, whereof the Lands lybelled were but a ſmall Part, not being the 15 Part of the whole, were Diſponed by the King to the Earl of *Kinghorn*'s For-bears, in Feu, for payment yearly of a Feu-Duty; ſo that before Declarator of Non-entry was *D*ecerned, the Donatar, Purſuer of the Non-entry, could not crave the Mails and Duties of the Lands to be *D*ecerned to him, but only the Proportional Part of the Feu-Duty, contained in the Vaſſals Infeftments, for all years Interveening, betwixt the time of the Non-entry, and before the Declarator, albeit after the Declarator for the ſubſequent Terms, the Donatar might ſeek the Mails and Duties; and ſo that the Decreet being ſo given, and the Compriſing Deduced thereupon were null. The *Lords* Found this Reaſon Relevant, albeit ſo long a time after this Decreet, Compriſing and Poſſeſſion, and albeit the Defender Alledged, that this Declarator migh then well proceed for the Mails and Duties, of all years before the Decreet ſince the Non-entry, there being at that time, neither Law nor Cuſtom to the contrair; for albeit the Cuſtom now keeped, might ſeem to tend to the contrair, yet that Cuſtom ought not to be drawn back to ſuch an ancient time, when there was not many ſuch Sentences given, which were hard now to evert, with all that has followed thereupon *poſt tantum tempus* upon this Ground, ſpecially ſeing that the Purſuer has not Alledged, nor can Alledge, that the whole Barrony was Retoured ever, or that the Lands lybelled, which are Alledged to be a part thereof, were ever Retoured to any extent, without which had been Retoured, he Alledged, that the giving of the Lands in Feu, was no Cauſe to have ſtayed the Declarator, for the Mails of the Lands, for the years before the Declarator. And if it had been proponed then, it would have been Repelled, and ſo ſhould not now be Found *R*elevant to Reduce: And if it had been then Relevant, being proponed, yet it would never have ſtayed the Declarator; for the Sentence would have proceeded for that Proportion of the Feu-Dutie, whereto the Lands ſhould have been proven to have extended, and for that Quantity he might have Compriſed, ſo that it were iniquity now to evert his whole Compriſing upon this ground, becauſe a Part of that, for which he had Compriſed, was not due; for it ought not to fall for that which was due through the Purſuers own default, who Compeared not then to propone this: Which Alledgance was Repelled, and the Reaſon ſuſtained; For the *Lords* Found it not neceſſar to qualifie, that the Cuſtom was then to retrinſh the Purſuit to the Retoured Dutie, this being now the Cuſtom, which muſt preſuppone, that it was ever ſo the Cuſtom, where nothing is *poſitivè* ſhown otherwiſe; Likeas the *Lords* Found it *R*elevant to Lybel, that the Lands were Diſponed in *F*eu, ſo that before Declarator, nothing could be craved, but this proportion of the Feu-Duty of the whole Barrony *pro rata*. And Found there was no neceſſity in ſuch Caſes to lybel, or Alledge, that either the whole Barrony was Retoured, or thir Lands particularly, which are Controverted; but without Retouring ſuſtained the ſame: And Found alſo, that the Compriſing being Deduced for a Debt, and Cauſe, whereof one Part was not due, was ſufficient to cauſe the Compryſing fall *in totum*. And ſo the Reaſon was ſuſtained, and the *Lords* Found, that after ſo long time, the Party could not be urged to produce the Warrands of the Compriſing. Actor. *Advocatus* & *Nicolſon*. Alter. *Stuart* & *Ruſſel*. *Gibſon* Clerk. *Vid. March* 23. 1622. Lo. *Leſlie*, as alſo *Feb.* 9. 1632. *Maxwel* contra *Glaſtock*, where the like was found as in Lo. *Leſlies* Action, *viz.* that no Mails in Non-entries might be claimed afterward, without Declarator of Non-entry, except the firſt three Terms after the Ward. *Vid. March* 24. 1632. *Ruſſell*.

Adamſon

Adamson contra *Maisterton*, *July* 21. 1631.

MR. *John Adamson* having obtained Decreet against *Maisterton*, before the Dean of Gild of *Edinburgh*, and another before the Provost and Baillies of *Edinburgh*, against the same Defender, who dieing, he obtains Decreet of Transferring of both thir Sentences, in one *Re*-presenting the Defender deceased, before the Provost and Baillies of *Edinburgh*, which being Suspended. The *Lords* Found in that Suspension, without other Process of Reduction, this Decreet of Transferring null, whereby the Provost and Baillies Transferred the *Decreet* given by the *Dean* of Gild; For they Found, that an Inferior Judge had no power to Transfer the *Decreet* given by another Inferior Judge, for he could not *Execut* such a *Decreet*, and so neither Transfer it; and Found that the Judgment and Jurisdiction of the Dean of Gild is distinct, and a several Judicatory from the Court, and Jurisdiction of the Provost and Baillies, albeit the *Dean* of Gild be an Officer, and Magistrat of the same Burgh, and that the one is not a Judicatory subaltern to the other. But the *Lords* Found, that an Inferior Judge might Transfer that Decreet, which was given in his own Court; for that Transferring was but a preparation to the Execution thereof, and he might Execut his own Decreet, and therefore Transfer the samen; and consequently the Transferring by the Provost and Baillies of that Decreet, which was given by them, in their own Court, was sustained. *Hay* Clerk. *Vid. March* 26. 1624 *Liddel.*

Dowglas contra *Kellie*, *July* 22. 1631.

SIr *Robert Dowglas* being Infeft in the Lands of *Spot*, by the King's *Majesty*, with the Heretable Office of Chamberlain and Bailliary of the Lands and Lordship of *Dumbar*, and having Conveened Mr. *William Kellie*, Possessor and Heretor of the Lands of *East-barns*, and others within the Lordship, to Answer to his Court. The said Mr. *William* intents Action and Declarator for Exemption, that he ought to be free of Compearance, and acknowledging of these Courts, in respect that he is Infeft *cum curiis* in his Lands, and his Author Sir *John Ramsay*, who was thereafter Earl of *Huldernesse*, long before this Right of Bailliary granted to Sir *Robert Dowglas*; Which Infeftment was granted for great and seen Causes, and worthy Services done by the said Sir *John*, to the King's *Majesty*, so Found by the Estates of Parliament, and upon Dissolution of these Lands from the rest of the Lordship of *Dumbar*; Which Infeftment being so granted, *Cum Tenentibus*, *tenandriis*, *curiis & eorum exitibus*; and for payment of a Red-Rose Blensch holding, only must exeem the said Heretors of the saids Lands, succeeding in the said Sir *John's* Right, and acquired by the said Mr. *William Kellie*, by consent of the King and Council, from all Servitude, and Compearing in any Courts of any Bailliarie; Constitut since his saids Authors Rights, and the said Right of Bailliary, ought only to extend to such Lands of the said Lordship, as payes yearly Rent to the King, and to such Persons as payes Feu-Farm, and their Tennents, and not to his Lands, which are given in Blensch-holding, with Freedom from all Service, and for so worthy Causes; Likeas he being conveened before by Sir *Archibald Dowglas*, as Baillie of the said Lordship, who is Author to the said Sir *Robert*, he raised a Summons of Exemption, upon this same Reason, which was Found Relevant by the *Lords*, and Proven, and he was Exeemed in all time-coming, from his, or any such Courts, which Decreet stands un-reduced. The *Lords* notwithstanding assoilzied from this Summons, and Reasons thereof, and Found the said Mr. *William* subject to thir Courts of Bailliary, and Found, that the King could not be prejudged by this Infeftment, bearing *cum curiis*: But that he might thereafter lawfully constitute a Baillie within that Lordship, who might have Jurisdiction and Power, to hold Courts upon the Heretors and Possessors of any Lands within that Lordship; and that the Dissolution of the Pursuers Lands, which Dissolution made

them ceaſe to be of the King's Property, but not to be of that Lordſhip, Exeemed not the Heretors thereof, from Compearing, and Anſwering to the King's Courts, and the Baillie Courts, created by the King, notwithſtanding of the Tenor, and Holding foreſaid, expreſt in the ſaid Infeftment; which Right of Bailliary was Found to extend thereto, and not only to theſe, who were Feu-Farmers, and payed Rent to the King: For ſeing the Infeſtment foreſaid could not exeem the Purſuer from the Sheriff-Court, no more from this Baillie-Court; By the which Bailliary, the King had diſmembred the ſaids Lands, which before were ſubject to the Sheriff-Courts, and ſeverally had erected the Bailliary foreſaid, and granted thereto the Juriſdiction over this Lordſhip: But the *Lords* thought, that the Purſuer could be no otherwiſe ſubject to Anſwer in theſe Baillie-Courts, than before this Bailliary, he could be ſubject to Anſwer the Sheriff-Courts, and no further; and for the ſaid Decreet of Exemption, the *Lords* Found, ſeing it was given, the Defender not Compearing, that it could not prejudge the Party here in this Proceſs, ſeing the King's *Advocat*, for the King's Intereſt Compeared, and defended the King's Right, granted to the Defender of the Bailliary, which by the 14 *Act Parl.* 1609. Providing, that any Omiſſion of preceeding Officers ſhould not prejudge the King, but the Succeeding Officer may oppone thereto, and the ſame ought to be received, by way of Exception, or Reply; and therefore he Alledged, that the *Decreet* foreſaid ought not to be Reſpected againſt the King's Right, granted to this *Defender*, and which, in reſpect of the ſaid Act, the Lords Found not prejudged by the foreſaid Decreet, wherein the King's *Majeſty*, nor his Officers, were not called; and albeit they had been, yet His *Majeſty* could not have been prejudged thereby. Actor. *Stuart.* Alter. *Advocatus* & *Nicolſon. Gibſon* Clerk The like done, *March* 1. 1632. where L *Balnamoon*, as Baillie to the Earl of *Angus*, in the *Regality* of *Abernethy*, It was Found, that no Vaſſal, but they that were Inſeft by Ward holding, or they who by the condition of their Infeftments are Rentallers, who ſicklike, by the Clauſe of their Rentals, were ſubject thereto, were holden to Compear at the Head-Courts of the Bailliary. And no others of other Holding, and that an Unlaw of a Baillie of Regality, for the Vaſſals not Compearing at the Head-Courts, could not exceed 10 pounds, as was Found and Noted, *Decem.* 6. 1628. Sheriff of *Nithiſdale.* The like done *Feb.* 17. 1632. E. *Mar. Gibſon* Clerk, in a Bailliary granted by the Biſhop of *Glaſgow*, in Lands holden of the Biſhop. *Vid. March* 12. 1630. Biſhop of *Aberdeen*; Idem *March* 3. 1630. Lo. *Lorn.*

Crighton contra Lo. *Air, July* 26. 1631.

THe deceaſt *Edward* Lo. *Sanquhair* having Set a Tack of the Lands of *Glenarie* to umquhile *Nicol Crighton*, and to his Heirs and Succeſſors for 5 years, and after that ſpace for other 5 years, and ſo forth from 5 years to 5 years for ever, for payment of a certain Duty therein contained, which the ſaid Lord obliged him and his Heirs, to warrand to the ſaid *Nicol* and his Heirs, and that they ſhould never be Removed therefrom. The Viſcount of *Air* having obtained Decreet of Removing againſt *Matthew Crighton*, being Heir to the Tacks-man, Purſues the Viſcount as Heir to the Lord, Setter of the Tack, to warrand the ſame; and he Alledging the Tack to be preſcribed, and ſo that no Action could be granted thereon, there having interveened more than 50 years ſince the date thereof. And ſecondly, Alledging, that the Tack was null, becauſe it had no time of Iſh, but was Set for ever, and ſo not of the nature of a Tack: Both theſe Alledgances were *Repelled*, becauſe the Preſcription was Found could not have place, ſeing the Purſuer and his Predeceſſors bruiked ever the Lands Libelled by vertue thereof, while lately within thir two years or thereby, that they were then diſtreſſed by the ſaid Decreet of Removing, ſince

since which time the Warrandice could only be counted to take beginning to prescrive. And sicklike the Tack was sustained, to produce Warrandice against the Heir of the Setter, albeit it was Set without a Term of Ish, seing the Heir might not object the same, albeit the Singular Successor might have opponed the same, which was Found not competent to the Heir; for the Tack was Set to the Receiver and his Heirs for ever, & the Setter had thereby obliged him & his Heirs never to Remove the Receiver nor his Heirs. Actor. *Stuart.* Alter. *Nicolson.* *Scot* Clerk. This Cause was Called in *November* 1631, and the Parties ordained to be heard upon this Poynt, but they agreed amongst themselves.

The *Messengers* contra the *Lyon*, *Eodem die.*

THe *Messengers* Pursuing the *Lyon*, to hear him Decerned to hold his Courts in the Tolbooth of *Edinburgh*, and to be discharged to conveen them, and hold his Courts in private Houses, and also to be discharged to hinder them to Elect their own Box-masters to be nominat by them, for keeping of the Box, containing the charitable Supply, to be made by them and their Brethren, for help of decayed Messengers, their Wives and Children, and other such pious uses; seing it was their own voluntar Charity, which they might only appoint to be kept by such, as they pleased to nominat themselves, and wherein no other had interest to intermedle; for otherways it might make that good intention and charitable work to cease. The *Lords* Found, that the *Lyon* might conveen the Messengers in any place before him, to answer in any privat House, the place being specially designed by him in the Copy of the Summons and Execution, to the which, and where he should Summon them to compear; and that he was not holden to hold all his Courts against them in the Tolbooth of *Edinburgh*, seing his Predecessors *Lyons* hath been in use to hold their Courts in their Clerks Chamber. And this was Found, albeit some of the *Lords* were of opinion, that no Judge could hold Courts, nor sit to do any Judicial Deed in privat places, but in the place publickly destinat to sit and Judge: And also the *Lords* Found, that albeit the Box of the Messengers was appointed for their voluntar charitable help of their decayed Brethren, yet that the *Lyon* had Right to Over-see the imployment thereof; and therefore Found, that the Messengers might Leit and Choose any six of their number to be Box-masters, of whom the same being presented to the *Lyon*, he might choose any two he pleased to keep the said Box; and which they Found due to be done by the *Lyon*, albeit the Box proceeded from their voluntar charity. *Scot* Clerk.

Maxwell contra L: *Earlstoun*, *Eodem die.*

ALexander *Maxwell* as Assigney to *Katharine Glendinning*, Pursuing umquhile *Gordon* of *Earlstoun* in the year 1626. for intrometting with certain Sheep pertaining to the Cedent, the intromission being in *anno* 1604, and the Pursuit not Intented till 1626, as said is; and the Defender being dead, the Action is transferred in his Son and Heir, and the Profit of the Goods was also craved since his Fathers Intromission: In which Action (being a wrongous Intromission, and wherein no Spuilzie was craved, nor could not be, not being Pursued *debito tempore* within three years.) The *Lords* Found, that no Profits could be granted, and that the Pursuer in wrongous Intromission had no Action therefore, but Declared that they would consider of the Parties Interest at the advising of the Process, after Probation Deduced and Renounced. Actor. *Cunninghame.* Alter. *Nicolson*, *Mowat* & *Gilmor.* *Scot* Clerk. *Vid.* 6 *December* 1631. Betwixt these Parties. 17 *Decemb.* 1631. Lo. *Lowdoun.*

Bishop of the *Isles* contra *Schaw* and others, *Eodem die.*

IN a Reduction of a Tack of the Teind-Fishes of the *Isles*, Set to the Defenders by umquhile *Thomas* Bishop of the *Isles*, upon thir two Reasons, *viz.*

Firſt, becauſe the Biſhop Setter of the Tack, had no power to Set the ſame, in ſo far as the Biſhop of the *Iſles*, immediat Predeceſſor to the Biſhop, Setter of the Tack controverted, had Set another Tack of the ſame Teind-Fiſhes to other perſons, which Tack was not yet expired the time of the Setting of the Tack Libelled, neither is yet expired, and ſo the Tack is Set *a non habente poteſtatem*, and ought therefore to be Reduced; It being Alledged, that this Reaſon was not Relevant at this Biſhops inſtance, and that he had no intereſt upon this reaſon to *Reduce* the Tack Libelled, ſeing the ſamine was clothed, and is yet clothed with preſent and continual Poſſeſſion, ſince the Setting thereof; and that the prior Alledged Tacks-man to the other Biſhop, who only might have intereſt to quarrel the Defenders Tack upon that reaſon, compeared not to quarrel the ſame. The *Lords* Found nevertheleſs that this Biſhop had intereſt upon this reaſon to quarrel the Tack, and Found this *Reaſon* Relevant, and ſuſtained his intereſt, and ſo it was found by this Deciſion, that the ſucceeding Biſhop could not Set a Tack of any thing, whereof his Predeceſſor had Set a Tack of before, which was ſtanding then un-expired; and that the Succeſſor, albeit the Party quarrelled not the ſame, had intereſt to Reduce upon ſuch Reaſons. The ſecond Reaſon of Reduction, was diminution of the Rental, becauſe by the ſaid prior Tack, the Biſhop had Set the ſame for payment of a Merk for ilk Laſt of Teind-Fiſhes that ſhould be taken; and this Tack bore only the Duty of 100 merks for all. This was Found no diminution, ſeing there was no conſtant Rental Libelled, ever to have been of theſe Teind-Fiſhes, which had taken effect; for this uncertainty of *Duty* in the firſt Tack, *viz.* of a Merk for ilk Laſt that ſhould happen to be taken, was not ſuch a definite ſpecial Rentalled Duty, as might make it appear to be a diminution, when the Duty ſhould be thereafter appointed to be 100 merks; for it might happened, that there ſhould not have been one 100 Laſt of Fiſhes taken, *quo caſu* it could not be a Diminution of the Rentalled Duty, ſeing there was no ſpecial certain determinat Duty, for which the ſaids Fiſhes were Rentalled before; and the Tack being further quarrelled, becauſe the ſame wanted a ſufficient number of the Chapter preſcribed by the Act of Parliament, to the Biſhoprick of the *Iſles*, (which is an un-printed Act) for one of the Chapter had not Subſcribed as a Conſenter, but as a Witneſs, and ſome others were not of the Chapter, albeit they had Subſcribed as of the Chapter; for ſome others had ſerved the Cures and Charges of thoſe Kirks, the Miniſters whereof by the ſaid Act of Parliament were appointed to be of the Chapter, and theſe Conſenters had not ſerved that Charge, and ſo were not to be reſpected as of the Chapter. The *Lords* Aſſoilzies from this Reaſon, and Found that the Subſcription of that perſon as Witneſs, who was of the Chapter, was as ſufficient as if he had expreſly conſented; and alſo ſuſtained the conſent of the reſt, ſeing the Defenders offered to prove, that they were ever repute to be of the Chapter, and that they had thir many years by-paſt conſented to Tacks, and other Deeds done of the Biſhoprick, as theſe perſons who had the Charge of theſe Benefices, required by the Act of Parliament, and as of the Chapter of that Biſhoprick; and albeit others ſerved the Cure, yet ſeing the Purſuer offered not to prove, that others were provided to theſe Benefices, by lawful Proviſions, therefore the Exception againſt the Reaſon was ſuſtained to maintain the Tacks. Actor. *Stuart.* Alter. *Nicolſon* & *Mowat. Gibſon* Clerk. *Vid.* For this part of the conſent 12 *Feb.* 1633. *Forbes*, & 19 *July* 1625. *Walwood.*

Naper contra Mr. *John Rollock*, *July* 27. 1631.

Robert Naper Purſuing Reduction of a Horning Execute againſt him, at the inſtance of a Woman called *Lyell*, to whom the ſaid *Robert* was bound in a Sum contained in his Bond given to her, and whereto the ſaid Mr. *John* was

was made Assigney, upon this Reason, because the Letters of Horning were Raised and Execute at her instance, she then having an Husband, and the Letters not Raised at his instance, nor the Charges Used and Execute at his instance. This Reason was found Relevant, and the Exception Repelled, bearing, that the Wife might seek her own proper Debt, justly pertaining to her self, without necessity to raise the Letters at the Husbands instance, seing the Husband did never oppone thereto, so long as they lived together: Likeas now the Wife being dead, and the Husband being living, consented to the Chargers Letters, and Denounciation following upon the same, which was not respected, but the Horning Reduced for the Reason foresaid.

Douglass contra *Lawder, Novemb.* 25. 1631.

IN a Contract betwixt *Robert Lawder* of *Edringtoun*, and Sir *James Douglass*, the said *Robert* set a Tack of some Lands to Sir *James*, upon which Contract he being Charged, to fulfil the Heads thereof, the said *Robert* Suspends, Alledging, that the Contract was Consigned in a Depositars hands, to remain undelivered, while Sir *James* should fulfil the Conditions agreed, whereon he condescended, and if he did not, the Contract to cease; and Sir *James Douglass* having recovered the same, by some unorderly means, the Conditions not being keeped, no Execution ought to follow at his Instance thereon; which he offered to prove by the Depositar, and other Trysters betwixt the Parties, the time of the Contract: And the Charger Alledging, that this was only probable by Writ, or Oath of Party, seing the Alledgance tended to destroy the Contract, which being a mutual Contract, and now in his Possession, could not be taken away by the Depositions of any persons, except the Parties own Declaration, for the reason of Suspension tending to destroy the Contract, could not otherways be Admissable, albeit sometime the Depositars Oath might be taken, to approve a Security before it was delivered, when the Party and Depositar are Pursued for Delivery thereof; but where the Writ is in the Parties own hands, and the Alledgance tends to destroy the same, it were an unheard of preparative to admit that manner of Probation to destroy it; Notwithstanding whereof, the *Lords* Found no necessity to Restrict the Probation to the Parties Oath; but Found, that *ante omnia*, they would Examine the Depositar and Trysters *ex officio*, and thereafter they would consider of the Reason. Actor. *Dunlop.* Alter. *Hay* Clerk. *Vid. January* 22. 1624. *Lermonth*, and the cases there. *March* 4. 1631. *Hay.*

Mr *William Oliphant* contra E. *Marishal, Novemb.* 26. 1631.

THE Earl granting Bond to Mr. *William*, obliging him to Infeft him in some Oxen-gates of his Lands, of the Barony of *Strabrock*, and to Subscribe a Charter of Feu-holding, for a certain Duty therein mentioned, to be payed therefore allanerly, which was also under Reversion; and the Earl being Charged to give him such a Feu Charter, and Suspending upon production of a Feu Charter, bearing *payment of the Feu Duty conveened on, nomine feudifirmæ tantum pro omni alio onere, demanda, vel servitio, quod de dictis terris exigi poterit.* The *Lords* Found, that this Charter satisfied not the Tenor of the Bond, because the Charter bore not a Clause therein, *cum molendinis & multuris*, whereby if the same had been insert, the Receiver might be free of all Astriction, and Thirlage of the Lands, Disponed to the Miln of that Barony, whereof the saids Lands Disponed were a part: For the *Lords* Found, that the Bond being of this Tenor, obliging the maker thereof to Dispone the Lands in Feu, to be holden of him for payment of a Feu-duty allanerly, albeit the Bond bore no more, neither made mention of Miln nor Multures, but only proported *the payment of the foresaid Feu-duty therefore allanerly*, ought to import Freedom and Liberation of the Feuar from all Thirlage of these Lands, to that Miln of the Barony, either already

made before the Bond, or to be made any time after the same; and that, that word (*allanerly*) ought to produce that effect; and therefore that the Charter ought to be made with that Clause foresaid, which may Import the same: Neither was it respected, what the Suspender Alledged, that this Charter was conform to the Bond in every Point, and that it was not now time to Disput, what that Clause anent the payment of the Feu-duty only, appointed to be payed, should import; for seing the Charter bore that Clause, it was free to him to claim the Extent and Effect of that Clause, when any question should arise upon any Deed, contrair or different therefrom, which at this time was not proper to be *A*gitated; notwithstanding whereof the *Lords* Found, that he ought to have Liberation from all Thirlage, and that the Charter ought to bear, a Disposition of the Lands *cum molendinis & multuris*, albeit the Bond bore nothing of Thirlage, Milns, nor Multures, but only that word, (*allanerly*) as said is. *Actor. Præsens.* Alter. *Nicolson. Hay* Clerk. *Vid. July* 13. 1632. E. *Mortoun*, and the Cases there.

L. *Conheath* contra L. *Earlstoun*, *Decemb.* 6. 1631.

Conheath being made *A*ssigney by *Katharine Glendinning*, to certain Goods taken from her by *Earlstoun*, and Pursuing *Earlstoun* for wrongous Intromission therewith, as is noted, *July* 26. 1631. The *D*efender *A*lledging, that the Cedent was *R*ebel at the same time of the making of that *A*ssignation, and stood *R*ebel before the making thereof, and continued *R*ebel yet unrelaxed, so that the *A*ssignation is null, specially seing he has obtained the Gift of her Escheat, and Declarator thereupon, which must Liberat him, and prefer him to the *A*ssigney. The *Lords* Found the Exception *R*elevant, notwithstanding the *A*ssignation bore, *to be made for onerous Causes*, and that the same was made, before the Gift of the Cedents Escheat was Disponed, and before the Intenting of any Declarator thereupon; and albeit the Declarator thereon was recovered since the Intenting of this Pursuit, at the *A*ssigneys Instance, in respect whereof he *R*eplyed, that the Exception ought to be *R*epelled; yet the *A*ssigney before the Gift was granted, was ever *in bona fide* to take this *A*ssignation, notwithstanding of the *R*ebellion, which was never made publick, and whereof the *A*ssigney was probably ignorant: notwithstanding whereof the Donatar was preferred, and the Exception Sustained. *Partibus ut illic comparentibus. Vid. ult January* 1628. L. *Cleghorn*, and the Cases there. *Feb.* 26. 1633. L. *Conheath. Decemb.* 18. 1629. L. *Capringtoun. Feb.* 2. 1632. *Lindsay. March* 8. 1631. *Macdowgal.*

Grierson contra *Gordon* of *Troquhen*, *Decemb.* 7. 1631.

IN a *R*edemption of Lands conform to a *R*eversion, The Defender *A*lledging, that no Declarator could be granted, before the Money, whereupon the Lands were *R*edeemable, with the *A*nnualrent of all years since the Consignation, were Exhibite to be given unto the Defender. *A*nd the Pursuer *R*eplying, that he could not be compelled thereto, seing he had Consigned the same according to his *R*eversion, in a *R*esponsal mans hand, within the Paroch, as the *R*eversion appointed, where it has ever since remained, unuplifted by the Pursuer, and he has no power to compel the Depositar to Exhibite the same. The *Lords* Found, that the Declarator of *R*edemption should proceed, but before Extracting of Sentence, the Money should be Exhibit to be given up to the Defender; and therefore they ordained Letters to be direct at the Pursuers Instance, and also at the *D*efenders, if he please to Charge the Depositar to Exhibite the same, to the effect foresaid: But the *Lords* Found the Pursuer was not astricted in any *A*nnualrent for the Money since the Consignation, seing it was never *A*lledged, that the Pursuer had uplifted the same, or made any use thereof, but that it has lyen still in the Depositars hands ever since. *Actor. Miller.* Alter. *Gilmor. Hay* Clerk. *Vid. July* 25. 1623. contra *January* 21. 1632. betwixt these same parties.

L. *Cleish*

L. *Cleish* contra *Sanders*, *Eodem die.*

IN a *Redemption*, whereof the *Reversion* was produced, brydled in the *Date*, and the *Defender Alledging*, that no Process could be granted, while the same were discovered, that he might see the Date, and whole Contents thereof: And the *Pursuer Replying*, that the Defender should *Declare*, if he had any Discharge thereof, and should condescend on the *Date* of the *Discharge*, which being done *simul & semel*, he was content that the *Date* of his *Reversion* should be opened, as is usually done in Improbations. The *Lords* Found, that no Process could be granted while the *Date* of the *Reversion* were seen, and that the *Defender* could not be compelled to *Declare*, if he had a *Discharge* thereof, or condescend on the *Date* thereof, but that he might do the same, or not, as he himself pleased; for there was no more reason that the *Date* of his *Reversion* should be keeped obscure, nor that the *Date* of any other Obligation, or Writ, whereupon *Actions* are founded, should be so keeped, and the case of Improbation is not alike, where the Pursuer calls for the *Defenders* Writs ofttimes *ad fundandam litem*, and therefore there is required mutual condescending. Actor. *Nicolson*. Alter. *Stuart*. *Hay* Clerk. *Vid. Decemb.* 8. 1631. betwixt these parties.

Scarlet contra *Paterson*, *Eodem die.*

Helen Scarlet having Comprysed from *John Paterson*, a Tenement, the Legal whereof was expyred, before which Comprysing, the Lands were burdened with an *Annualrent*, which exhausted almost the yearly Profit of the Land, and Mails thereof: She, after *Decease* of her *Debitor*, and expyring of the Legal, Pursues the Son of her *Debitor*, as behaving himself as Heir to him, to make payment to her of the Sum, for which she had Comprysed; and he *Alledging*, that by the foresaid Comprysing, she must be repute satisfied, and cannot return to seek personal Execution for that *Debt*, whereof she was satisfied by the Comprysing, the Legal whereof was expyred, and so she was become Heretrix of the Land, unless she would *Renunce*, and *Resign* her Comprysing and Infeftment *habili modo*. And the Pursuer *Replying* that the Comprysing cannot hinder the Creditor to seek payment, and to use all competent means to obtain payment, besides the Comprysing, seing the same is unprofitable to her, through the burdening of the said anterior Infeftment of Annualrent, and she needs not Renunce the Comprysing, but being pay'd she shall Renounce the same: And the Defender Duplying, that albeit the Annualrent should exhaust the whole Mails of the Land, (which was not granted) yet the Heretable Right thereof subsisting in the Compryser's person, was more worth than the whole Debt of the Comprysing. The *Lords* Found the Comprysing, although expired, hindred not the Compryser to Pursue the Heir of her Debitor for that same Debt; and that notwithstanding thereof, she might obtain, and seek Action and Sentence against him therefore, to the effect she might Compryse the Heirs Lands, and Poynd his Goods for her satisfaction; But Found, that so long as the said Comprysing stood Unrenounced by the Pursuer, whatever Sentence she should recover against the Heir, that she should not be heard to use any personal Execution thereupon, either of Caption, Warding, or Horning, but only Poynding of his Goods, or Apprysing of his Lands, as said is. Actor. *Cunninghame* and *Scot*. Alter. *Stuart* and *Primrose*. *Scot* Clerk. *Vid. penult January* 1628. *Meldrum*. *December* 16. 1632. *Chisholm*.

L. *Cleish* contra *Sanders*, *December* 8. 1631.

IN the above-written Cause of the Laird of *Cleish*, the *Lords* Sustained the Premonition, made by the Procurator, Constitute to that effect, albeit at that time of the using of the Order, the Procuratory was not Read and shown, without which had been done, the Defender Alledged, the Order could not be Found lawfully used, which was Repelled: seing now the Constituent affirmed the Procuratory,

curatory, and Deed done by vertue thereof, and when the Premonition was made, the Party enquired not for the Procuratory, nor desired to see it, or to have it Read: *Item*, a Service of one as Heir to him, to whom the Reversion was granted, being Deduced before the Baillie of the Regality of *Dumfermling*, was Sustained, albeit it was not Retoured to the Chancellary, seing it was Deduced before the Baillie of the Regality of *Dumfermling*, who has their own Chappel, and so it was not necessary to be Retoured to the King's Chancellary. *Partibus ut supra comparentibus, Vid. February* 7. 1628. *Maxwel. July* 2. 1622, *L. Thornidykes.*

Grahame contra *Stirling*, *Decemb.* 9. 1631.

John Grahame being Donatar to the Escheat of umquhile *John Grahame* of *Callendar*, and after general Declarator, having also obtained Sentence of special Declarator against *Stirling*, Relict of the said umquhile Rebel, and her second Spouse for his Interest, for certain particulars, for which she was conveened, as intrometted with by her, after her Husbands Decease, and which were referred to her Oath, and whereupon she was holden as confest upon her not compearance, after Citation; which Decreet being Suspended, and craved to be Reduced, because it was given against her, she then being dwelling out of the Countrey with her Husband and Family, *animo remanendi*, and she being only Cited first by the principal Summons upon threescore days, referring it to her Oath, and by the second Summons upon 15 dayes, by Warrand of the *Lords* Deliverance, whereby it came never to her knowledge, she therefore desired to be Reponed to the giving of her Oath: And the Donatar Replying, that her absence out of the Countrey could not excuse her, seing she was Summoned upon 60 dayes first, and then by the *Lords* Deliverance on 15 dayes, conform to the Practick and Form of Citations, used against all Parties out of the Countrey, against which to Repone Parties, It were to invert the whole Order of Process, and Parties Securities. The *Lords* not the less Reponed the Woman to her Oath, as if Decreet had not been given, & albeit she was not present, they assigned a day to Exhibit her to give her Oath, & Declared what she Deponed, should not work against the Husband, but against her self and her Goods, in case she survived her Husband, and against the Husband after her Decease, in case he survived her, in so far as he should be found to meddle with any thing pertaining to her, after her Decease, and wherein he should be Debitor to her, and no further; and if the Party pleased to choose any other manner of Probation, rather than her Oath, The *Lords* granted the Election to the Donatar, to choose the same as he pleased in his option. Actor. *Nicolson* & *Chaip.* Alter. *Stuart* & *Craig. Gibson* Clerk.

Bennet contra *Bennet*, *December* 10. 1631.

John Turnbul of *Barnhil* having Wodset to *Raguel Bennet*, some Lands under Reversion, and within the space of a year, or less after the Date of this Reversion, having Impignorat to the said *Raguel* another peice Land, for a Sum lent to the said *John Turnbul*, conform to his Bond, granted thereon to the said *Raguel*; in which Bond, the said *John Turnbul* was obliged not to use any Order of Redemption, of the prior Wodset Land, by vertue of the said Reversion thereof, except he also Redeemed the other Land, Impignorat, as said is, and that no Redemption or Order should be lawful, except both the Lands were Redeemed *simul*, and both the Sums Consigned: The said *John Turnbul* uses an Order for Redeeming of the said first Land, conform to the Reversion granted thereon; and after the using of the Order diverse years, he makes Mr. *William Bennet* Assigney to the said Order and Reversion, and Dispones his Right to him, whereupon the Assigney Intenting Declarator of Redemption upon that Order. The Defender compearing, proponed his Defence upon the said Bond, Alledging the Order foresaid not to be lawful, in respect of the foresaid Provision,

on,

on, contained in the said Bond, which he Alledged, as it would have been competent to have excluded the Cedent, who granted the Bond with the said Provision, if he were insisting on that Order, so it behoved to meet the Assigney made to that same Order: And the Pursuer Replying, that this was a Paction, *extra corpus Reversionis*, done long after the Reversion, and so cannot be repute a part thereof, and which could not have been obtruded against the granter of the Bond, who in the using of the Order of Redemption, was obliged to nothing, but to that which was within the body of his Reversion, and which he has punctually fulfilled; far less can it be opponed against the Pursuer, who is Assigney, and Singular Successor; seing also his Author is Responsal to fulfil his Bond. The *Lords* Found, seing the Assigney who Pursued, Insisted to have Declarator upon that Order, which was used, not by himself, but by his Author, who granted the Bond excepted on, that therefore the same which might have been proponed against the user of the Order, was competent against the Assigney thereto, for the Order being used by the Cedent, the Excipient quarrelled the Order, that that Order could not be Sustained, who ever was the person user thereof, in which case the Pursuer Insisting on that Order, he is not to be repute a Singular Successor; whereas if he as Assigney to the Reversion, had used an Order at his own Instance, *eo casu* the Bond would not have met him: Therefore the *Lords* Found, that before any Sentence of Declarator should be prononunced upon that Order, that the Redeemer by vertue thereof should Consign in the Clerks hands, to be given up to the Defender, that Sum contained in the said last Bond; But they Sustained the Order as lawful, and would not put the Party to use any new Order of Redemption, the Sum being Consigned. Actor. *Mowat*. Alter. *Taylor*. *Gibson* Clerk. *Vid. June* 25. 1643. The Lady *Sinclar* and the cases there.

In this same Process of *Bennet* against *Bennet*, the Defender proponing another Exception on another Bond, by which, he to whom the Reversion is granted, after the Reversion, granted him to have received 280 pounds from the Defender, and obliged him to repay the same at *Whitsunday* 1618. otherwayes he Renunces the Reversion, and the said Sum not being payed, and the Order used by him, before the same *Whitsunday*; Therefore as this would have Excluded the user of the Order, so should it exclude the Pursuer, insisting upon that Order: Likeas he Alledged, that by the Contract of Wodset Lybelled, it was Provided, that no Redemption should be used, while he were Refounded of all his Costs, Skaiths, and Expenses, Deburst by him, in *Turnbuls* default, and he had Deburst the Sum of 280. pounds, *Ergo* the same should yet at least be repayed: The *Lords* Found, that seing the Renunciation of the Reversion was not Registrat, conform to the Act of Parliament, that the Alledgance thereupon could not be opponed against the Pursuer, who is a Singular Successor, albeit it might have militat against the Maker of the Bond: And also Repelled the other Alledgance, seing the Sum of the Bond being borrowed Money, could not come under the Clause of the Contract, anent the Expenses, which was of another nature: And also Found, that it could not be proponed against this Assigney. *Partibus ut supra.*

Laird of *Whittingham* contra Lady, *December* 13. 1631.

THe L. *Whittingham* being Provided to the Fee of the Lands of *Whittingham*, after the decease of the Laird his Author, Pursues the Lady Relict of his said Author for Contravention, she being Charged and Bound to him in Law-borrows, upon this Deed, that after her Husbands decease, she had Tilled a part of the Lands, wherein he was Infeft, as said is. And she Alledging, that that was no Deed whereupon Contravention could be Inferred, seing there was no Violence qualified, to have been committed by her, and the Tilling of that Land, wherein her Husband died Possessor, and was in Possession

sion ever before, could not cause her to incur the pain of breach of Law-borrows, specially seing she was Infeft in Conjunct-Fee, in the Lands lybelled, which lay *in confinio* with that Piece thereof, which is Alledged to have been Tilled by her, and Alledged pertaining to the Pursuer; so that there being no Declarator, nor tryal taken, whether this Land pertained to the Pursuer, or was comprehended in her Infeftment, before that was Declared, she could not be found to have Contraveened, by doing the Deed foresaid. And the Pursuer Replying, that the Tilling of the Pursuers Ground was enough to infer Contravention, whereto she had no Right, albeit there was no Violence otherwise done by her, specially seing after she had tilled, the Pursuer having sowed the Land so Tilled up by her, she did thereafter sow the Land over again; and where she Excepts upon her Infeftment of Conjunct-fee, the same cannot furnish her a Right to the Lands lybelled, because her Infeftment cannot extend to the same, seing the Contract of Marriage, which is the Warrand of her Infeftment, Provides her to be Infeft in the Lands, at that time Set in Aiker-dale. And true it is, that this Piece of these Lands, for tilling whereof this Contravention is craved, was not then set out in Aikers, but was laboured by the Lairds of *Whittingham* at that time, and since with their own Goods, and in Manfing, & another Part thereof was then set out in Aikers, which she possesses, as her Conjunct-fee, and cannot claim the other Part of these Lands, specially seing in this same Contract of Marriage, her Husband is obliged to make her Conjunct-fee Lands worth 18 Chalders Victual; and the same are worth, and were then worth that yearly Duty, by and besides this Piece Land now Controverted. The Defender Duplying, that her Contract of Marriage must extend to all thir Lands lybelled, albeit the words thereof bear her to be appointed, *To be Infeft in the saids Lands*, with this Adjection, *viz. Presently Set out in Aikers*, for this is no Taxative Clause, to restrict her Right to that Part thereof, which was then so Set out in Aikers, and to exclude her from the rest, if any was in Manfing, unset out in Aikers; seing she is appointed to be Infeft in these Lands indefinitely and totally, and is not restricted to any Part thereof, by any limiting word, which would have been set down expresly, if it had been so intended by some word, to import the same, as *allanerly, or in so far as it was Set out in Aikers*, and the Words adjected, are only Demonstrative, and not Restrictive, as the Pursuer would mean; And further to remove all Doubt, she offers to prove that all the Lands, and particularly this Parcel lybelled, was Set out in Aikers, the time of the said Contract; and so she being to maintain her Infeftment and Contract of Marriage, ought to be preferred in Probation, and she desires the *Lords*, in respect there is no Violence, and that her Infeftment is now drawn in question, to grant Commission to some of their Number to visit this Ground, and to take such competent Tryal, as the verity may be known, and Reported to the *Lords*, before this Cause were Decided; The *Lords* refused the Visitation, and Found that they would presently Decide this Cause, and they Repelled the Exception and Duply, in respect of the Reply, which they admitted to the Pursuers Probation; for they sustained the Deed of Contravention, albeit there was no Violence lybelled, and Found these Words of the Contract, *viz. presently set out in Aikers*, not to be Demonstrative, but to be Taxative, and to restrict her Security to so much of these Lands, as were set out in Aikers, and not to any further. And where the Lady Duplyed, that all was then set out in Aikers. The *Lords* preferred the Pursuer Replying, that a part thereof, was then in the Masters hands laboured in Manfing. Actor. *Stuart* & *Craig*. Alter. *Nicolson* & *Mowat*. *Gibson* Clerk. *Vid. Feb.* 13 1634. *Murray*.

Doctor

Doctor *Kincaid* contra *Alexander Aikenhead*, *Decem.* 15. 1631.

IN a Reduction at the *Doctors* Instance of a Decreet Arbitral, Pronounced betwixt them, by Mr. *Thomas Sydserff*, and Mr. *John Maxwell*, upon this Reason, that the same was *ultra vires Compromissi*, and that there was no Claims given in; for the Submission was of all Controversies, Questions, Sums of Money betwixt the Parties, and what either of them should do to others thereanent; And the Judges has Decerned the *Doctor* to Renounce a Bond of Five Hundred Merks, being an Heretable *Bond* owing to him, by the said *Alexander Aikenhead*; and also to Renounce an Heretable Infeftment of an Annualrent of Fiftie pounds, which he had out of the said *Alexander* his Land in *Edinburgh*, Redeemable for five hundereth pounds; which two particulars were never questioned betwixt the Parties, nor mentioned, especially in the Submission, neither can they be drawn under any word of the Submission, being of the Tenor foresaid. The Defender *Alledged*, that the Decreet was good, notwithstanding of the Reason, and not *ultra vires*; in respect the Submission gave them power to Decern anent all Questions, and Sums Controverted betwixt the Parties; So that albeit the Arbitrators had never taken in any Claims from the Parties, yet upon their own Conscience, they might have Found, that any of the Parties should pay to others such Sums, as they should think Reasonable, that being within the power of the Submission; and as they might do that, so they might very well Decern in place thereof, the one to quite an Heretable Right to the other, in stead of payment of Moneys. *And* the Pursuer Replying, that albeit the Submission gave the Judges Power to Decern Sums of Money, as they should find due in *Reason*, yet under that Clause they had no power to Decern upon Heretable Rights, which were neither Submitted, nor any Pretext or Claim made thereto by the Party, to whom the Judge has Decerned the Heretable Right to be Renounced. The *Lords* Assoilzied from the Reasons of *Reduction*, and Found, albeit the Submission was of the Tenor foresaid, yet that the saids Judges had not Decerned *ultra vires compromissi*, albeit they had Decerned upon the Heretable Securities of Lands, as the same bears; but sustained the Decreet, and Found the not giving in of Claims, albeit it had been so, no cause to infringe the Decreet. Actor. *Advocatus* & *Mowat*. Alter. *Stuart* & *Burnet*. *Gibson* Clerk.

Lo. *Loudoun* contra L. *Capringtoun*, *December* 17. 1631.

LO. *Loudoun* as *Assigney* to *John Baird*, to whom the L. *Capringtoun* had *Set* a Tack of his Coal-heugh of for the space of a year, for payment of Twelve Hundreth pounds yearly, and payment of some yearly Loads of Coals to his House, Pursuing Action of Ejection of the said *John Baird*, before the Expiring of the year of his Tack: *And Capringtoun* Alledging, that this Cause was Prescribed, this Action not being Intented within three years, after the committing of the Alledged Deed; And the Pursuer Replying, that the Cedent had *Debito tempore* Intented Action of Ejection, before the Baillie of *Kile Stuart*, wherein the Defender had Compeared by his Procurator, and produced Horning, to debar the *Pursuer ab agendo*, which he referred to the Defenders Oath now present; and the *Defender* Duplying, that the Reply was not *Relevantly* qualified this way, to be proven by the Defenders Oath; for nothing can interrupt Prescription, but a Summons and lawful Citation: for his Compearance, to debar the Pursuer by Horning, could be no Impediment, if the *Party* had been, or should be Relaxt, to quarrel the Citation, as not lawfully made, or to Improve the same, or to Alledge, that he was not subject to that Jurisdiction, to which he was Summoned; so that to prove by his Oath, that his Procurator produced Horning against the Pursuer in that Cause, without Production of the Process, could be no Interruption. *And* the Pursuer Triplying, that

he referred to his Oath, that the Cedent had Intented Action *debito tempore*, & that he knew the Citation, and thereupon gave Direction to his Procurator to Compear in the Court, and produce Horning against him, which if he confess, was sufficient to Interrupt Prescription, howsoever now that Process was miscarried, and not extant. And in respect thereof he Answered, that he could never Improve that Citation, so acknowledged by himself: notwithstanding of the which Answer and Reply, The *Lords* Found the Exception Relevant, and that the Action was Prescribed, and that the Interruption was not Relevantly qualified by the Parties Compearance, as said is, albeit it were granted; seing nevertheless thereof he might quarrel the Lawfulness, or Truth of the Execution; and therefore the Pursuer passing from the Violent Action of the Ejection, he retrinched the same, to crave Re-possession of the Coal, and of the common and ordinary Profites thereof, and sought no Violent Profites. And the Defender Alledging, that seing the Ejection was Prescribed, as is Found; therefore he could not seek to be Re-possest now, specially there being five years expired since the Alledged time of the Tack of the Coal, Set to the Pursuer, was run out, so that where there was no Ejection, there could be no *Re*-possession, neither could there be any Profites sought, where the *Deed* of Violent *Ejection* was Prescribed; but the most that the Tacksman could seek in Law, was the damnage sustained by the Pursuer for not bruiking, during the time of his Tack. And the Pursuer Replying, that albeit the Action for Ejection, was Prescribed, yet this Action to be restored against the Deed unorderly done, and for the ordinar Profits, is not Prescribed, albeit the Violent Profites cannot be sought. The *Lords* Found where the Ejection was Prescribed, specially after so long a time, after the yearly Tack was out-run, that there could be no Action, for restoring of the Pursuer, or his Cedent, to the Possession of the Coal again, neither had he Action for the Profites; But the *Lords* Found, that he had good Action to Pursue for Damnage and Interest, sustained by the Cedent, since the time of his Dis-possession, to the time that the Tack was out-run; for the which Damnage they sustained this same Pursuit, seing the Pursuer acclaimed the Profites, as the Damnage foresaid, and which the *Lords* Found he might do. Actor, *Nicolson* & *Stuart*. Alter. *Advocatus* & *Cunningham*. *Gibson* Clerk. *Vid. July* 26. 1631. *Maxwell*.

Auchterlonie contra *Oliphant*, *Eodem die*.

ONe *Auchterlonie* left Tutor Testamentar to *John Oliphant* a Pupil, by the Pupils Father, Pursues *Lawrence Oliphant*, who had Married the Bairns Mother, for delivery of the Pupill to him; And the Defender Alledging, that he was Tutor-Dative lawfully made, and gifted five years or thereby, before this Pursuit, & had made faith, and found Caution, and was in possession of the Bairn conform thereto, and had sensyne administrat the Bairns affairs, so that the Pursuer ceasing to accept the office, or to administrat now by the space of seven years after the decease of the Testator, he could not now be heard as Tutor to seek the Bairn, but he as Tutor-Dative ought to be preferred to him, and continue in his Possession; the *Lords* notwithstanding of the Cessation of the Tutor Testamentar, during the foresaid space of 7 or 8 years, and the *Defenders* Tutory Dative and Possession, Repelled the Alledgance, and Found, that the Pupill should be delivered to the Tutor Testamentar, against whom they Found, that there was no Prescription for his Cessation, *quia quamdiu speratur Tutor Testamentarius, non est locus Dativo, neque legitimo*; and the rather this was Found, and the Tutors Testamentars Cessation found excusable, because the Minor in the mean time had no prejudice in his Person, Lands, and Goods, and that his Mother was living, except within the space of half an year, before the Pursuer Intented this Action; so that she having the whole, or most part of

of his Estate, and of her Motherly affection intertaining her Son, he ceased to trouble her while she lived, and after her decease he Intented this Action against the Defender her Husband. Actor. Alter. *Cheap. Hay* Clerk. *Vid.* 6 *July* 1627. *Campbell* and the Cases there. 22 *Feb.* 1628. *Colquhoun.* 29 *June* 1632. *Irwing.* 15 *July* 1631. *Grant.*

Meinzies of *Castlehill* contra L. *Cashogill*, *December* 20. 1631.

THe deceast *Meinzies* of *Castlehill* being Cautioner for *Douglass* of *Cashogill*, and for his relief of the Sums payed by him as Cautioner, Compriſing *Cashogill's* Lands; after the said Cautioner his decease, his Heir Pursues the said Principal for payment of this Sum, and Annualrent thereof, ay and while the re-payment, and of all years since his Fathers *Decease*; and the Defender Alledging, that this *Relief* pertained not to the Heir of the Cautioner, seing it was sought, not by vertue of the Compriſing Deduced by the Cautioner in his lifetime, but by a Personal Pursuit, at the instance of the Heir of the Cautioner; which Relief so sought was not proper to him, but pertained to the Defuncts Executors, who Pursued not therefore. The *Lords* Repelled this Alledgance, seing they Found this Defender, who was Debitor, could not competently propone the same, and the Executor distrest him not; Likeas the Heir offered Caution to warrand him at the Executors hands, which the *Lords* Found sufficient. *Actor. Burnet.* Alter. *Scot* Clerk. *Vid.* 10 *July* 1629. *Wardlaw* and the Cases there. 18 *March* 1630. *Hart.*

Mr. *Andrew Skeen* contra *Betson*, *January* 17. 1632.

ONe *Betson* being Tennent to Mr. *Andrew Skeen*, and having granted to him an Obligation for some Money, as the price of certain Farms, which he was unable to pay to him; and having thereafter left his Ground, the said *Betson* thereafter falling Heir to a Burgels of *Burnt-Island*, who had both Moveable Heirship, and Tenements pertaining to him Heretably in *Burnt-Island*; he Disponed all his Right, both of the Lands and Moveables, to his Son in Law, whereby he was unable to pay the said Mr. *Andrew Skeens* Debt, having no other Goods nor Gear, but that which fell to him that way: And the said Mr. *Andrew* having Arrested the said Heirship, in the hands of the Relict of the said person, to whom he was become Heir, and desiring the same to be made forth-coming to him for his said Debt; and the other Party Assigney claiming the same, by vertue of his said Disposition, which preceeded the Arrestment, which he Alledged was lawful to give him Right thereto, seing the Cedent was never Bankrupt, neither had the said other Creditor done any Diligence, to recover payment from him, whereby he might not lawfully take the said Disposition, albeit it had been granted to him *ex donatione*, and without Causes onerous, whereas the same bore to be for Sums of Money; for the Maker was neither Bankrupt, nor at the Horn, nor ever Charged to make payment, so that the Act of Dyvoury could not be obtruded conveniently in this case; & the other Party obtruded competently the said Act of Dyvory, which he Alledged to militate for him against this Party, seing the Disponer, albeit he was not at the Horn, yet he, by making of the said Disposition, was become in effect a Bankrupt, for thereby he hath denuded himself of all which he had: for he had neither Goods nor Gear whatsoever, but only that which he had fallen to as Heir, and which fell under the said Disposition, and which was made by him to his own Son in Law, and so *inter conjunctas personas*, and without any Cause onerous; at least if any Cause onerous was, it was not equivalent to that which was Disponed, and therefore it could not agree with Conscience that he should bruik that which was Disponed (except in so far as might proportion his Debt, if any truly might be qualified) and that the other Party should want all. The *Lords*

Found, albeit the Debitor was not Rebel, nor yet that the Creditor Mr. *Andrew Skeen* had used any Diligence against him before this Disposition, yet seing the Disposition extended to all the Goods he had, and that the other Party, to whom the Disposition was made, could not Alledge, nor Qualifie, that the said Debitor was answerable in Goods or Lands to pay the other Parties Debt, beside the Gear Disponed, that they would only sustain the said Disposition, to give the Acquirer thereof preference *pro tanto*, in so far as he should shew the same to be acquired for a just and onerous Cause; according whereto it was Found, that he should be preferred to the other Creditor, and not for any further; seing in the over-plus the *Lords* Found, that the other Creditor ought to be answered, and the said *Disposition* ought not to prejudge him therein: seing the same in the overplus was to be repute as a Donation, or a Deed done without competency of a just price, which in reason ought not to be permitted as lawfully done in prejudice of a lawful Creditor, by the Debitor, who was otherways unable to pay his Debt; in prejudice whereof he could not gift his Goods *in totum*, and thereby become irresponsal in hurt of other Creditors, albeit not doing Diligence before that Donation: And the *Lords* Found, the onerous Cause for which the *Disposition* foresaid was made, might be proven by the Acquirers own Oath; which the *Lords* Found enough to prove, seing the Disposition it self proported to be made for Sums of Money. Actor. *Baird.* Alter. *Burnet.* *Scot* Clerk. *Vid.* 22 *January* 1630. *Hoppringle.* 6 *March* 1632. L. *Garthland.* 2 *Feb.* 1632. *Jack.*

E. *Lauderdale* contra L. *Waterstoun*, *Eodem die.*

IN a Removing, the Defender defending with a Tack Set by the Earl's Author to the Excipient's Father, to whom he is Heir, for Terms to run; and the Pursuer Replying, that his Father after this Tack had accepted a posterior Tack, of shorter space, and years of endurance, and for a less Duty, and which less Duty was ever since only payed. Likeas in the Pursuers Court, holden by his Baillie of those Lands, the Defender hath Declared Judicially, that he bruiked by vertue of this last Tack, and Renounced all other Tacks, as the Act of Court Subscribed by the Clerk of Court bears. And the *Defender* Duplying, that the Alledged paying of a less *Duty*, cannot be found any passing from the first Tack, which bore a greater Duty, seing he nor his Father never payed a greater Duty before the Alledged Setting of this posterior Tack; so that the paying of that Duty cannot be ascribed to this Alledged posterior *Tack*, which they ever only payed before the said Alledged posterior Tack was *in rerum natura*; for their Master who was Author to this Pursuer, was never in use to take any more from them than this less Duty. And further, this is not probable by Witnesses, but by Writ, or Oath of *Party*, to take away his Tack, which is perfected by way of Contract, and Subscribed by both *Parties*; whereas his Alledged posterior Minut is not a perfected *Tack*, but a Minut for a Tack, and is only Subscribed by the Party Setter, and not by the Tacks-man, who Subscribed the first Tack by way of Contract, and which posterior Minut never came in the hands of this Excipient or his Father, to whom it is Alledged to be Set, nor ever saw it, nor was it ever called in question in the Fathers lifetime, Acquirer of the Tack, albeit the prior Tack was Set to the Father & his Heirs, this Defender being his eldest Son and Heir, to whom the *Right* of that Tack could only belong; whereas that Alledged second Tack, or Minut of Tack, was conceived in favours of the said Defunct, and a Son of the second Marriage, whereby this Excipient could never have Right thereto, and so could not be accepted by him, and whereby it is altogether improbable that the Excipient in the Pursuers Court Renounced his prior Tack, and Declared that he bruiked by the said last Tack, whereas *per rerum naturam* he could not bruik thereby, he having

ing no Right thereto, as said is, and which cannot be taken away but by Writ, or Oath of Party; and as to the Confession contained in the Act of Court, the same being only Subscribed by the Alledged Court-Clerk, and not by the Party, or a Nottar for him, cannot be of force to derogat to his prior Right, which cannot be taken away, but either by Oath of Party, or as great a solemnity in Writ, as is the Writ, which is desired to be everted thereby; notwithstanding whereof the Exception was Repelled, and the Reply Found Relevant, and admitted to Probation. *Actor. Stuart.* Alter. *Burnet. Scot* Clerk. *Vid.* 21 *Decembr* 1638. L. *Craigmillar.*

Haliburton contra *Monteith, January* 20. 1632.

ONe *Blair* being Debitor to *William Davidson*, in the Sum of 200 pounds, whereupon having served Inhibition against *Blair*, both at the Cross of *Dalkeith*, which is the Head Burgh of the Regality where the said *Blair* had a Tenement of Land and Houses, and also at the Mercat Cross of *Edinburgh*, being the Head Burgh of the Sheriffdom, within the which the Debitor dwelt for the time; and this Tenement of *Dalkeith* being thereafter Compriſed by *Jean Haliburton*, another of *Blairs* Creditors, after the Inhibition, *Monteith* as Assigney to *Davidsons* Right and Inhibition, Pursues Reduction of that Compriſing and Infeftment, as done after Inhibition; Wherein the *Lords* sustained Reduction at this Creditor and Assigneys instance, upon the said simple moveable Obligation and Inhibition, albeit the Pursuer was not Infeft, nor had any real Right, and albeit it tended to Reduce the Infeftment and Compriſing in the *Defenders* person. And the *Lords* Found, upon another Alledgance, the Inhibition null, because the Tenement Compriſed lay within the Regality of *Dalkeith*; and albeit the Inhibition was Execute at *Dalkeith* Cross, yet the same was not Regiſtrat in the Clerks Books of that Regality, as the Defender *Alledged* it ought to have been, and is provided by Act of *Parliament* 1581. *And* which Act, and the Solemnities thereby appointed for Executions within Sheriffdoms, is renewed and required within Stewartries and Regalities, by Act of Parliament 1597. And which the *Lords* Found ought to have been Regiſtrat; neither Found they it enough that it was Execute there, not being Regiſtrat there; Neither was it sufficient that the Pursuer Replyed, that it was *Regiſtrat* in the Sheriff-Court-Books of *Edinburgh*, within the which the Party *Prohibite* dwelt for the time, *viz.* within the Town of *Edinburgh*, seing he dwelt not then within the Regality; and contended, that the Act of Parliament 1597. required no such Regiſtration, where the Parties dwelt not within the *Regalities*; which Reply was not respected, but the Exception sustained, and the Inhibition found null. Actor. *Hart.* Alter. *Vid.* 30 *January* 1629. *Stirling.*

Greirson contra *Gordon, January* 21. 1632.

IN a Redemption, whereof mention is made *December* 7. 1631. the Depoſitar being Charged, as was ordained and mentioned the day foresaid, to exhibite the Money Consigned, by Letters under pain of Rebellion, and he not having obeyed, by Exhibiting the same, nor yet Suspending the Charge, the Party desiring the *Lords* to direct Letters simply against him, to Denounce him; and it being controverted, if such Letters should be direct so summarly, the Depoſitar not being Called in this Proceſs of Redemption, nor any Compearance made for him, but that it was called in doubt, if Horning could so proceed, except that he had been conveened and pursued in some ordinar *Action* for the Money, where it might be lawfully tryed if the Money was really Consigned, and remained still in his hand; for as the Inſtrument of the Alledged Consignation thereof was not enough, nor could not be found enough, if he being pursued for the Money, denyed the Consigning thereof, so it could not be found

enough now, he not being heard nor pursued *via ordinaria*, to be put to the Horn for the same; Notwithstanding whereof the *Lords* Found, that Letters of Horning should be direct to Denounce him, seing he Suspended not the first Charge; albeit it was granted only *incidenter* against him in an Action of Redemption, wherein he was not called, nor was a Party. *Vid.* 14 *January* 1630. *Lawrie.*

Helen Scarlet contra *John Paterson*, *January* 25. 1632.

Scarlet Pursuing *Paterson*, as Heir to his Father, by intromission with his Fathers Heirship Goods, and so thereby Behaving himself as Heir, to pay his Fathers Debts; he Compearing, and Proponing an Exception, that his Intromission was only by vertue of a Warrand of the *Lords*, directed at his instance, craving Inventar to be made, that the Goods might be made forth-coming to all Parties having interest (and that his medling with the same upon Inventar, as use is, should not make him Heir) according whereunto Inventar was made by the Judge and Clerk, to whom the *Lords* committed the same, and which Goods were yet extant in that same estate. And the Pursuer Replying, that the Defender had intrometted with a Bible, and an Hagbut and Sword, and a Cod, & a Board-Cloth and Curtains of a Bed, and had used them on this manner, *viz.* by reading on the Bible, and retention in his House of the Hagbut and Sword, and by lying on the Cod, and hanging the Curtains about the Bed, and by spreading of the Cloth upon the Board; which particulars were not given up by the Defender, at the making of the Inventar, but were fraudulently left out thereof, at least must be presumed to have been done fraudulently, seing they are not in the Inventar, and the Defender having used them as said is (whereby he cannot pretend ignorance) he must thereby be lyable as Heir. The *Lords* Found this Reply Relevant, albeit it was not Alledged, that the Defender had Disponed or Sold any of the foresaid particulars: And albeit the Party Alledged, that the retaining of the same, and using of the same, as was qualified, could not thereby infer him to be lyable to all his Fathers Creditors, seing the omission to put them up in Inventar, might have proceeded from either his ignorance, or that the same were not then in his sight, or that the Clerk might possibly have forgotten to Write them up; and they were of so little avail, and of so small importance, that thereby he cannot be made Heir, specially seing he offered to make them all forth-coming, and that they were extant in as good estate as they were the time of the Inventar; which Duply was not sustained, but they Found, that they would advert diligently to the Probation anent the Deeds of the Defenders Intromission, and to the very particulars which should be proven to have been intrometted with by him, and the manner thereof, and would thereafter consider at the advising of the Process, if thereby the Defender should be found in reason lyable as Heir, or not, to which time the *Lords* superceeded to declare, if he shall be thereby Heir, or not, and what it shall import. Actor. *Cunninghame.* Alter. *Stuart. Scot* Clerk. *Vid.* 15 *January* 1630. *Cleghorn.*

Kaidislie contra *Lawder* of *Whitslaid*, *Eodem die.*

THe said *Lawder* being conveened as Heir to his Father, for payment of a Sum contained in his Fathers Bond, and for verifying him to be Heir, a Decreet being produced, given at another Parties instance against the same Defender, being then Pursued as Heir to his Father; by the which Decreet he is Decerned as Heir to him, being found proven by production of a Seasin given to him, as Heir to his Father; which Decreet proceeding upon the said Probation, the *Lords* Found, proved this Party Heir in this Process, and that there was no necessity to produce the Seasin, nor no other Writ, except the said Decreet,

creet, to prove him Heir, so long as the said Decreet stood unreduced: albeit the Defender Alledged, that that Decreet was given against him, being absent, and for not Compearance, and that *deducta in uno processu non probant in alio, & res inter alios Judicata aliis non nocet*, and that if the Party will produce the Seasin used in the other Process, he will offer to improve the same; for he Alledged, that there was never such a Seasin; which Alledgance was Repelled, in respect of the said Decreet, which behoved to prove, ay and while the same were Reduced, and the manner whereby it was there found proven taken away. Actor. *Hart.* Alter, *Burnet.* *Gibson* Clerk. *Vid.* 26 *January* 1631. L. *Gadgirth*, 11 *June* 1631. *Tailzifer.*

Hamilton contra *Dundonnald*, *Eodem die.*

THe Pursuer being Seased upon a Precept of *Clare-constat*, expreset in the Seasin, bearing to be granted to the Pursuer by the Master of *Abercorn* as Commissioner, and having power for that effect by the Earl of *Abercorn* his Brother; and the Defender Alledging, that no Process should be granted on that Seasin so proporting, while the Warrand thereof were produced, seing it was but the assertion of a Nottar, which ought not to have Faith uninstructed, no more than if any Stranger, not having Right, had given such a Precept. And the Pursuer Replying, that this Seasin was sufficient, without further production against this Defender, who was a naked Tennent, having no Right at all. The *Lords* Found no Process, while the Precept, and Commission whereto the Seasin was relative, were produced. *Gibson* Clerk. *Vid.* 27 *January* 1632. La. *Montquhanie.*

La. *Montquhanie* contra Commissar of St. *Andrews*, *January* 27. 1632.

THe Lady Pursues the Commissar for payment of the Duties of the Lands wherein she was Infeft, and which were uplifted by him divers years since her Husbands decease, wherein she produced only for her Title her Seasin, bearing to be given conform to her Contract of Marriage; against which the Commissar, who was Infeft by a publick Infeftment, proceeding on a Comprising from her umquhile Husband, Alledged that the same wanted an *Adminicle*, and being only *assertio Nottarii*, that it proceeded on her Contract of Marriage, could not be a Title to sustain this Pursuit against him, except the Warrand thereof were produced. The *Lords* took the Pursuers Oath, if the Contract were in her hands, which she declared she had not; and in respect thereof, the *Lords* Found no necessity to produce the Contract, nor the Adminicle of the Seasin presently, but sustained the Seasin for a Title in this Pursuit, and ordained the Pursuer to prove her Reply *cum processu*, that there was such a Contract as the Seasin proported, which was the Warrand of the Seasin, which the *Lords* admitted to be proven, and that the Process ought not in the mean time to delay while that were proven, but Ordained the Cause to proceed. Actor. *Nicolson* & *Pitcairn.* Alter. *Stuart* & *Lermonth.* *Scot* Clerk. *Vide supra* 25 *January* 1632. *Hamilton.*

Grant contra *Grant*, *January* 28. 1632.

A Contravention being Pursued by him, to whom Caution of Law-borrows was found, against the Party who was bound, and found the Caution, upon this Deed of the break of Law-borrows, *viz.* because the *Defender* had taken from the Pursuers Tennent (who occupyed his Lands Set to him by the Pursuer for a yearly Duty, to be payed therefore) two Horses. The *Lords* Found not this Deed committed against the Tennent, to be such a Fact, whereupon breach of Law-borrows, and Contravention might be sought, at the instance of the Tennents Master, seing neither was there any special Charge Execute by the Tennent, nor any Caution found, specially to that Tennent, neither

ther was the Tennent Pursuer of this Action of Contravention, to whom the wrong was alledged done, but only the Master of the Ground: for the Tennent had his own Action unprejudged by this Pursuit, or any thing following thereupon against the Party, for Spuilzie, or wrongous Intromission with his Horses: And it was not qualified that the Fact done to the Tennent had any relation to the Master, to whom the Law-borrows was found, or that the said wrong was done, in regard of the Master, or for that quarrel; but if it had been true, as it was also denyed by the Defender, yet it might have been done upon some other respect, and for some privat Question betwixt the Defender and that Tennent, wherein the Master could have no interest; so that the Pursuer not qualifying how that Deed Libelled did more particularly concern himself, than by that respect (*viz.* becaus it was done to his Tennent.) The *Lords* Found, that they would not grant Contravention therefore, specially seing the Tennents self complained not; neither was it respected, that the Pursuer Replyed upon the Tenor of the Act, which bore, *That the Pursuer, his Men, Tennents, and Servants, should be harmless in their Bodies, Lands, Goods and Gear,* &c. seing that was only the common Style of Court in such Acts, and the Tennents as said is, complained not. Actor. *Burnet.* Alter. *Gibson. Hay* Clerk. *Vid.* 9 *Feb.* 1633. *Lindsay.*

Rediek contra *Maxwel* of *Logan, January ultimo* 1632.

A Debitor being Incarcerat by Letters of Caption, at the Instance of the Assigney, Constitute by the Creditor to the Bond, Registrat at the Creditors Instance, after the Registration whereof, he having made this Assignation to this Pursuer, the Pursuer as Assigney having raised Letters of Horning, and Denunced him, and thereafter by Caption, having caused Incarcerat the Rebel, who Escaping, the Magistrat being Conveened for the Debt; he Alledged, that no Process ought to be granted, while the Assignation were produced. And the Pursuer Replying, that he needed not produce the Assignation to this Defender now, who was not conveened *Nisi ex suo delicto,* for he was not here in pursuing his Cause upon his Titles, as if he were *in ingressu litis,* where he might be urged to produce the same; but it was enough to him to show that his Debitor was Rebel, and that he was apprehended, and that the Defender is become lyable to the Debt, for the Debitors escape: Notwithstanding of the which Answer, the *Lords* Found no Process while the Assignation were produced. *Gibson* Clerk.

Ferguson contra *Mckenzie, Eodem die.*

TWo Compryfers being Infeft in their Debitors Lands, and the Tennent who was Pursued by them both for the Duties thereof, Suspending upon Double-poynding, wherein the two Compryfers being heard to Dispute upon their Rights, Infeftments and Compryfings, and who of them should be preferred to other. The *Lords* preferred the first Compryfer, albeit last Infeft by the Superior, to the last Compryfer, who was first Infeft, although he who was first Infeft, was by vertue of his Right in Possession of the Lands; in respect not only he, who was last Infeft, was the first Compryfer, but also by reason that before this other Parties Compryfing was perfected, he had Charged the Superior to Infeft him, and which Charges he had Suspended, and thereby delayed the Charger, and gave in the mean time a voluntar Charter to the posterior Compryfer; which voluntar Deed done after the first Compryfers Diligence, & no Possession obtained thereon, The *Lords* Found, ought not to prejudge the prior Compryfers lawful Diligence, but they drew back his said posterior Infeftment, to the time of his said prior Diligence, and preferred him therein to the other Party. *Gibson* Clerk. *Vid. Decemb.* 1. 1632. L. *Kilkerran.*

Miller

Miller contra *Nisbet* & *Lindsay*, *Eodem die.*

ONe *Miller* having obtained Sentence against *Nisbet* his Father's Relict, as Executrix to him, to pay a Sum owing to him by his Fathers Bond, and thereafter Arresting in *Gavin Lindsay*'s hand, a Sum adebted to his Father, and Pursuing to make it forthcoming. The Defender Alledging, that before the Arrestment, the Relict, Executrix foresaid, had recovered Sentence against him, to pay to her the Sum; which Decreet, she also before the Arrestment, Assigned to a Creditor of her Husbands, and which Creditor also, intimat the Assignation to him before the Arrestment, and to which Assigney he has payed the Debt acclaimed from him. This Alledgance was Sustained, albeit the payment was made, and the Discharge Reported after the Arrestment In respect of the other Titles before the Arrestment, which were a Warrand to the payment thereof: And the *Lords* Found it not needful to the Party to Alledge, that he payed the whole Debt owing by him to the said Assigney, to whom the Pursuer Alledged, that there was not so much owing, as was owing by him to the Defunct, & therefore that the superplus should be made forthcoming to him for his Debt, which was Found not necessary; for it was Found that the Assigney might Discharge the Debt for nothing, if he pleased, and that the Debitor was thereby Liberat, and that the Pursuer, or any other of the Defuncts Creditors, had Action safe to them against the Executrix, and her Cautioner found in the Testament thereanent, to Pursue them therefore; But that as the Executrix Discharge did Liberat the Debitor after Sentence, and that she remained thereafter comptable, so her Assigneys Discharge did the same, without necessity to Alledge total payment, seing the whole was totally Assigned, as said is. *Vid. March* 8. 1632 L. *Luss.*

Johnston contra *Howison*, *Eodem die.*

JAnet *Johnston* in the Contract of Marriage of her Daughter with *Robert Howison*, Spouse Contracted to her Daughter, being obliged to pay to *Robert Howison* elder, Father to the Husband, and to the said *Robert* younger, the Husband, the Sum of a Thousand Merks in Tocher, (for these were the words of the Contract) *That she was obliged to pay it to* Robert Howison *elder, and to* Robert Howison *younger his Son, to the effect it might be imployed upon Land, or Annualrent, to the said Husband and Wife, and the longest liver of them two, and the Bairns of that Marriage, with another Thousand Merks to be payed by* Robert Howison *elder, and added to the former Sum by him, the time of the paying of the said Tocher*; And by a posterior Clause of the Contract, of this Tenor, *The said* Robert *elder, was obliged that after his Receipt of the said Sum from the said* Janet, *he should imploy the same with his own other Sum, in manner foresaid*; Upon which Contract *Robert Howison* elder, having Charged her to pay, she Suspends, that she had payed the same to *Robert* younger, and had Reported his Discharge; Which payment was really made in presence of *Robert* elder, he then not opponing thereto; and the Father opponing the Contract, by the meaning of the words whereof, it is evident, that the payment should be made to him, seing he is obliged to imploy it, so that the Sons Discharge could not free her, in respect that he has spent it, whereas it should have been imployed. The *Lords* Found the Reason Relevant and Proven, and that the Payment made to the Son in presence of the Father, who Opponed not against the Payment at the making thereof, as he might, if he had disallowed the same, to be as sufficient, as if he had consented expresly thereto. *Hay* Clerk.

Bartilmo contra *Hassington*, *February* 2. 1632.

IN a Contract of Marriage betwixt *Eupham Hassington* and *Patrick Bartilmo*, the Wife Dispones her Goods and Debts, condescended on in the Contract, to her said future Husband, to be bruiked by him and her, and the longest liver

of them two, during their Lifetime, and after their decease to their Heirs, Executors and Assigneyes; and the Wife dieing, no Bairns being begotten betwixt them being on Life, her Executors Pursues the Debitors of the Wife, Assigned in the foresaid Contract, for Payment thereof; wherein the Husband Compearing Alledged, that the Goods pertained to him, in respect of the Disposition contained in the Contract; and the Pursuer Answering, that he could have no Right, but to his own just half thereof, in respect the Clause of the Contract bore, *the same to be disponed to their Heirs*; which being in the Plural Number, imports Division betwixt the Husband's Heirs, and the Wif's; and the Husband Answering, that the Clause must be Interpret only of the Husbands Heirs *tanquam Personæ dignioris*, and which agrees with the Practiques of this Countrey, even as in Heretable Rights, and Infeftments granted to the Husband and Wife in Conjunct-fee, or Liferent, and to their Heirs Heretably, there is no Division *hoc casu* betwixt their Heirs, where they have no Bairns; but the Fee only belongs to the Husbands Heirs. The *Lords* Found, in respect of the foresaid Tenor of the Contract, that the Husband ought to have his Liferent of the whole Goods contained in the Contract, which were extant the time of the Wifes decease, and that he had no Right to the Property, but only to the just equal half thereof, and that the other half pertained to the Wifes Executors and Heirs; for the Contract being of Goods and Gear, and Sums of Money, and bearing the Word, (*their Heirs*) ought not to be respected, as in Infeftments of Heretable Rights, which by that Clause imports no Division, but pertains only to the Husbands Heirs, except it be more specially Provided otherwise; for albeit the Husband, while the Wife lived, might have Assigned and Disponed the whole Goods, yet after her decease, he had no more Right than he had Provided himself unto, by the said Contract. *Hay* Clerk. *Vid.* June 17. 1631. *Chapman*, and the other Cases there.

Lindsay contra *Nisbet*, *Eodem die:*

IN a special Declarator of *Helen Nisbets* Escheat, it was Alledged, that the particular Goods Assigned by the Rebel, to *David Nisbet* her Brother Defender, could not come under this Declarator; because the Assignation was made by her thereof, albeit after her Rebellion, yet before the General Declarator, which was lawful for him to accept. The *Lords* Repelled the Alledgance, seing the Assignation could not prejudge the King's Donatar, being made after Rebellion, albeit the Assigney had not been a Conjunct Person, specially seing there was no lawful, nor Onerous Cause qualified, which might sustain the Assignation; for if it were sustained, the King and his Donatar would ever be prejudged by such Deeds, albeit no Creditor proponed the same. *Vid. Feb.* 26. 1633. & *Decem.* 6. 1631. L. *Conheath.*

Jack contra *Gray*, *Eodem die*,

ONe *Gray* having Compriſed *James Liddels* House in *Leith*, and being Infeft thereupon, and *Jack* Son in Law to the said *James*, having received a Disposition of that House from him, for satisfying of his Tocher, owing by her Contract of Marriage, and being also Infeft conform thereto, they contending for the Mails of the House, *Jack* was preferred, albeit the Disposition made to him, was Alledged to be made by a Bankrupt, *& inter Conjunctas Personas*, and *in meditatione fugæ*, *& in momento fugæ*, the maker having fled to *Berwick* on the morrow after the making thereof: And *Gray* had denounced the Land to be Compriſed, before he was Infeft on his Disposition; Likeas he had served Inhibition, and was Infeft, and had Arrested the Duties of the House, which Diligence so done, ought to give him preference; at least to make him equal with the other Party, who is a Conjunct Person, and has only Acquired a voluntar

luntar Right, without doing of any Diligence at all, and was conscious of the Bankrupts flight; and there being also but a few days betwixt his Infeftment, acquired on Diligence, and the other Parties voluntarly purchased, as said is: notwithstanding whereof *Jack* was preferred, in respect of his Infeftment, depending on an *Disposition*, made for a preceeding lawful Onerous Cause; seing the said *Disposition* preceeded any *Diligence*, done against the common Author by *Gray*; for the *Lords* Found, it was lawful to a Just *Creditor*, to take either Payment, or lawful Security, in place of Payment of his true Debt, from any Person, albeit becoming Bankrupt, *etiam in ipsa fuga*; where there was no preceeding Inhibition, nor Diligence before the doing thereof, used by any Concreditor; and therefore *Gray's* Alledgance was Repelled. *Vid. Jan.* 17. 1632. Mr. *Andrew Skeen*, and the Cases there.

Muirhead contra *Lichton*, *Eodem die.*

ONe *Lichton* Daughter to umquhile *Lichton*, being Served and Retoured Heir to him, and as Heir obtaining Sentence, for Delivery of her Fathers Writs, and Evidents of his Lands to her; and another being Served and Retoured as Son and Heir to the Defunct, claiming the same, the Daughter craving preference, in respect of her Sentence; and that she Alledged, that her Brother was dead before the Service, and his Alledged Service was Deduced only by a Procurator, whose Procuratory was only Subscribed by a supposititious Person, who was not truly that Person, but called himself that Man. The *Lords* notwithstanding of the *Decreet*, Found, that if the Sons Procurators would offer to prove, that the Son was on Life, the time of the Service of him to be Heir, which was Deduced by an Alledged *Procuratory*, and not by his own Personal Compearance, that they would prefer him, that being proven, and admitted the same to their Probation; and Found no necessity to Reduce the Daughters Retour, or Decreet; but Found, that this Tryal should be received in this same place, without necessity of other Process, or of any Reduction. Actor. *Sandilands*. Alter. *Vid.* 16. *Feb.* 1627. Lo. *Colvil*, and the Cases there.

Hume contra *Hume*, *February* 7 1632.

GEorge *Hume* being by Contract, obliged to pay to *Samuel Hume*, two thousand Merks, and the Heir of *Samuel* having Charged one of the two Daughters of umquhile *George*, as Heir to him, to pay the Sum; which being Suspended by that one Daughter, upon this Reason, that she could not be lyable in the whole Sum, being only one of the two Daughters, and Heirs of the Party obliged; and so could not be subject, but in her equal half. And the Charger *Replying*, that she had Succeeded to more through her Fathers decease, than would pay the Debt. The *Lords* Found, that in this *Personal* Pursuit, she could only be lyable to pay her own half, and Found no Process against her but for that half, the other Sister not being called; But the *Lords* Found this Scruple occurring in their Consideration, that if the other Sister should prove Bankrupt, and go to the Horn, for not payment of the other half, and had Disponed all she had acquired by her Father, if *eo casu* the Creditor might return to seek real Execution against that Part of the Defuncts Lands, bruiked by the other Sister, who had payed her own Part, for her other Sisters Part, which sundry of the *Lords* thought might be Found, seing the Creditor was not holden, to acknowledge any Division of the Sisters, made among them; and so long as any of them bruiked any of the Defunct's Lands, or Goods, it behoved to be lyable to his Debt; but this was not Decided, seing the same occurred not to be discussed. And further the *Lords* Found, that albeit there was a Decreet Arbitral, betwixt these two deceast Contracters, after the said Contract, which one of the Parties had acknowledged, by payment of an yearly Dutie

thereby appointed, and so thereby the *Decreet* was Alledged to be Homologat; and that therefore the Heir of him, who had so Homologat it, could not oppon any nullity against the *Decreet*, yet the *Lords* Found, that he might oppon a nullity, seing that partial Homologation made as said is, by an illative qualification, and not directly done, nor bearing to be done, conform to the said Decreet, and not offered to be proven *specifice* to be so done, or offered to be proven by Writ, or Oath, was not sustained, as a Relevant Qualification of Homologation, and the Allegeance founded thereupon was Repelled. Actor. *Craig.* Alter. *Hepburn. Gibson* Clerk. *Vid. Feb.* 15. 1634. *Ore. March* 9. 1637. This Decision was again Found betwixt L. *Lawers* and *Dumbars*, where the three Sisters being conveened as Heirs, it was Found, that one could not be Decerned *in solidum* for all; and that the Sentence could not pass against her, but for her own Part, albeit the Pursuer Replyed, that seing he offered to prove, that the one Sister, against whom he insisted, had Succeeded to more than his Debt acclaimed extended to, which was not respected, but Found, that here they should be Decerned, for their own Proportions; but the *Lords* Reserved to the Pursuer his Action, *de novo* again to pursue *prout de jure*, in case he were debarred from the effect of his Execution, against any of the rest of the Sisters for their Parts, to pursue any of the rest for the whole Debt, upon any ground competent in Law, which might produce that Action. *Item, Vid. July* 3. 1632. *Straiton.*

Lookup contra *Downie*, Eodem die.

IN a Contract of Marriage betwixt *John Morton*, and *Lookup* his Spouse, then a Widow, he being obliged to Infeft her in a Tenement of Land; and before this Contract, he being Debitor to *Alexander Downie*, either of the Parties having done all lawful Diligence, to obtain the Right of this Land, wherein they were equal in Diligence, except that the Defunct was Debitor to *Downie* before the Contract. The *Lords*, notwithstanding of his Priority, albeit that the Contract bore, *No Tocher to be given to the Husband*, neither could any thing be shown in Writ, to Prove that he had received any thing, in Remuneration from the Wife, whereby it was Alledged, that she ought only to be Respected, as another common Creditor, yet preferred her to the Right of the Land, by vertue of the said Contract of Marriage. Actor. *Gibson.* Alter. *Rollock. Scot* Clerk. *Vid. June* 19. 1635. *Walker.*

Laird *Lamington* contra *George Foulis*, *February* 14. 1632.

IN a Contract of Partinary and Society, betwixt *George Foulis*, umquhile Mr. *Robert Foulis*, and *John Muir* of *Annistoun*, being all Ingadged in great Sums, for umquhile *Thomas Foulis*; and for all their Relieffs, having acquired from the said *Thomas*, the Right of the *Lead-mines*, ay and while they were Payed by the said Contract. The saids three Partners appoints *John Muir* to over-see the *Lead-mines*, and Works thereof, and to attend the same, that the Advantage thereof might go in Common to them all, for their Relieff; Thereafter by another Contract, intended and drawn up in Form, betwixt *Lamington* on the one Part, wherein these are made Contracters on the other Part, as a Party, the said *George Foulis*, the said *John Muir*, and the Bairns of the said umquhile Mr. *Robert Foulis*, himself being dead, which Contract is only Subscribed by *Lamington*, and the said *George Foulis*, and the Bairns of the said umquhile Mr *Robert*, and not by *Muir* of *Annistoun*, who is the Third Conjunct Contracter, on the other side; by which Contract *Lamingtoun* obliges him to relieve the saids Three Contracters, of all the Debts foresaid, wherein they were Ingadged, and whereof they were not Relieved, by the Profites of the *Mynes*, the Compt of which Debts, and Relieff, and Intromission was in that Contract, committed by the Parties to certain Friends chosen by them, and who were

were appointed to hear the Compts of the Parties, and to end the same, betwixt and the day set down in the Contract, and the Intromission by the Contract, was Ordained to be tryed by *Annistoun's* own Oath, who had not Subscribed the Contract, nor would stand thereto; and *Lamington* having Charged *George Foulis* upon the Contract, and *George* having intented Reduction thereof, Because it was a Contract, intended to be done by him, and his other two Partners, all making up but one Party Contracter on the other side, and *Annistoun*, the Third Partner and *Socius*, and who was the only Person that could perfect the Contract, and had most Interest therein, seing he was sole Intromettor, and that the Contract bore, *The Intromission to be tryed by his Oath*, had not Subscribed but dissassented, It could not be Obligator against him who had Subscribed, seing without *Annistoun* it could not take effect, & in a Society all must Dissolve, else the Society remains, neither can one of the Partners obtrude another, upon the rest: Attour, that the Friends nominat to try & end the Compts, betwixt and the time Prescribed, had not done the same, which made the Contract become void. The *Lords* Found none of these *Reasons* Relevant, but assoilzied simply therefrom, and *Found* that the Contract ought to have effect against *George Foulis* for his Part, albeit the other Partner should never Subscribe, seing the Partinary might divide, the said *George* being always first relieved by *Lamingtoun*; and albeit the Friends nominat had not ended the Compts, they Found that the Contract was not thereby Dissolved. Actor. *Nicolson* & *Mowat*. Alter. *Advocatus* & *Cunningham*. *Gibson* Clerk.

Aiton contra *Aiton*, *February* 15. 1632.

Margaret Aiton, as Appearand Heir of Line to umquhile Mr. *Andrew Aiton* of *Kinglassie* her Brother, Pursues *Aiton*, half Brother to the Defunct, for Exhibition of the Writs of the saids Lands of *Kinglassie*, wherein the Defunct died Infeft; and the Defender Alledging, that she had no Interest to Pursue this Cause, because the Defunct before his decease had, by a Procuratory of Resignation, whereupon Instruments of Resignation were taken, in the Defuncts own Lifetime, Resigned the saids Lands, for new Infeftment, to be taken to himself, and the Heirs Male to be gotten of his own Body; which failzieing, to his Brother, and the Heirs of his own Body, and to the other Persons, Provided in the said Procuratory of Resignation, whereby the Pursuer was altogether secluded from that Succession, and so she could not call either for Delivery, or Exhibition of the Writs. The *Lords* Repelled the Alledgance against the Exhibition, in respect no Infestment, nor Real Right was exped in the Defuncts Lifetime, nor sincesyne, upon the said Resignation, so that this being an Act begun, but not consummat, The *Lords* Found the Heir of Lyne might crave Production of the Writs, that she might Advise, if she would enter Heir specially in these Lands; and after Production, the *Lords* Reserved this Exception upon the Resignation to be Discussed against the Delivery. Actor. *Barclay*. Alter. *Gibson* Clerk.

Kinnaird contra *Yeaman*, *February* 17. 1632.

IN a Contract of Marriage, betwixt umquhile *David Yeaman*, and *Margaret Kinnaird*, the said *David* is obliged to Imploy two thousand Merks received in Tocher, with other Three thousand Merks of his own, to his said *Spouse* in Liferent, whereupon after his decease his Executors being Charged to imploy the Sum at the Relicts Instance, & to pay to her all the Annualrents thereof, of all Terms since the Husbands decease, which being Suspended, that these Deeds were only Prestable by the Heir, specially anent the paying of Annualrent since the Husbands decease, which they *Alledged* was not Prestable by the Executors, but by the Heir of the Defunct: As also, that since the Contract, the Husband had Infeft the Charger, in some Tenements in *Dundee*, the yearly Mails whereof

ſhould be allowed to her *pro tanto*, in the firſt end of the Proviſion of that Contract. The *Lords* Found, the Executors of the Defunct Subject to the Creditor, as well as the Heir, both to pay the Annualrents, ſince the deceaſe of the Huſband, who was obliged, as alſo to imploy the Principal Sum; and that the Creditor might conveen therefore, either the Heir, or Executors of the Defunct; and therefore, ſeing the Creditor, *viz.* the Relict, had choſen the Executors. The *Lords* Found them lyable thereto, according to the free Goods of the Teſtament, which was ſo Found, albeit the Executors were the Defuncts Bairns, and ſo who ought in Law to have not only the naked Office, as Strangers, who are Subject to Compt, and has only a naked Adminiſtration, but they being Bairns has alſo benefit by the Executory, and which they Alledged, ought not to be taken from them, by compelling them to pay Heretable Debts, which ſhould affect the Heir, and not to deprive them, not only of the Executry, but of all Bairns Part of Gear for theſe Heretable Debts, which nevertheleſs was Repelled, ſeing the Creditors might ſeek either the Heir, or Executors, without prejudice always to them, to ſeek their Relieff therefore, againſt the Heir, *pront de Jure*. And it being Controverted, if the Executors ſhould ever be holden to Imploy the Money to the Relict again, how often it ſhould happen to be lifted, as the Relict Alledged, ought to be found ſhould be done. The *Lords* Decided not this Poynt, but Ordained the Executors once to Imploy, and when the ſame ſhould happen to be lifted, and that the Queſtion ſhould then ariſe, at the Relicts Inſtance, for the Imployment thereof, they ſhould then conſider thereof: whereby it may appear, that if the *Fee* of the Money pertain to the Heir, and not to the Executor, after the Liferentrix deceaſe, that *eo caſu* the Re-imployment ſhould fall upon the Heir, and not upon the Executors. But the *Lords* Found, that they ought not to be burdened with the Annualrent for the broken Term, ſubſequent to the Defuncts deceaſe; nor for an whole compleat year after that Term, ſeing that *S*pace and Term was given to the Executors, to gather in the Defuncts Goods; for the which Space they were Found not ſubject to pay any Annualrents. Alſo the *Lords* allowed the yearly Rent of the Land, wherein the Wife was Infeft by her Huſband, to be in ſatisfaction of the firſt end of this Imployment now acclaimed *pro tanto*; albeit the ſame bore, *Not to be granted to her for ſatisfaction, nor for the cauſe of this Contract*; But that the Charger Alledged, that the ſaid Infeftment was granted to her, conform to a Bond granted to her, by her Husband, for Infefting her therein, which made no Relation to the *C*ontract; Likeas her Infeftment has no Relation thereto, and ſo the *C*ontract ought to have full effect, notwithſtanding of the Infeftment, which was Repelled: and the ſaid Infeftment, albeit depending on that poſterior Bond, was Found ought to ſatisfie the *C*ontract *pro tanto*. Actor. *Stuart* & *Gibſon*. Alter. *Hay* Clerk. *Vid. Feb.* 24. 1632. betwixt theſe Parties. *July* 19. 1637. L. *Smitoun. Decem.* 7. 1627. *Porteous* and the Caſes there. *July* 22, 1630. *Salmond. Penult July* 1630. L. *Carnouſie. June* 13. 1629. *Inglis. Decem.* 11. 1632. *Shaw. March* 20. 1630. *White.*

L. *Johnſton* contra Captain *Johnſton*, 21 *Feb.* 1632.

IN a *R*emoving, the *D*efender Alledging that he had a Sub-Tack of the Lands Libelled, Set to him by who was Liferent Rentaller, and who was yet living, and which Rental was Set to the *R*entaller, his Heirs, Executors, and Aſſigneys, and by vertue of the Sub-Tack in Poſſeſſion. The Purſuer Replying, that the Rentaller before the Setting of this Sub-Tack, had Diſponed this Rental to the ſame Defender, by vertue of the which Diſpoſition he became in Poſſeſſion of the Lands, and was Poſſeſſor thereof, and of the Profites and *D*uties, a whole year before he acquired the Sub-Tack, by the which *D*iſpoſition the Rental became extinct and null, and ſo can neither defend the Rentaller,

Rentaller, nor Acquirer of the Right thereof, and consequently the same being null, there could no valid *Sub*-Tack be made thereafter, which could defend; even as after the Acquiring of an Infeftment of the Lands of Ward-holding, whereby the benefit of Recognition was Acquired to the Superior, the Receiver of the Ward-right could never thereafter take a Feu-Infeftment, which could validly maintain him against the Superior. And the *Defender Duplying*, that the Disposition could not prejudge him to take a Sub-Tack, after that he knew that the Disposition would not be effectual to him, specially seing he clothes not himself with the Disposition, but with the Sub-Tack, and which he Alledges he might lawfully take, before ever he was called in question for the Right of these Lands, or that the nullity of the Rental was obtruded; for before the Rental was quarrelled as null, by reason of the Alledged Disponing thereof, he might lawfully Renounce that Right, and take a better Right, *viz.* the Sub-Tack, and which he having taken *debito tempore*, as said is, before any question was moved for these Lands, the same should defend him in this Judgment. possessor; and he cannot be so summarly Removed, except the Rental were *Reduced* for that cause. The *Lords* Repelled the said Alledgance and Duply, and admitted the Reply, to take away the Rental in this same Judgment, without Reduction; for the *Lords* Found this Disposition made before the Sub-Tack, albeit not quarrelled before the Sub-Tack, having taken effect by one years Possession before the Sub-Tack, was sufficient to make the Rental become null, and consequently that the Rentaller could not validly Set thereafter a Sub-Tack thereof. Actor. *Stuart* & *Cunninghame*. Alter. *Nicolson* & *Burnet*. *Scot* Clerk. *Vid.* 26 *Feb.* 1630. *Lockhart* and the Cases there. *Ult. January* 1633. L. *Cleghorn*.

Elizabeth Alexander contra *Kinneir*, *Eodem die*.

IN a Reduction of a Disposition of a Liferent made by this Woman *Alexander* to the Defender, upon this reason, because the Woman the time of the making thereof, was then Furious and *Distracted* of her Mind and Wit, and was done without an onerous cause, the circumstances of her Fury being qualified in the Summons, and offered to be proven by the Ministers of *Dundee*, and Doctors of Medicine, and Apothecaries, and other honest Burgesses of that Town where the Woman then remained. This Reason so to be proven was Found Relevant, and sustained at the Womans own instance, who was now Convalesced, and recovered of that madness; albeit the Defender Alledged, that there ought to have preceeded a Precognition and Declarator of her Fury, by the determination of an Assise, after tryal taken, and that it ought to have been so first found by an Assise, before this Reduction could be sustained, being of a dangerous preparative, to Reduce lawful Deeds upon Alledgance of Fury, and to be proven by Witnesses, which may offer occasion to others to move the like Actions, and to prove the same after that manner; which Alledgance was Repelled: For the *Lords* Found, that the Party recovering, albeit no friend should seek Protection of the person of the Furious, nor of her Goods the time that she was diseased; yet it were not just to deny that remeed to her self, which her neareſt Agnat or Friend might have gotten of the Law, if they had sought the same, and their omission could not prejudge her therein. Actor. *Burnet*. Alter. *Mowat*, *Scot* Clerk. *Vid.* 26 *July* 1638 *Loch*.

L. *Jerriswood* contra L. *Livingston*, *Feb.* 23. 1632.

IN a Suspension of a Decreet obtained by *Jerriswood* against *Livingston*, Tacksman to him, of some Lands, pronounced by the Sheriff of *Lanark*, which was given, Decerning the Tacks-man to Remove, being conveened before the Sheriff by *Jerriswood*, to find Caution to pay the Tack-Duty of the years by-

gone owing, and in time to come, or else to Remove, and for not finding Caution, being Decerned to Remove; in a Suspension, the Decreet was found null, because the *Lords* Found, that inferior Judges were not competent Judges to such Actions, to Decern Tacks-men to Remove for not finding Caution, but that such Actions properly belonged to the *Lords* of Session, and therefore Found the Decreet null, albeit the Charger produced an Instrument, where the Party Decerned, Renounced the Tack and Right of the Lands, which was not respected, being done by one Nottar, under Instrument, in a matter of importance: But the *Lords* in this same Suspension Ordained the Parties to Dispute anent the finding of Caution, if it were due to be found in this Process, sicklike as if Action *ab initio* had been Intented before the *Lords*, to find this Caution, or to Remove. Actor. Alter. *Miller. Scot* Clerk.

Bishop of *Galloway* contra his Vassals, *Feb.* 24. 1632.

IN a Pursuit against certain Vassals, holding their Lands in Feu, for payment of their Feu-Duties, which were craved by that Summons, both *personali Actione*, and also to hear the Ground Poynded therefore. And the Defenders Alledging, that their Rights of these Lands being real, and the Feu-Duties really subject to be payed out of the Ground, and for which the Ground might be Poynded by the Superior. The Vassals were not subject, neither could be conveened *personaliter* to pay the same, seing they were not personally obliged thereto. This Alledgance was Repelled, and Process and Action also was sustained against the Feuars, for Decerning of them personally to pay the same, and that Charges of Horning might as well pass against them therefore personally, as Decreet to Poynd the Ground. Actor. *Mowat.* Alter, *Gilmor. Gibson* Clerk. *Vid.* 29 *March* 1636. *Elphingston.*

Kinnaird contra *Yeaman*, *Eodem die*, mentioned 17 *Feb.* 1632.

IT being Alledged by the Executors, that the Defunct after the Contract had Infeft this Charger then his Wife in two Booths in *Dundee*, the Rent whereof must compense *pro tanto*, this Implement now craved, and must produce liberation to the Executors of so much of this Contract as the same extends to, and must be found satisfaction *pro tanto*: And the Charger Answering, that that Infeftment cannot liberat any part of this Contract, because the same depends upon a preceeding Bond granted by the Husband after the Contract, whereby he was obliged to Infeft her therein for her lifetime, bearing, *to be done by him for love and favour*, and having no relation to the Contract, or that it was made for Implement thereof; and which Bond and Infeftment following thereon must be effectual, besides, and by and attour the Contract, seing the Husband who might have given it, hath also given it, and hath not Revocked it before his death, and therefore is good in it self. The *Lords* nevertheless of this Bond, which was the cause of the Infeftment, seing the same had no other cause therein but the Husbands love and favour, Found, albeit it was never Revocked, that the same ought to be understood to be done for satisfaction of the Contract of Marriage *pro tanto*, and that so much of the Imployment ought to be defalked, as correspondent to the yearly Duty of the Booths, *quia nemo præsumitur donare quamdiu est Debitor*; but this Case and Decision may have its own doubt and scruple: for although *Debitor non præsumitur donare*, yet that holds in cases where the Deed done, and that which is satisfied, hath no expres mention of any cause at all, in contemplation and respect whereof, it bears to be done, and where the fulfilling and satisfaction is indefinitly made, *quo casu* the fulfiller is to be presumed, rather to have done it for his own liberation of his preceeding Debt, than that he should have given that, and remained still Debitor; but this presumption ceases, where the fulfilling depends upon another cause, expressed

preſſed by him, who was obliged, and upon his obligation, whereby he hath bound himſelf, to give that Infeftment for love and favour, and whereby he hath not left place to preſume upon a *Donation*, or againſt the ſame, or to leave place to aſcribe that to his liberation, which himſelf hath *ſpecificè* expreſt, and aſcribed to his *Donation*; attour albeit he had not ſo expreſt the ſame, yet if the Huſband be of a competent Subſtance, it may be in Law affirmed, that that Infeftment ſhould not be interpret to be done for Implement of his Contract, which he hath not ſo Interpret himſelf; whereas if he had been of a mean Eſtate, and that he had not expreſt a ſpecial cauſe himſelf, *eo caſu* it might have tholled a more favourable conſtruction, *viz.* that it might have been aſcribed to the fulfilling of the Contract: As alſo in this caſe controverted, this *Deciſion* may be thought more hard, becauſe the Infeftment foreſaid, and Bond whereupon it proceeded, was conceived for Infefting of this Woman in Liferent, and the ſpecial Bairns therein named, which were then procreat betwixt them Heretably (for this Woman was his ſecond Wife, and he had no Bairns of a prior Wife) for whoſe proviſion chiefly this Infeftment was expede; ſo that theſe Bairns being Heretably provided to theſe Booths, whether the Wife had her Liferent thereof or not, it was all alike to the Executors Charged: for if ſhe had not the ſame, the Bairns provided thereto will have the full Right thereof, both Liferent and Property; and as the Infeftment of Property would not exclude the Bairns provided thereto, to ſeek the Fee, of the Sums whereof now the Relict craves the Liferent; and as if they were ſeeking the ſame, they would not be excluded from the Fee, by giving of that Infeftment, which would not be admitted againſt them, as any part of Implement of that Contract *pro tanto*, no more it ought to be admitted againſt the Liferenter, for any part of liberation of her Liferent of the whole Contract, yet it was ſo Decided, *ut ſupra.*

Ult. February 1632. *Gordon* contra *Corſan*, 1632.

HAry *Gordon* of *Kinſtuir*, as Tutor-Dative to *Anna Hathorn* a Pupill, Purſues *Geills Corſan*, Mother to the Bairn, and *Hugh Kennedy* her ſecond Spouſe, for delivery of the Bairn to him, to be educat by him as Tutor; and the Mother Alledging, that ſhe ought to have the keeping and education of her own Bairn, ſeing ſhe was not paſt 5 years of age, and of the Law being within Infancy, the Mother ſhould be preferred to the Tutor, both for that reaſon of Infancy, and for that natural affection in-bred in the Mother, which will beget a more allowable care of the education of her own only Bairn, than can be preſumed in a Stranger: Likeas ſhe offered to entertain her *gratis*, without craving any allowance therefore off the Pupill's Means; and this Tutor is ſuſpitious to have the keeping of her, becauſe his Son in Law is neareſt of Kin to ſucceed to her; notwithſtanding whereof the *Lords* preferred the Tutor to the Mother, in keeping the Bairn, becauſe the Mother was Married, and ſo by the ſuperinducing of a *Vitricus* to the Bairn, ſhe was *in poteſtate mariti* her ſelf, and conſequently ſhe could not claim the charge of the Pupill, who was her ſelf under her Husbands Charge; and alſo becauſe this her Husband had Compriſed the Bairns Eſtate for Debt, whereto he was made Aſſigney by her Fathers Creditors, and alſo in reſpect that the Tutor ſicklike offered, to entertain the Bairn on his own Charges, without ſeeking any allowance or defalcation of the Bairns Means therefore; for which reaſons the Tutor was preferred, albeit the Mother Alledged, that *ſuperinductio Vitrici* might well make the Mother fall from the Tutory, if ſhe had been Tutrix-Teſtamentar, but will not in Law make her to amit the Benefit given in Law to her, of educating her Daughter within the years of Infancy; and ſeing in Law *multum tribuitur arbitrio judicis*, to eſtimat *ubi & apud quem Pupillus educari debeat*, ſhe Alledged, that her Motherly affection, and the Sex of the Pupill ſhould rather move the Judge to incline to the

Mother than to the other; and as to the Comprising used by her Husband, it is to be presumed, that it is more probable and profitable, that that Right should remain with her Husband, who may and will use the same to the good of the Bairns, than if it had been Deduced by the Creditors, who are meer Strangers, and are not to be presumed to have carried the like respect to the Pupill; Notwithstanding whereof the Tutor was preferred, as said is. Actor. *Gilmor.* Alter. *Mowat.* *Gibson* Clerk.

Andrew Forsyth contra *Durie*, *March* 1. 1632.

IN a Removing from a *Rigg* of Land, as part and pertinent of two Aikers of Land in *Dalkeith*, wherein *viz.* the saids two Aikers, the Pursuer was Infeft. The Defender Alledging, that he was in Possession of the Rigg Libelled thir ten years bypast, without interruption peaceably; and this Pursuer cannot by vertue of this Title, which is acquired lately since his Possession, and only of two Aikers of Land, and not of this Rigg specially, have interest to Remove him upon this pretext, as that the *Rigg* Libelled were part and pertinent of the saids two Aikers, seing he offered to prove that the said Rigg lyes discontigue from the saids two Aikers, and there are other Lands, pertaining to other Heretors, interjected betwixt the same. And the Pursuer Replying, that the discontiguity could not be Found Relevant, to make the Rigg cease to be pertinent of the saids two Aikers, seing albeit it might thereby appear not to be a part thereof, yet it remained a pertinent thereof; for there are many other Heretors, & Possessors of Aikers in *Dalkeith*, who have their Aikers lying in sundry portions discontigue, as these Libelled doth; and he offers to prove, that the Pursuers Author hath been many years before the Defenders Possession, in Possession of the said Rig Libelled, as a part and pertinent of the saids two Aikers; neither hath the Defender, nor is he able to shew any Right or Title to the said Rigg. The *Lords* Repelled the Exception, in respect of the Reply, which they admitted to Probation, and Found that discontiguity made not the Rigg to cease to be part and pertinent of the saids Aikers, specially where there was no Right Alledged to the Rigg, in the person of the Excipient. *Gibson* Clerk.

Redicks contra *Dalbatie*, *March 6.* 1632.

IN a Suspension of a Decreet, for payment of the Duties of Lands, the Suspender being debarred by Horning, Execute against him at the Chargers instance, and his Cautioner in the Suspension, desiring to be admitted to produce the Suspension, and to insist therein; and the Charger Renouncing all Action against the Cautioner, Alledging him to be irresponsal; and thereafter one *Maxwell*, who as Magistrat being Charged to take the Rebel, was Pursued *Actione Subsidaria* for the Sum, he desiring to insist in the Suspension as Party, whom the same concerned. The *Lords* Found, that neither the Cautioner, nor the Magistrat conveened, could be heard to insist in this Suspension, the Cautioner therein being irresponsal, except that a Cautioner were found good and responsal by the Party, or one of those Compearing, to pay the Debt Libelled, in case they prevailed not in the Suspension. *Vid.* 22 *January* 1629. *Fairbairn.*

Laird *Garth-land* contra Sir *James Ker*, *Eodem die.*

THe Lord *Jedburgh* having bound himself to Dispone an Annualrent out of his Land of to the Laird of *Garthlands* Son, Oy to the Lord *Jedburgh*, Redeemable upon twelve thousand Merks, and accordingly having Infeft him, and there being then a Back-Tack Set to the Lo. *Jedburgh* of the Lands, for the yearly Dutie of twelve hundred and thirty Merks; upon this Right *Garthland* having Intented Action of Declarator, as is mentioned betwixt these Parties, *Feb.* 26. 1631. Sir *James Ker* Compearing, Alledged this Right was a

Right

Right made by a Conjunct Person, *viz.* the Guidsir to the Oy, without a cause onerous, but only for Love & Favour, which ought not to be found Good and Lawfull against him, who was a lawful Creditor to the Master of *Jedburgh*, to whom the Granter of this Infeftment is Father, and Retoured Heir; and who is Alledged expresly to pay all his Sons Debts, for which this Excipient is bound, conform to a Contract betwixt them; and for Relieff whereof, he is Infeft before the Pursuers Infeftment, albeit after the Bond granted to the Pursuer, and so that his Right being for causes onerous, and the Pursuers *ex titulo lucrativo*, he ought to be preferred, specially seing the same is made to his own Oy, whose Mother is one of his Appearand Heirs, he having no other Bairns but her, and her Sisters; and so being that Person who has acquired that Right, *post contractum debitum*, and which therefore will make her lyable to the Creditor, if the Guidsir were dead; so it ought now to have no force against the Creditors Right; Moreover he Alledged, that this was an Usurary Right, and fell under the Act of *Par.* 1597. Which prohibits to take more nor Ten for ilk Hundred; for there is a Back-Tack Set for 1230 Merks, which is Thirty merks more than the Ordinary Annualrent of 12000 Merks. Thir Alledgances were both Repelled, and the Pursuers Infeftment sustained, albeit it had been a meer Donation, depending upon a Bond prior to the Excipients Infeftment, seing it was never Alledged, that the Granter of the Infeftment, the time of the making thereof, or since, was become Bankrupt, and not *solvendo*; neither had the Excipient done Diligence against him, to discuss him for his Debt; and so not being Bankrupt, but being able to pay all his Debts in Lands and Goods, he might lawfully *ex causa simplicis donationis* effectually grant this Infeftment, albeit he was then debitor to his Creditors; and the Act of *Parliament* 1597. anent Usurie, was not found to Militat in this Case, which was not of Borrowing and Lending of Money, wherein the Act prohibits to take more than Ten for the Hundred, and extends no wayes to this Case controverted, or the like, which concerns a free Donation, where the Parties may Contract, to make the Lands Redeemable, which is Gifted upon more or less Sums, as they agree together, then as effeirs to the Duty of the Land, contained in the Back-Tack; and the over-plus also being but Threttie Merks, and so being of so mean a quantity, could not make the whole Infeftment null. *Partibus ut illic Comparentibus*, and the Advocat for the Excipient. *Vid. Feb.* 26. 1631. Betwixt these same Parties. *Feb.* 16. 1628. *Kilgour. Jan.* 17. 1632. *Skeen. Novem.* 27. 1629. *Paterson.*

La. *Lawriestoun* contra her Tennents, *Eodem die.*

IN a Removing, the Defender Alledging, that he was Subtennent to who was Tacksman of the Lands, and whose Tack, albeit it was Expired the time of the Warning, yet he bruiking still *per tacitam Relocationem*, it must Defend this Defender, his Subtennent, ay & while the Tacksman were Warned. This Exception was Repelled, & found there was no necessity to Warn the Tacksman, whose Right was expired before the Warning, seing *tacita Relocatio* was Found could avail to none, but to the actual Possessor, and he not being naturally in Possession of the Land, albeit he Alledges, he bruiked by his Sub-Tennent, whose Possession he Alledged to be his Possession, seing *is possidet cujus nomine possidetur*; which was Repelled by the *Lords*: But the Defender, who was Warned, being only natural Possessor, and having also payed of before Duty for the Lands to the Pursuer; The *Lords* Found, there was no necessity, to acknowledge any tacit Relocation in the Person of the Tacks-man, whose Right was expired, and he not in Possession, and so that he needed not to be Warned. Actor. *Nicolson.* Alter. *Stuart. Gibson* Clerk. *Vid. Dec.* 2. 1628. L. *Johnston.*

Dickson contra *Scot*, *March* 7. 1632.

IN a Reduction upon a reason of Inhibition, the Defender Alledging the Inhibition to be null, because being Execute within the Sheriffdom of *Ber-*

wick, it was not Execute at the Mercat-Cross of *Greenlaw*, but only at *Dunce*; Albeit by *Act* of *Parliament* it is Appointed, that all such Executions and Hornings should be Execute at *Greenlaw*, which is Declared the Head-Burgh of the Sheriffdom by that *Act*, and all Executions otherwayes made, are Declared null. This Alledgance was Repelled, and the Inhibition Sustained, in respect of the Consuetude, and use to Execute at *Dunce*, notwithstanding of that *Act*, and that the *Act* is not in observance, and that it is but a particular privat *Act*, not Printed, and so not Publick and known to the Leidges, but contained in a Ratification of an Infeftment of some Lands, granted to the Earl of *Dumbar*, wherein *Greenlaw* is Erected the Head-Burgh, with the Declaration foresaid, and which is Ratified in Parliament, and so is but a privat *Act*, not keeped, nor known in the Countrey, nor Printed, or Published, and this was done without any Probation. *Gibson* Clerk. *Vid. June* 16. 1626. Pryor of St. *Bathans*.

Logan of *Balvie* contra L. of *Luss*, *March* 8. 1632.

IN a Suspension of Charges, Execute against *Archibald Thomson*, who was Cautioner to the Laird of *Luss*, for Relieving of the Lands of *Balvie*, of all Burden which might affect these Lands, the same being sold by *Logan* of *Balvie* to the L. *Luss*, and ay and while the payment of the remanent of the price thereof by the Laird of *Luss*; The said *Archibald* was Cautioner, to the effect foresaid; and the Laird *Luss* being Distrest, by a Sentence recovered for Poynding of the Ground for an Annualrent, wherein the Creditor was Infeft out of the saids Lands by *Balvie*; and the said *Archibald* being Charged, to Relieve the saids Lands of that Burden, who Suspended upon this Reason, that he ought to Relieve him only in so far as he was Distrest truly for the said Annualrent, and for no more than he has payed to the Annualrentar for his Right; and the other Answering, that albeit he had Acquired that Right *gratis* from the Party, to whom it was truly adebted, he ought either to be Relieved of the whole, for the which the Land might be lawfully Burdened by that Right; or else the Party ought to show how he might be fred legally thereof; and it is unjust and unreasonable, to Restrict the Warrandice to that which he payed for that Right; for the Party might have quited the same for nought, or for less or more, as they agreed; Notwithstanding whereof, the *Lords* Found, that the Suspender was only holden to pay for the Relief of the said Distress, so much as was payed by the Charger, for the Acquiring of the Right of the said Annualrent, the quantity whereof was Found Probable by the Chargers own Oath; and this was the rather done, because *Balvie*, for whom *Archibald Thomson* was Cautioner, was a Poor Aged Distressed Person, and Reduced to great necessity, and therefore the Distress and Warrandice was so Retrinched. Actor. *Nicolson* & *Baird*, Alter. *Craig*. *Gibson* Clerk. *Vid. July* 23. 1633. L. *Aberzeldie*. *July* 1. 1634. *Glendinning*. *January ult.* 1632. *Miller*. *

L. *Ludquharn* contra L. *Haddo*, *March* 10. 1632.

THe Lady *Haddo* having Confirmed her Husbands Testament in *April*, after her Husbands decease, who died in *October* preceeding; and wherein he left his Bairn, being then in his Mothers womb, now this Party, who was his only Bairn, his Executor; and she having obtained a Factory of the Bairns Tutor, after the years of Tutory, there were Actions *hinc inde* intented betwixt them for Tutor Compts, *Directa & contraria tutelæ*; in discussing of the Articles whereof there was an Article, by the which the Lady and *Ludquharn* her second Husband were Charged to Compt, for the Goods contained in the Confirmed Testament, given up by her self, and Intrometted with by her; and for the Prices of the Corns, pertaining to her Husband, of the Lands, which then at his decease, *viz.* in *October*, he had in Mansing, and the Increase thereof, as the same was given up by her: whereanent she Answering, that albeit she gave the same

same up, yet seing the Commissar of *Aberdeen*, and all the other Commissars of *Scotland*, in the Confirmation of Testaments, has a common Estimation of the Increase; and that the Prices were given up probably by her, as she esteemed the same, yet of no Reason ought she to be Burdened with more quantity nor the Corns truly did extend to, nor with other Prices than they gave, and were sold for, specially seing at the time of the Confirmation she made Protestation, that she should be no further obliged than as said is, albeit the same was Confirmed at the Rate forsaid: And also that after the Confirmation the same were Appriſed by Un-suspected Persons, for a less Price and Quantity, for which she was content to be answerable; and as the Bairn should want nothing of his own, so it were against Equity, to lay more on her nor she got; it being unprobable, that she would not make the best use of the Corns, and others, to the use of her own only Bairn. The *Lords* Found, that notwithstanding of the Protestation foresaid, made by the Relict, and the Appryſing of the Goods and Corns thereafter; yet that she should be answerable, both for the Prices of the Corns, and Goods, as they are given up by her self in Testament, without respect to the Prices of the Compriſers, specially the Alledged Compriſing in *May*, which ought to have no respect for the Goods, *viz.* Oxen, Kine, and other Bestial, which then were at the worst estate, *viz.* after Beer-seed, whereas the Defunct died in *October*, at which time the Goods were at the best; and so the Prices given up were Found to Oblige the up Giver thereto, *Item*, the Relict Defending her self with a Decreet of Exoneration, wherein the Commissars had Found her Super-expended in eight hundred Pound, more nor the whole free Gear of the Testament. The *Lords* Found not this sufficient, seing it was General, and bore not *the particular Debts payed by her, wherein she was super-expended, nor the Instructions of the Particulars*; therefore Ordained her to qualifie the same in this Place; and she Alledging, that she had produced all her Instructions, and Discharges before the Commissars, in that Proces of Exoneration, and that the Commissar, nor his Clerk would never give them up again; Likeas it is the custom of all the Commissars of *Scotland*, to keep the Instructions for the Warrand of their Sentence, and never to give them up again, and both the Commissar and his Clerk being dead, the Party ought not now to be prejudged thereby, seing his Sentence must put her *in tuto*, which it is probable the Commissar would never have pronounced, nor no publick Judge in his Office, without clear Probation. The *Lords* Found, that they would try, if there was such a Custom, and consider thereof thereafter. Actor. *Advocatus*, *Nicolson* & *Mowat*. Alter. *Stuart*. *Gibson* Clerk.

Ahannay of *Kirk-dale* contra *Aiton*, *March* 13. 1632.

IN an Action for payment of Duties of Lands, the Defender Defending himself with a Rental Set by the Town of *Wigtoun*, to his Father and his Heirs Heretably, *ad perpetuam remanentiam* (for this was the Tenor of the Rental) and that he was Heir to his Father, and so it ought to Defend him, during his Lifetime; and the Pursuer contending, that the Rental ought not to Defend him after the decease of the first Receiver, albeit it bore that Word of the Rentallers Heir, except that he might prove by Authentick Probation, that the Custom of the Town of *Wigtoun* is so, that Rentals so Set, are effectual to the Receivers Heirs, for his Lifetime; and that that Custom has been allowed to the Heir so to bruik. The *Lords* sustained the Exception, and Found, that the Rental Set to a Rentaller and his Heirs, ought to maintain the first Heir of the Rentaller, during his Lifetime; and that there was no necessity to Alledge or Prove any such Custom, as was Replyed on; But sustained the Exception without that Alledgance, and Found, that they would observe this Decision thereafter, when the like Questi-

on occurres; But albeit it was so here Found, yet the Exception of the Tenor of Rentals may furnish cause of Scruple; for if any Heretor should receive a Person and his Heirs, Rentallers to the Setter Personally, not proporting, that they are admitted to the Setter, and his Heirs, it may appear *eo casu*, that then the Heirs of the Rentallers should not bruik longer than that Setters Life; for albeit the Rentallers Heirs be mentioned, yet that may be constructed, that they should bruik, in case the Rentallers self should die before the Setter, so that thir Considerations, and the like, will depend much upon the Tenor and Conception of Clauses in Rentalls. Actor. *Gilmor.* Alter. *Hepburn. Gibson* Clerk. *Vid. March* 15. 1631. E. *Galloway.*

Relict of *Veitch* of *Dawick* contra *March* 15. 1632.

THe Relict of *Veitch* of *Dawick* Pursuing upon her Service to her Terce, the Intromettors with the Duties of the Lands, for payment of the third of the Duty to her; It being Alledged, that she could have no Action therefore upon the Service, used for her Title, except she had been particularly Kenned to the Terce, and the Instrument of Kenning shown and produced, without which no Process ought to be granted upon the Service. The *Lords* Repelled the Alledgance, and Sustained the Process upon the Title of the Service produced; and Found the Kenning not necessar in this Action, which was Pursued for payment of the third part of the Duties, payable for the Land; Whereas if the Action had been real, as in Removing, or for apprehending Possession of the Ground, The *Lords eo casu* would have Found necessity for an Instrument of Kenning. Actor. *Craig.* Alter. *Gibson* Clerk. *Vid. March* 18. 1630. Lo. *Maxwel,*

contra *Eodem die.*

IN an Ejection wherein an Exception being admitted of a voluntar Removing, and Found probable by Witnesses; at the Term of Probation, a Witness being produced at the fourth Term after Caption, and it being Objected, that he was not a Competent Witness, being Tennent to *Robert Gibson*, which *Robert* had Set the Lands Lybelled, for which Ejection was Pursued to the Defender, who Entred by his Setting, as Tennent to him, and so who in Law was thereby obliged to warrand these Defenders from this Action of Ejection; and it being Answered, that the Witness was become *Robert Gibsons* Tennent in other Lands than the Lands Lybelled, and that only since the last Term of Caption, and had a three years Tack of him, so that he was not Tennent Removeable; and albeit he were, yet not being Declineable, but who might have been a lawful Witness, when he was first Summoned, and all the Terms since his now becoming Tennent ought not to prejudge him *ex post facto*; Attour, *Robert Gibson* will not be subject in Warrandice to the Defenders; The *Lords* Found, that albeit the Witness could not have been Declined, if he had compeared at any time before this Term, yet seing he was at the time and Term of his Compearance such a person, as legally could not be then Witness, as becoming then Tennent or Servant to the Party, albeit he was not so before, that therefore he ought not to be admitted Witness: but in this Instance, because it was not Declared nor Found, that the said *Robert Gibson* his Master was in Law holden to warrand the Defenders, therefore he was received as a Witness, and the Objection Repelled, but he was Received *cum nota ob penuriam testium.* Actor. Alter. *Gilmore. Hay* Clerk.

L. *Ley* & *Stuart* contra the Earl of *Lauderdail*, *March* 20. 1632.

IN an Improbation, one *Stuart* Descended and Served Heir by Progress to *Stuart* of *Craigihall*, and being Infeft in the Lands of *Braidwood*, Pursues for Improbation of the Writs of the saids Lands, made by this Pursuers Predecessor, to whom he was Served, and Infeft as Heir in the same, and by the Descendents

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enumerat in the Summons; in which Pursuit, the Pursuer having produced his said Predecessor, to whom he was Heir, his Charter under the Great Seal of these Lands, and his Seasin thereof, which was Dated *Anno* 1419. and his Authors Charter of the same, granted under the Great Seal to that Author of before *anno* 1400. years, with sundry other Evidents, granted to their Successors, since the Earl of *Lauderdails* Right, flowing from a second Son of the L. *Craigihal*, whom the Pursuer Alledged was never Infeft, nor ever had any Right to these Lands, and which the Pursuer called for as false. The Defender Alledged that the Seasin foresaid, granted to the Pursuers Author, *anno* 1419. was null, and could not give Entres to the Pursuer, to call for Improving of the Defenders Writs, and to quarrel them after an hundreth years progress of Rights & Possession, uninterrupted in his own and his Predecessors Persons; because the Charter, which was the Warrand of the Seasin, and the Seasin were Disconform; for the Charter was granted to one *Alexander Seneſcallus*, and the Seasin to *Alexander Stuart*, and the Seasin bore, to be given by vertue of *Breve Regis*; which presumed a Retour of the Party; whereas the Charter flowes upon the Heretors Resignation, and not upon Retour: albeit the Pursuer Replyed, that *Alexander Seneſcallus*, and *Alexander Stuart* were both one, *viz.* the one *Latine*, and the other *Scots*; and *Breve Regis* is to be taken off a Precept of Seasin out of the Chancellary, which after 200 years and more, the Party is not holden to show. 3°. Alledged, the Charter bears, *That the Lands are given to the Fiar, with Reſervation of the Reſigners Liferent*; Whereas the Seasin is only given to the Fiar, which the Pursuer Answered to be no Defect, seing the Disponer, whose Liferent is reserved, was the Fiars own Mother, and She caused take the Seasin to her Son. 4°. The Seasin bore not, that the same was given to the said *Alexander* personally present, nor yet to his Atturney, and made no mention of any Tradition of Earth and Stone, which are necessary Solemnities to the Validity thereof; nor bears, that any took Instruments for the Fiar; whereto it's Answered, that the Seasin bears, *To be given to* Alexr. Stuart, which included that he was personally present, and that his Mother took Instruments thereupon, and that Seasin was given *ſecundum conſuetudinem, & ut moris eſt in talibus fieri*, which presuppons Tradition of Earth and Stone, & that all Solemnities were kept. It was further Alledged, that the Seasin was Suspitious for Insolite unusual Clauses, *viz.* The Indiction of the Pope, enumerat therein, with this Clause *ſecundum computationem Eccleſiæ Scoticanæ*, which phrase was not then used, neither were Seasins then in use: Whereto Answered, that that was no Defect in the Seasin, in respect of the Schism then amongst the Popes at the Council of *Conſtance*, there being three Anti-Popes. Further Alledged, the Seasin made no mention of the hour when it was done, as it ought, and is necessar, that it might be known, that it was done at such an hour of the day, *ne quid de nocte fiat*: Whereto Answered, that the Seasin bore, *To be done on a ſpecial Day therein expreſt*, which is enough, and there is no Prohibition to have it done in the Night, albeit it had been so done, which is not; And to all he Opponed the Seasin done in so ancient a time, and wanting no requisit Solemnity, and proceeding upon a Warrand of a Charter under the Great-Seal, and that no Right subsisted in the Person of the Defenders Author, ever flowing from his Predecessor foresaid, by Progress to the Pursuer. The *Lords* notwithstanding of the Exception, first Found on the 15 of *March*, that this Seasin was sufficient to give the Pursuer Action, and Entres to Pursue this Action of Reduction and Improbation against the Defenders: But this Day the Defender producing some of the Writs called for, and the Pursuer craving Certification against the rest, not produced, The Defender Resumed the foresaid Exception against the Seasin, and Alledged, that the same could not be Sustained now after Production, to

furnish Action to the Pursuer, to seek Certification against the Defenders, who, and their Authors those 120 years and more had bruiked their Lands, by vertue of these Rights uncontrolled: Which Alledgance the *Lords* Sustained, and Found therefore the Seasin null, notwithstanding the Antiquity thereof, and not to furnish Action of Improbation. Actor. *Nicolson* & *Advocatus*. Alter. *Stuart* & *Burnet*. *Gibson* Clerk.

Russel contra *Dick*, *March* 24. 1632.

IN an Improbation of a Compryfing, wherein the Executions and Warrands of the Compryfing were Called for, to be produced and Improven; And the Defender having produced the Principal Compryfing, which was Deduced 20 years since; he Alledged, that no Certification ought to be granted, for not production of the Executions, and Warrands thereof, which remains with the Clerk of the Compryfing, and comes not again to the Party, and the Clerk is not called for to produce the same in this Process, so the Party cannot be holden to produce the same. This Alledgance was Repelled, and no necessity Found to call the Clerk to this Improbation, who was but a privat person, and could not be repute a Publick Officer, or Clerk, who could be known to the Pursuer, whereby he had no necessity to call him, seing the Compryser may take at his pleasure, any ordinar Nottar to be his Clerk, and that the Party ought to take up all the Warrands of his Compryfing, and to keep the same upon his own peril, and that they remain not with the Clerk, albeit the Compryfing was Deduced 20 years since; & if the Party had omitted to take his Warrands from the Clerk, he ought to have recovered the same by his Travels, or some other lawful Diligence against the Clerk, and produced the same in this Process, that the *Lords* might have Considered, if it should have stayed the Certification, or not; but that not being done, he was ordained to produce, without necessity to Cite the Clerk in this Process. Actor. *Russel* & *Burnet* of *Barns*. Alter. *Stuart* & *Gibson*: *Hay* Clerk. In the Action E. *Kinghorn* against *George Strang*. *July* 19 1631. The *Lords* Found the Party not holden to produce the Warrands of a Compryfing, but it was an old Deed. The like *July* 7. 1636. *Nicolson*.

L. *Caprington* contra *Geddie*, *Eodem die*.

IN a Pursuit against *Geddie*, for payment of certain Sums, for being absent from *Caprington's* Work, at his Coal-heugh, contrary to the Tenor of *Geddie's* Bond, whereby he had obliged him *to worke at* Caprington's *Coalheugh, during all the days of his lifetime*; and the Laird of *Craigie Wallace*, who was Master to *Geddie*, compearing to defend him, Alledged that this Bond was null, and ought not to be Sustained in any Christian Nation, seing it was against good Manners, and Christian Liberty, to take any person perpetually Bound to a perpetual and miserable Servitude, and also was against the Acts of Parliament, which Prohibits all Leagues and Bonds among the Subjects, as the 43 *Act* 6 *Par*. Q. *Mary*, and 12 *Act*, 10 *Par*. *Ja*. 6. For it is against all Equity and Natural Liberty, to take the free Leidge of his Majesty obliged to a perpetual Servitude. This Alledgance was Repelled, and the Bond Found Lawful and Sustained. Actor. & *Gilmore*. Alter. *Gibson* Clerk.

L. *Lochinvar* contra *Lindsay* of *Wauchop*, *Eodem die*.

IN a Declarator of *Wauchop's* Liferent of the Lands of *Dryburgh*, holden of *Lochinvar*, the Defender Alledged. that the Summons should abide Continuation, seing it must abide Probation; for he shows not where the Defender holds the Lands of him, which in Declarators at the instance of the King's Donatar, is presumed, that all the Subjects holds of his Majesty, except another Superior be instructed; but the like Presumption stands not for any Subject. This Alledgance was Repelled, and no necessity Found of Continuation, where the

the Purſuer ſhew his own Infeftment of the Lands Libelled, and that the Defender was Rebel year and day, Actor. & *Gilmor.* Alter. *Gibſon* Clerk. *Vid.* 2 *July* 1622. L. *Kilſpindie.* 23 *June* 1626. Lo. *Stormonth*, where alſo the *Lords* Found, that the Purſuer needed not to prove, that the Defender held the Lands of the Superior, for he might Diſclaim him.

Hay contra L. *Achnames*, *Eodem die.*

James Hay ſeeking Declarator of *Achnames* Liferent of Eſcheat of the Lands of holden of the ſaid *James*; and *Achnames* Alledging, that no Liferent can fall to *James Hay*, becauſe he was Infeft in theſe Lands, holden of the Prince upon *James Hay* his Contumacy, for refuſing to Infeft him; ſo that the benefite of the Liferent thereby cannot belong to him. This Alledgance was Repelled, for the Infeftment granted by the Prince; for the immediat Superiors diſobedience, or refuſal to receive his Vaſſal, was Found a good and lawful Reaſon to exclude all Non-entry, which the Superior might ſeek for the Vaſſals Non-entry, ſeing the Superior was Charged, and refuſed; and the Entry by the Prince was Found to purge the ſame, and to ſupply that defect; but it was Found no ways to exclude the immediat Superior from any other caſualities of his Superiority, which otherways might belong to him as Ward, Liferent, Recognition, and others, and alſo the Duties, if any were payable by the Tenor of the Infeftment, are due to the Superior, notwithſtanding of the Vaſſals Entry by the Prince; for theſe Caſualities accreſſes to the Superior, for the fault of the Vaſſals ſelf, wherein the Superior cannot be hurt *ſine ſua culpa*; but in the Non-entry he is prejudged for his own fault, for therein *habet ſeipſum Authorem culpæ, & non Vaſſallum, & in aliis Vaſſallus eſt Author culpæ, & delicto-tum, & non Dominus.* Actor. *Gilmore.* Alter. *Hay* Clerk.

L. *Ludquhairn* contra L. *Haddo*, 28 *March* 1632.

L. *Ludquhairn* Purſuing wrongous Intromiſſion of Teinds, Compeared L. *Haddo*, and Alledged, that the Tack, which was the Title of the Purſuit, was acquired by the L. *Ludquhairn*, he then being Factor to his Tutor, and ſo who ought to be repute as his Tutor in this, that he might do nothing in *re Minoris*, to his hurt; whereby that his Tack, which was of the Teinds of the Defenders own Lands and Heretage, albeit he hath acquired the ſame to his Wife during her lifetime, and to the Defender thereafter after her deceaſe, yet it muſt be ſolely profitable to him, and not to her. And the Purſuer Anſwering, that it was lawful to him, albeit he had been Tutor, far more when he is Factor only to the Tutor, to acquire this Tack, wherein he hath done no wrong to the Minor, to purchaſe the ſame to him, after the deceaſe of the Purſuers Wife, who is the Defenders Mother, and who is Conjunct-fiar of the moſt part of the Lands contained in the Tack. The *Lords* Found, that the Factor might do no more than the Tutors ſelf in this caſe, and the like caſes, and that the Tutor might take a Tack to his own Wife, for her lifetime of the Teinds of ſuch Lands, whereof ſhe was Liferentrix, ſhe defalking a proportion *pro rata* of the Greſſum payed for the Tack of the Minors Lands, and ſuſtained the Purſuit and Tack to her, for the Teinds of the Lands only; but for the Teinds of the reſt of the Lands pertaining to the Minor, whereof ſhe had no Liferent; The *Lords* Found, that the benefit of the Tack in that ought to accreſce to the Minor, and not to the Conjunct-fiar, the Factors Wife, nor to the Factor, nor to the Tutor, the Minor always paying a proportion *pro rata* of the Greſſum of the Tack, and therefore would not ſuſtain the Action Libelled for the Teinds of theſe Lands. Actor. *Nicolſon*: Alter. *Stuart*. *Gibſon* Clerk.

L. *Lochinvar* contra *Wauchop*, *Eodem die.*

IN this Cauſe mentioned before *March* 24. 1632. The *Lords* Found, that although the Vaſſal had Diſponed the Lands, for a Cauſe onerous to another,

who was Heretably Infeft therein, to be holden of the Vassal's self, and that before the Vassal was Rebel year and day; but he being then Rebel, and the Rebellion *in cursu*, and the Rebel being un-relaxed the time of the Disposition; and albeit there were ten years and more bypast, since the expyring of year and day, during the which whole space the Acquirer of the Lands from the Vassal had been, as he yet is, in continual peaceable Possession of the Lands, uninterrupted by the Superior, or any other by vertue of the Alledged Casuality of the Rebellion; and whereby he Alledged, that the continuing of the Rebellion, which hath lyen so long over and obscure, cannot now be obtruded against this singular Successor, to prejudge his Right Acquired for onerous Causes, and clothed with so long real Possession, of the which Rebellion he had so probable cause to be ignorant; yet the *Lords* Repelled this Alledgance, and Found the Superior notwithstanding of the Right made by his Vassal, as said is, being then Rebel, and the Rebellion running (he unrelaxed) had *Right* to the Liferent of his Vassal, and that the Profites of the Lands pertained to him, during the lifetime of his Vassal. *Partibus ut illic*, &c. *Vid.* 24 *July* 1632. *Rule*, and the other Cases there.

Maxwell contra La. *Stanlie*, *Eodem die.*

THe Relict of L. *Stanlie* being conveened by *Margaret Maxwell* one of his Daughters, as Intromissatrix with her Husbands Goods, to pay some Debt to her; and the Relict Alledging, that one of the Defunct's Sons was Executor Confirmed, and who ought to be answerable to the Creditors, and who had found responsal Caution at the Confirmation of the Testament; and the Pursuer Replying upon the Defenders Fraud, in Confirming of a Minor, especially seing her self was nominat Executrix by the Defuncts self: Likeas she intrometted with her Husbands Goods, before she Confirmed the Minor; as also she hath intrometted with many other particulars (whereon the Pursuer condescended) beside, and attour the Goods Confirmed, whereby she was *in dolo*, and so ought to be lyable to the Pursuer as universal Intromissatrix. And the Defender Duplying, that it was lawful to her, to Accept or Renounce to be Executrix, albeit she had been nominat by the Defunct, seing the Confirming of another, where there is also sufficient Caution, is no more prejudicial to the Creditors, than if she had been Confirmed; for the Confirmed Goods will be made forth-coming to the Creditors; and her Alledged further Intromission with Goods omitted, Un-confirmed, cannot make her universal Intromissatrix, to make her so lyable for Debts of her Husbands, amounting to greater Sums than either she is worth, or all her Husbands own Estate might pay: But the most that thereby can result on her Alledged omission, is to take a Dative *ad omissa*. The *Lords*, notwithstanding that there were Executors Confirmed, and nottheless of the Alledgance foresaid, sustained the Action against the Defender, as Intromissatrix, without necessity to take a Dative *ad omissa ad hunc effectum*; only to infer Sentence against her, to make the particulars, wherewith she shall be proven to have intrometted, besides the Goods Confirmed, forth-coming to the Pursuer for her Debt allanerly, and not to make her lyable as universal Intromissatrix thereby, either to his Creditor, or to any other of the Defuncts Creditors, if the Intromission to be proven, shall not be found to be so much, as will pay the Debt, and respected not the Reply, to make her further lyable. *Vid.* 12 *January* 1633. *Bruce* of *Stanshill*.

Cassie contra *Fleming*, *June* 27. 1632.

ONe *Cassie*, Relict of one *Hamilton* Cordiner in *Glasgow*, Reducing a Contract and Infestment of a Wodset of a Tenement in *Glasgow*, granted to *Fleming* by her Husband and her, so far as concerns her Consent to the Alienation, she being Conjunct-Fiar thereof, upon a Reason of *metus causa*, Alledging,

ing, that she was compelled to give her Consent by her Husband, upon just fear, she being beaten by her Husband, to the effusion of her blood, and menaced by him, and otherwise abused, and expelled out of his House, so that she behoved to consent; Likeas after her Husbands decease, she Revocked. This Reason and Qualification of Fear, without that Clause of the Revocation, was Found Relevant and sustained, being *specifice* lybelled, as was found necessar to be by the *Lords*, that the Deeds lybelled were done by the Husband to her, for refusing to consent to this Alienation, & for this Cause expressly, albeit that at the time of her Subscription, she expresst no such cause of Compulsion, and albeit the Party Receiver of the Wodset knew no such Compulsion, neither was the same ever Intimat or Signified to him, neither by the Wife, nor no other at her Subscribing, or before, without which had been done, he Alledged that the Reason lybelled of *metus causa*, could not be received against him, who had truely barganed with this Party, and had really delivered to him the Sums contracted for the Wodset; And that it were against Reason, that he should be defrauded of his Money, who had made a lawful Bargain, and dealt *bona fide*, and was neither partaker of the Violence enforced, nor cause of Fear, neither knew thereof. This Alledgance was Repelled, and this Qualification sustained: and thereafter the Defender Alledged, that she freely and voluntarly, of her own accord, gave her consent to the Alienation, and received the Money her self from the Defender, never expressing any cause of discontent, but appearing to be well pleased therewith, and the Pursuer opponing the Reason of Fear lybelled, the Deeds lybelled being so done to her before her consent, that she behoved to consent thereafter, and durst not then express any contrair Signification, so that she ought to have the prerogative of Probation. The *Lords* Found, that they would *ex officio* examine both the Parties witnesses, to be produced *hinc inde*, both anent the voluntar consent, and coaction, and thereafter they would consider of the whole Cause; whereanent it is to be considered, that albeit in thir Actions *super metu, talis metus* is required to be qualified, *qui caderet in constantem virum, intelligitur vero metus & justus, qui etiam dicitur, quando res veresimiliter tendit ad metum.* Bart. *in L. Metum ff. Quod metus causa*; *is enim dicitur justus metus, qui dat causam Restitutioni*, yet *in muliere minor metus consideratur quam in masculo, quin et æstimandus est metus, etiam in viro, ex qualitate personæ, nam quidam potest metu affici & sic ad aliquod solvendum cogi, ex levi metu, qui tamen non caderet in virum constantem; & quoad probationem metus probatur per Indicia & præsumptiones, sed hoc totum relinquitur arbitrio Judicis; & quoad exceptionem liberæ voluntatis notandum est, quod jura dicant, plus credi duobus Testibus deponentibus de metu, quam centum de libera voluntate; nam deponentes de metu, & violentia, attestantur de minis & tormentis, aliisque, quæ sensu corporis percipiuntur, & de mediis extrinsecis; at deponentes de voluntate, dicunt de voluntate simpliciter secreta, quæ non tam aliorum sensibus subjacet, nisi & voluntas in actum aliquem eruperit, quæ per sensum dignoscitur, ut si actus factus sit in præsentia Judicis, tum enim non præsumitur metus, tunc & quando est paritas terminorum, non est differentia circa fidem probationum de metu vel de voluntate, cum sic etiam per externa media, libera voluntas appareat; non est autem necessarium ut adhibeatur Protestatio, ab eo cui metus infertur, de sic facta illi violentia & metu, sine enim ea protestatione actio procedit; & cum ex quibusdam legibus protestatio videtur requiri, tum ex sola facta protestatione metus probatur, nec est opus alia probatione metus, sed si non sit facta protestatio, non negant illa jura, quin, probato metu, quis excusetur: metus vero purgatur ex libera voluntate, quæ post illatum metum expresse, vel ex aliquo actu deprehenditur, ut metus in promittendo tollitur, spontanea solutione facta ejus, quod fuit metu promissum, præsertim si intervenit aliquod temporis intervallum, inter metum & spontaneum postea factum, si ante spontaneam solutionem cessaverit causa metus; nam durante & subsistente eadem causa metus, nunquam etiam cum inter-*

vallo, metus purgatur, ut in aliquo carcerato à Communitate, quæ coëgit carceratum ei præstare cautionem de certa summa Communitati solvenda, quamque postea ille solvit liberatus etiam ex intervallo, non sic purgatur metus, nam durat causa, cum eum iterum Communitas carcerare potuisset, nisi solvisset; idem in uxore verberata a marito, quia nolebat consentire cuidam Instrumento, si postea, licet ex intervallo consentit, videtur metu facere mariti, durante Matrimonio; & hic est ferè idem Casus, de quo inter partes hic expressas agitur: ita est apud Philippum Decium, de regulis Juris, ad Regulam, in omnibus causis 68; hæc autem Actio datur in rem, & non solum in eum, qui vim intulit, sed in quemcunque alium, ad quem res pervenit, etsi non ipse, sed alius vim metumque intulit: Ut est in Wesembecio. *Ad Tit. Quod metus causa* Tit. 2. *Lib.* 4 *ff. & in Legibus ipsis, hoc titulo. Idem in Lege si vi* 2. *&* L. Non-interest 5. *Cod. eod.: at Consideranda est dicta* L. *si vi & L. si per vim. Cod. eodem, quæ dicunt, Pretium rei, quod datum est ei, cui metus fuit illatus, ut rem eo Pretio venderet, esse restituendum ei, a quo res petitur auferri, per hanc Actionem, antequam restituatur: & hoc est notandum* L. *velle,* 4. *ff. de regulis Juris, quæ sic dicit, velle non creditur, qui obsequitur imperio Patris vel domini; nam licet coacta voluntas dicatur etiam voluntas, non est tamen proprie & simpliciter voluntas; ea enim, ex libero mentis arbitrio, & proprio metu procedit, & non ad alterius petitionem: quare voluntas coacta, est voluntas qualificata, & secundum quid, quæque instante necessitate fit; sic vero facta, non dicuntur in jure voluntaria; quod enim fieri debet ex voluntate, non est imponendum ex necessitate;* L. *si per vim* 4. *Cod. de his quæ vi &c. requirit, ut actus æstimetur voluntarie factus fuisse, ut adhibeatur consensus ejus, qui dicitur Compulsus, illi actui ex intervallo. idem Authent sive a me, sub.* L. 21. *Cod. ad Senatus Consult. Velleianum: ubi dicitur alienationem a marito, cum consensu Mulieris factam, soluto Matrimonio, illi non præjudicare, sed eam posse rem repetere, nisi duo concurrant,* viz *nisi post biennium alienationi consentiat, & nisi aliæ res viro supersint, ex quibus illi plene possit satisfieri, alioqui licet frequenter consentiat Mulier, non illâ præjudicatur alienatione, quod & obtinet in alienatione rei dotalis: & Auth. si qua. Cod. eodem: dicit oportere constari pretium fuisse conversum in rem Mulieris, ut & Jura Canonum, nullum consensum admittunt, nisi juratum: ut* cap. *cum contingat. Extra: de Jurejurando: quod & convenit cum praxi, & Legibus nostris, siquidem qui caute acquirunt rem, in cujus acquisitione requiritur uxoris consensus, solent coram Judice hunc consensum adhibere, & Juramentum ab ea exigere, consensum ut hunc esse voluntarie præstitum ab ea, & non coactum, idque si ab illa præstatur extra viri præsentiam; ita est in statuto,* 84. *P.* 11. *Ja.* 3*d.* And this Action upon the 19. of *July*, 1632 was so Decided, and the Reasons of Reduction *super metu* therein qualified, albeit long preceeding the Alienation, were sustained, and the Exception of voluntar Consent, albeit proponed for a Wodsetter, who was ignorant of the Coaction, and Alledged that at his Contracting, she did willingly Consent, which he offered to prove by the Witnesses insert in his Contract, was Repelled. *Gibson* Clerk.

Lyon contra Baillies of *Forfar*, *June* 28. 1632.

ONe *Lyon* Pursuing the Baillies of *Forfar*, for payment of his Debt, because his Debitor being Rebel, was Apprehended by a Messenger, by Warrand of Letters of Caption, & was offered by the Messenger, and the Party Pursuer his Creditor, to the saids Baillies, and desired to Commit him to Ward while he were satisfied, and they suffering the Rebel to escape, and not having put him in Ward, therefore they were conveened for the Debt, and they Alledging that the Charge was not lawful, being Execute in the end of *October*, about, or after six hours at night, they had no Reason to obey the same, being given under night, specially seing they had no sufficient Tolbooth, nor Jayl, where the Rebel

bel might be keeped in Firmance and Surety; and they being but Magiſtrats of a poor ſmall Burgh: Likeas they deſired Surety of the Party, for payment of the Expenſes, and Intertainment of the Rebel, which he refuſed to do, and ſo they had no neceſſity to Ward him. And the Purſuer Replying, that after the Charge given to the Baillies, they abode in company with the Rebel till ten a Clock at night, and ſuffered him to depart without doing any Diligence to detain, and put him in Ward, as they ought, albeit then they had ſufficient Power to Keep and Incarcerat the Rebel, he being then ſingle and alone, and there being two Baillies preſent with the Party Creditor, and the Officer who apprehended him, & the Rebel having Supped with the Baillies and the Officer, in one of the Baillies Houſes, which diſcovers their Faulr; and the not ſufficiency of the Jayl, makes them the more Culpable, being the Head-Burgh of the Sheriffdom. This Exception was Repelled, and the Reply was admitted to Suſtain the Charge, and the refuſing to find Surety for Intertaining of the Rebel, was found no cauſe why the Magiſtrats ſhould have diſobeyed the Charge. Actor. *Gibſon.* Alter. *Gibſon* Clerk.

Dalrymple of *Waterhead* contra L. *Cloſeburn, Eodem die.*

Dalrymple of *Waterhead* Purſues *Cloſeburn* as Univerſal Intromettor with his Fathers Goods, to pay his Fathers Debts, who for the particulars condeſcended on by him, Alledged the ſame to have been delivered by his Father to the Defenders Wife, two years before his Fathers Deceaſe, who by vertue thereof was in Poſſeſſion before his Fathers Death: And the Purſuer Replying, upon the Fathers Retention of the ſame continually in his Poſſeſſion, until the time of his Deceaſe, notwithſtanding of the Alledged Diſpoſition or Gifting which behoved to be Repute Simulat betwixt Father and Son, and the Sons Wife, and to prejudge Creditors: And the Excipient Duplying, that no Retention of Poſſeſſion could be Alledged, to prejudge the anterior Delivery made by the Father, and to bring on all his Fathers Debts on him, ſeing the Defender and his Wife, after the foreſaid Delivery became in actual Poſſeſſion of the ſame whole Goods in the Fathers lifetime, who, two years before he died, had neither Eſtate nor Means, whereof he might be Repute Poſſeſſor, but was all this time ſick and infirm, and lay Bedfaſt, and remained in Houſe with his Son the Defender, who Entertained him in his Family, the Father neither having Family nor Servants, whereas the Family was ſuſtained upon the Defenders Charges, and he only payed the Hires and Fees of the Servants, the Father having no Means to do the ſame, ſeing his whole Eſtate was Evicted and Appryſed from him by *Bryce Sempil.* And the Purſuer Triplying, that the Father Retained the Poſſeſſion, and Entertained the Family, and payed the Servants Fees, and that the Son who had nothing, remained in the Houſe with his Father: Likeas the Father during all the dayes of his lifetime, continued ſtill in Poſſeſſion of his Lands and Living, notwithſtanding of the ſaid Compryſing; The Exception and Duply was Repelled, in reſpect of this Reply and Triply, which was Suſtained and Admitted to the Purſuers Probation; And upon the 3*d* of *July* 1632. the Defender Alledging, that the Gift of his Fathers Eſcheat was Diſponed to *Kirkpatrick*, who had obtained thereupon both General and Special Declarator, who made the Right thereof to the Defender, by vertue whereof he Intrometted, and ſo he could not be Conveened as Univerſal Intromettor with his Fathers Goods: And the Purſuer Replying upon the Fathers Retention of his Goods all his lifetime, and that the Defender after his Deceaſe Intrometted therewith. The Reply was admitted, and the Exception Repelled. *Hay* Clerk. *Vid. July* 4. 1632. betwixt theſe Parties. The like Deciſion was done betwixt *Moodie* and *Hay* of *Tourlands*, *July* 24. 1633. To which Proceſs *Gibſon* was Clerk.

Irvin contra *Elsick*, *June* 29. 1632.

ONe *Irvin* being Served Tutor lawful to a Pupil, but not having found Caution, *de fideli administratione*, as use is, divers years after he was Served, *Bannerman* of *Elsick* takes a Tutory Dative to the said Pupil, and finds Caution, and intents Action thereon, for Delivery of some Writs of the Minors to him as Tutor; and the other Tutor lawful Compearing, Alledging that the Dative had no place to call for the same, seing he was Tutor lawful, Served and Retoured *debito tempore*, within year and day, and so had only Interest to Pursue for the Pupil, as his Tutor; and the Dative Alledging, that this Service was alike, as if he had not been Served, seing he had not found Caution, whereby the Service was void, and he had Expede a Tutory Dative, which behoved now to have place, seing the Tutor Lawful had found no Caution; and the other Answering, that seing the Tutor was Retoured *debito tempore*, the not finding Caution could not make it to fall, seing he now offered Caution, and that the Pupil sustained no prejudice in the mean time, and that he as Lawful Tutor had Intrometted, and had the handling of the Pupils Affairs, for the Indemnity whereof the Cautioner now found would be lyable *ab initio*, so that the Pupil could have no prejudice; and the Dative contending, that it was no time now to offer Caution, after his Gift was expede, and Caution found by him, and after the others so long Cessation, which made him to fall from his Office. The *Lords* Found, that the not finding Caution within the year by the Tutor Lawful, and the interveening Dative, and Caution found by the Dative, before any Caution found by the Tutor Lawful, was no cause to Exclude the Tutor Lawful, and to prefer the Dative, but preferred the Lawful to the Dative, notwithstanding of the Lawful Tutors Cessation to find Caution, divers years after his Service, and permitted him yet to find Caution, which was received, seing the Tutor Lawful had Administrat ever since his Service, and that it was not qualified, that the Pupil had received any prejudice, or that the Tutor Lawful had done any wrong. Actor. *Mowat*. Alter. *Davidson* & *Gibson* Clerk. *Vid. Feb.* 22. 1628. *Colquhoun. Decemb.* 17. 1631. *Auchterlony. July* 15. 1631. *Grant.*

Straton contra his Mother, *Eodem die.*

THe Son Pursuing the Mother to Remove from Lands, and she Excepting, that her Husband by his Testament, had ordained her to bruik all his Lands, and to give to the Pursuer their Son, a Roum Plenished sufficiently; which Testament the Pursuer has Homologat, by receiving from the Defender, by vertue and conform to the said Testament, the said Roum well Plenished by the Defender; and so the Testament being thus Approven by the Pursuer, he cannot come against the same, nor seek the Defender to be Removed from the Lands Lybelled, which the Defunct has willed her to bruik, during her lifetime, and which the Pursuer has Ratified by Acceptation of the Condition thereof, as said is; This Exception being Found Relevant by consent of the Party Pursuer. The *Lords* Found the Homologation of the Testament so qualified, as the Exception bears, *viz. The receiving of the Roum Plenished for Implement of the Testament, and by vertue thereof*, ought to be proven only by Writ, or Oath of Party, and Found it not to be admissable to be proven by Witnesses, as the Defender Alledged it ought and might be proven, consisting *in facto, viz.* in delivering of a Roum with the Plenishing thereof, which was Laboured, received, and keeped by the Pursuer, seing the *Lords* Found it should be Proven by Writ, or Oath of Party, that it was received by the Pursuer for Implement, and by vertue of this Testament, which in that part was not probable by Witnesses. Actor, *Gibson*. Alter. *Scot* Clerk. *Vid. Feb.* 7. 1632. *Home.*

Davidson contra *Hamilton*, *July* 4. 1632.

IN a Reduction of a Contract of Marriage, at the Instance of *Alexander Davidson*, made betwixt him and *Robert Hamilton*, and the said *Robert's* Daughter, Wife to the said *Alexander*, whereby the said *Alexander* was obliged to Infeft his said future Spouse in all his Lands and Estate, and in all which he should thereafter Conquess *stante matrimonio*, during her Lifetime, which the said *Alexander* desired to be Restricted to a competent Provision, seing there was only conditioned to him in Tocher by the Contract 1000 merks, & seing the Bairns, if the Wife survived him, would be destitute of all Means to live by; And also by the Contract he was obliged to pay to his said Father in Law 5000 merks, and to do sundry other Particulars to him, if there were no Bairns of the Marriage, which should live while they were Married; Which Contract he desired to be Reduced, because he was then Minor and greatly hurt. The *Lords* Sustained the Reason of Minority and Lesion, for Reducing of the Contract, in so far as the Pursuer was thereby obliged to his Father in Law, as said is; But the *Lords* Found not the Reason Relevant to Reduce the Contract, so far as concerns the Provision therein, introduced in favours of the Minors Wife, for her Liferent of the Pursuers whole Estate; For the *Lords* Found, that any, either Major or Minor, might provide his future Spouse to his whole Means, and that such Provisions are valid by the Laws of this Realm: Howsoever by the Roman Law, there was required an equal proportion, *inter dotem & donationem propter nuptias*, neither was the Minor esteemed to be prejudged by such Provisions, in such sort, that he should be restored against the same, specially where there was no Creditor to the Pursuer assisting in this Reduction, nor complaining of this Provision *quo casu* if the Wife had been Provided to her Liferent, and the Bairns to the Fee of the whole, and Inhibition Served thereon in their Favours, the Reduction then might been more considerable, whereas it is not so now, none being Pursuer but the Husband alone; And where it was Alledged, that by this Provision, the Bairns of the Marriage, if the Wife survived the Pursuer, would want all Provision, and Means of Life and Maintenance, that was not to be respected, seing it was an uncertainty, which had a possibility to be so, or otherwise; for it might be that the Wife should die before him, & it might be that the Bairns might die before the Wife should come to have the use of her Liferent, and if they should not die, but lived after their Father, the Mother bruiking the Liferent, yet in Law the Wife would be compelled, to grant them a reasonable modification, for their Education and Sustentation, which is agreeable with all Law, both Divine, Natural and Humane. *Vid. March* 7. 1623. Lo. *Bargeny*.

Dalrymple contra L. *Glosburn*, *Eodem die*.

IN the Cause of *Dalrymple* of *Waterhead*, mentioned *June* 28. 1632. It being Alledged, that the Annualrent of one of the Debts, for which the Defender was conveened, was payed, which he offered to prove by Witnesses, and which he Alledged was probable by Witnesses, seing the quantity of the said yearly Annualrent was but the two part of an hundred merks, which was only the Pursuers part for the whole Annualrent, being only an hundred merks yearly, the Pursuer had only Right to the two part yearly, which was within the Sum, which was probable by Witnesses. The *Lords* Found, that seing this Annualrent was constituted by Writ, and that the Party was obliged by Writ to pay the same, albeit the quantity yearly belonging to the Pursuer, was within an hundred merks, and that it was Alledged, that it was yearly payed, whereas there was many years Pursued for, that therefore the payment could not be proven by Witnesses, but only by Writ, or Oath of Party, and no otherways. *Partibus ut illic comparentibus*.

Burnet of *Barns* contra E. *Buccleugh*, *Eodem die.*

IN a *Reduction*, wherein an Exception being admitted to the Defenders Probation, to be proven by Writ, or Oath of Party, and Incident being used against certain persons called as Havers; which being denyed by the Defenders therein, in the second Term of Probation, Assigned to Summon the Witnesses for proving thereof, no Diligence being used against the Witnesses; and the Pursuer of the Principal Cause desiring therefore the Term to be Circumduced, seing no Diligence was used nor produced to satisfie the Term: And the Party User of the Incident Alledging, that he might refer the having of the Writs contained in the Incident, to the Oaths of the Defenders therein, albeit he had done no Diligence: And the other Party contending, that that ought not to be granted, but only he ought to refer the verity of the Principal Exception to the Pursuers Oath of Verity, seing his Process ought not to be delayed, what-ever others should declare upon the Incident, except the Writs, whereby the Defender might prove his Exception, were produced. The *Lords* Found, that albeit there was no Diligence done upon the Incident at the second Term, yet seing the Defenders called in the Incident were present, that the Party User of the Incident might refer the same, & the Having of the Writs therein contained, to their Oaths, after whose Depositions, seing they were present, the Pursuer might urge his Process to be put to such further point, as he might in Law by the course and order thereof: and the *Lords* would conconsider what their Declarations should work, for, or against any of the Parties. Actor. *Burnet.* Alter. *Nicolson* & *Scot.* *Gibson* Clerk.

Sheriff of *Forrest* contra Town of *Selkirk*, *July* 5. 1632.

IN a Reduction of an Infeftment of the small Customs of *Selkirk*, granted by K. *Ja.* 5, thereof, to the Town, upon a reason of Anteriority and Prior Right, made of the same by K. *Ja.* 4. to the Pursuers Predecessors, to whom he was Retoured Heir. The Defenders Alledging, that the Pursuers Predecessors Charter of their Customs could not be a Title to produce this Action, because there was no special Seasin of the same produced, granted conform to that Charter. Also that the Pursuers own Seasin could not be a Title to Pursue, because it proceeded upon a Retour out of the Chancellary, and was not given by the Sheriff Clerk, conform to the Act of Parliament, and so was null. The *Lords* Found, that the Charter granted to the Pursuers Predecessor of the Customs, was sufficient, albeit there was no special Seasin taken of the Customs, in respect there was Seasin of the Lands contained in that Charter, taken conform thereto produced, and that there needed no special Seasin to have been produced of the Customs, which was *jus incorporeum*, no more than there needed to be taken of the Patronage of a Kirk; and also the Pursuer offered to prove, that conform to that Charter, by the space of 20 years after the same, Compt was made in Exchequer of these Customs, so that thereby the Charter was Corroborat with Possession, and so needed no Seasin, which was sustained, and the Alledgance Repelled: And as to the other, that the Pursuers Seasin was Alledged, not to be given by the Sheriff Clerk, the *Lords* sustained the Process upon the production of the Pursuers Retour, and his Predecessors Seasin, to whom he was Retoured Heir, albeit no Seasin were produced, and so they respected not the defect of the Seasin Alledged; But the *Lords* inclined, if the Seasin had been necessarly required to be used as a Title, to find the same null summarly by way of Exception, if it had not been qualified that the Nottar, Giver of the Seasin, was then Sheriff-Clerk. Actor. *Nicolson*, *Stuart* & *Craig*. Alter. *Cunninghame* & *Mowat*. *Gibson* Clerk. *Vid.* 4 *Feb.* 1630. E. *Kingborn*, and the Cases there Noted. 1 *Decemb.* 1632. *Carnegie.*

L. *Renton*

L. *Renton* contra L. *Wedderburn* and others, *July* 7. 1632.

IN an Improbation of an Inhibition Execute at the instance of two Daughters of *John Stuart* of *Coldinghame*, against Sir *George Hume* of *Manderstoun*, who was constitute their Debitor in some Sums of Money, and which Inhibition was by Pursuit of Improbation quarrelled by the Laird of *Wedderburn*, the Lord *Erskine*, and some others, Creditors to the said Sir *George*; In the which Improbation, the direct manner, *viz.* the Messenger Executor, and Witnesses insert, whereof one was dead, and the other two which were living, were Examined, and approved the Inhibition, and whole Executions thereof; and in respect whereof the Defender in the Improbation, Alledged, that the Process should be holden as Concluded and Advised; and the Pursuer desiring, that he might give in indirect Articles of Improbation, which the Defender Alledged ought not to be permitted, where all the *Direct* were extant and approved. The *Lords* Found, that they would receive the indirect Articles, and Consider and Advise what Substance and Relevant Argument was qualified in them, which being given in, the *Lords* Advised them, without any Answer given in by the Defender thereto: And one of these Articles bearing, that the two Parties, at whose instance the Inhibition was Raised and Execute, *viz.* The two Sisters, had corrupted the Witnesses, and the one Sister had given them fourty double Angels, and the other fifteen, at the least had promised the same to them. The *Lords* Found this Article only admissable to be proven by the Oath of the Laird of *Rentoun*, who had Married one of the Sisters, and Found, that they would admit nor receive no other Probation at all therein, neither by Witnesses, nor by Tryal and Examination of the Witnesses, *A*lledged to be Corrupted, nor by the Oaths of the Women Alledged Corrupters, whose Oaths the *Lords* Found could not be taken in prejudice of the Laird of *Rentoun*, now Husband to one of the Sisters, nor in prejudice of the Husband of the other Sister, albeit the Sisters were Principal Parties, and the Husbands only were Parties for their Interests. And albeit it was Alledged, that the giving or promising of so large Money to the Witnesses by the Wives, could not be presumed to have been done but by the knowledge of the Husbands, in respect both of the greatness of the quantity, and that the Wives cannot in Law be esteemed to have so much Money, without their Husbands, *ob suspicionem turpis quæstus, et ut talis suspitio evitetur*, It was Questioned, if such Promises or good Deeds given to the Witnesses were proven, and that the Husbands were not accessory thereto, and that the Deed it self were tryed to be true, what should be the consequence; whereanent it is certain, that albeit the Deed be true, yet if the Party User of the Writs, & who is repute Principal party be accessory thereto, that he cannot in Law reap benefit by such indirect dealing, which is prohibite in Law, no more than the Party, who albeit in a just Cause, gives Bribes to his Judge, *ut pro se ferat sententiam, pro quo vid: L.* 2. *ff. de Condictione ob turpem causam.* Actor. *Nicolson* & *Mowat*. Alter. *Stuart* & *Craig*. *Gibson* Clerk. *Vid.* 5 *March* 1624. *Gicben* contra *Cochran*, & 26 *June* 1623. *Cochran*.

Lo. *Fentoun* contra *Archibald Drummond*, *July* 10. 1632.

IN an Action of Compt and Reckoning of the said *Archibald*, as Chamberlain, for his intromission with the Earl of *Kellie*'s Rent, and others particularly Libelled, there being an Article of the said *Archibald*'s Intromission with the Corns of one of the Tennents of *Kellie*, which grew upon the Roum Laboured by the said Tennent; and therefore it was craved that the said *Archibald* should pay the Farm of that Room, the Tennents self being dead, and *Archibald* having intrometted with the whole Cropt that grew. And the said *Archibald* Alledging, that his Intromission was for satisfaction of certain Rests of other years Farms adebted by that same Tennent, for the which he poynded it,

and intromett with the Corns controverted. The *Lords* Found, ſeing his Intromiſſion with the Corns was referred to his Oath, that he might ſwear, that he intromett for ſatisfying the cauſe forefaid of the preceeding Debt, and Found, that they would not divide his Oath, and that he needed not to ſhow any, either Writ or *Decreet*, whereby the Tennent was conſtitute his Debitor of theſe preceeding Reſts, nor any Act of Court, nor other Warrand to Poynd the Corns therefore, but that his Oath was ſufficient for all. And ſicklike he being charged for Intrometting with five Punſhions of Wine of the Purſuers, and which were ſold by *Archibald*, and which was referred to his Oath, who Declared, that he Intromett with them, and Sold them, but that they were freely gifted to him of before by the Earl of *Kellie*: And the Purſuer Anſwering, that that was not referred to his Oath, if they were gifted, but only his Intromiſſion. The *Lords ut ſupra* would not divide his Declaration, but Found, that he might Depone, that they were Gifted, and that they had no neceſſity, to except and prove that they were Gifted, either by the Earl of *Kellies* Oath, or otherways. *Actor. Burnet Major.* Alter. *Minor. Gibſon* Clerk. *Vid.* 14 *Feb.* 1633. *Rankine*, and the other Caſes there.

Fiſher contra *Turnbull, Eodem die.*

THe deceaſt *John Turnbull* of *Symontoun*, and *Katharine Fiſher* his Spouſe, having Set a Tack of ſome Lands to umquhile *Rutherford*, and *Turnbull* his Spouſe; both the Husbands being dead, *Katharine Fiſher* Purſues the Relict and appearand Heir of the Tacks-man, to pay a Terms Duty, which was owing, and to find Caution to pay in time to come, or to Remove, as uſe is; which Action the *Lords* ſuſtained, albeit there was not yet a whole year owing, but only one Term preceeding the Summons; and albeit it was offered to be preſently payed, in reſpect the Relict, who was Purſuer, was a mean Woman, who had no more to live upon; and that the Relict, who was Defender, albeit ſhe was Tacks-woman, ſeing the Tack was Set to her with her Husband, yet ſhe had not Subſcribed the Tack, ſo that ſhe might thereby either Labour the Land, or leave it waſte, as ſhe pleaſed, and ſo thereby the Purſuer might be diſappointed of the Tack-Duty, and all benefit of the Land. Actor. *Stuart.* Alter. *Gibſon* Clerk.

Hume contra *Bow-maker, Eodem die.*

ONe *Hume* having acquired the Right of the Liferent of *Bow-maker*, by his Annual Rebellion, and after general Declarator, having obtained Decreet of Removing againſt him; which being Suſpended upon a Reaſon, *viz.* That the Donatar, the time of the Gift granting, had granted a Bond to the E. of *Marr* then Theſaurer, to uſe the ſame by his advice, for the good of the Rebels Creditors; and for not verifying of this Reaſon, the Letters were Found orderly proceeded, and thereafter a new Suſpenſion being raiſed upon this ſame Reaſon, and the Bond, with the Earl of *Marr*'s Declaration, how the Donatar ſhould uſe his Gift, being produced for verifying thereof. It was queſtioned by the Donatar, that after Decreet upon the firſt Suſpenſion, againſt the ſame Reaſon, for not Verifying thereof, the Verification now ought not to be reſpected, nor received, otherways there would be no end of Pley: For if at the ſecond Suſpenſion the Verification were receiveable, it might be alſe well received in the third or fourth, and ſo *in infinitum*; and as if Decreet were given for not Probation of an Exception admitted, that *Decreet* could never be taken away by production of any Probation thereafter, in any ſecond inſtance, far leſs ought it to be received by Suſpenſion after Decreet once given, and thereafter another Decreet given upon Suſpenſion, finding the Letters orderly proceeded, for not Verification. The *Lords* notwithſtanding Found, that they

they would receive the Verification in this ſecond Suſpenſion, albeit it was not produced in the firſt, eſpecially ſeing it was not the Suſpenders own Bond, but was made by a third Perſon to the Theſaurer, and that it depended upon the Theſaurers *D*eclaration, which was only made ſince the firſt Suſpenſion was Diſcuſt, and which is not eaſie to the Parties always to obtain, but muſt be attended while he pleaſed to give it: And the *Lords* Found this Declaration now produced, made by the Earl of *Marr*, being then Theſaurer, ought not to be reſpected, ſeing the Back-bond was granted to the Earl of *Marr*, being then Theſaurer, and he ceaſed to be in that Office the time of the Declaration, and long before, and ſo that it was not proper to him, to Declare as Earl of *Marr*, how that Gift ſhould be uſed, by vertue of the Back-bond, the power whereof to Declare was only proper to the Theſaurer, being in Office for the time, and not to the perſon Receiver of the Bond, if he ſhould be out of Office when he Declared; for the power of ſuch Bonds followed the Succeſſors of the Office, and was not otherways inherent in the perſon of the Receiver, being become a privat perſon; and therefore the *Lords* yet aſſigned a competent day to the Suſpender, to produce the preſent Theſaurers Declaration, anent the ſaid Back-Bond and Eſcheat, that thereafter the *Lords* might conſider thereof, and diſcuſs the Reaſon of Suſpenſion, and Verification thereof. *A*ctor. *Craig.* Alter. *Gibſon* Clerk. *Vid.* 20 *December* 1632. *Knox* for the firſt part of this Deciſion. *Item*, 18 *March* 1630. *Frank.*

Lichton contra *Muir-head*, *July* 11. 1632.

THe Daughter of a Defunct being *S*erved Heir to her Father, ſhe having a Brother living, who was ſuppoſed to be dead, and thereafter the Brother being Served Heir to his Father, who after his Service and Retour, having Diſponed all Goods Moveable and Immoveable, and whatſoever might pertain to him by his Fathers deceaſe, to one called *Stuart*, which Singular Succeſſor purſuing the havers of ſome Obligations pertaining to the *D*efunct, to deliver the ſame to him, and after Decreet, the Haver Suſpending upon double Poynding, as troubled both by the Aſſigney to the Brother, and alſo by the Siſter, and producing the Obligations to be given to any of them who ſhould be found to have Right thereto. The *Lords* Found, that the Brothers Aſſigney ought to have the Heretable Obligations, and that the Moveable Bond ſhould be given to the Siſter, who was Confirmed Executrix to the Defunct, which was ſo Ordained, albeit the Brothers Aſſigney Alledged, that the Executrix in this Proceſs could not come in ſo ſummarly, to ſeek the Moveable Bonds, ſeing ſhe had neither obtained any Sentence therefore, as Executrix againſt the Haver, which ought to preceed ere ſhe could ſeek the ſame, neither was there any thing here called in queſtion, but which of them, as Heirs, had beſt Right to the Obligation produced; notwithſtanding whereof in this ſame Proceſs, The *Lords* Found, that the Executrix might deſire the Bonds produced, ſo many of them as were Moveable, to be given her in this ſame Proceſs, without neceſſity to intent any new Purſuit therefore, ſeing the Bonds were Exhibit, and they could not be Ordained to be given back again to the Producer, who claimed no Right thereto; and the Heir or his Aſſigney having no Right to the ſame, the Executrix ought to have them; alſo the Executrix deſiring, that the Aſſigney conſtitute by the Heir, ſhould find Caution to relieve the Executrix of all the Defuncts Heretable Debts, for which ſhe, as Executrix, might be diſtreſſed by his Creditors; and this Aſſigney Replying, that he being a Singular Succeſſor to the Heir, and for onerous Cauſes, he ought not to be burdened with this Caution, no more than if he had bought Land, or any other particular from the Heir, could the Haver been compelled to find Caution to relieve the Executrix, or to make that Particular ſo bought by him, lyable to the De-

functs Creditors, who had done no Diligence before the Acquiring of his Right, against the Defuncts self, or against the Heir his Author, which might hinder him to Contract with the Heir, and to Acquire this Disposition: notwithstanding of the which Reply, which was Repelled, The *Lords* Found that this Assigney, and Singular Successor, should find Caution to make these Obligations Hereitable, now acclaimed, and Decerned to be given to him, or the Sums therein, so far as he should up-lift the same, forth-coming to all Parties having Interest, who might claim the same, for the Defuncts Debts, *prout de Jure*; for they Found, that this Assigney should therein be lyable, to all Parties having Interest, as said is, for these Bonds, and Sums thereof, to be recovered by him, in that same manner, as the Heirs self might have been lyable, if he had not been Denuded, specially seing the Disposition made to him by the Heir was universal, of all things whatsoever he might succeed to, as Heir, and so was *omnium bonorum & totius Juris.* Actor. *Stuart* & *Mowat.* Alter. *Nicolson* & *Sandilands.* *Hay* Clerk. *Vid. Penult July* 1630. L. *Carnousie.*

Ramsay and *Hay* contra *Pyronon* and *Edgar*, *July* 12. 1632.

ONe *Pyronon* a *French-man*, and his Factor having obtained Decreet against the Bairns and Executors of umquhile *Patrick Ramsay*, and *Alexander Hay* their Tutor, for Payment of Money owing to the *French-man* by the Defunct; after the discussing of the Suspension of this Decreet, the Moneys being Consigned by *Alexander Hay* their Tutor, was Decerned to be given up to *John Edgar*, Procurator for the *French-man*, the said *John* being Bound to Re-pay the same *cum omni causa*, in case the said *Alexander Hay*, and his Minors prevailled in the Reduction, which they had Intented of that Decreet; which Reduction was Intented, and Pursued by them, against *Pyronons* self, and the said *John Edgar*, upon this Reason, that the said *Pyronon* by his missive Letters, subscribed by him, and written to umquhile *Patrick Ramsay*, the Defenders Father had acknowledged these Sums satisfied, for which Sentence was given against them, and since the Intenting of this Reduction, *Pyronon* being dead, it was Alledged by *John Edgar*, that he could not be compelled, to sustain this Process, and to Dispute upon this Letter, whereupon the Reason is founded, while some Person to represent the Principal Party now deceased were Summoned, who might Answer to the Letter, and might know how to eleid the same, seing he was only Bound to repay the Money, if the Decreet were Reduced, as he is yet content to do; but the same cannot be Reduced against him, he not being Party therein, but of necessity the Reduction ought to be Deduced against the Principal Party, obtainer thereof, and who has only entered to maintain the same. This Alledgance was Repelled, and the Process of Reduction sustained against this Excipient, receiver of the Money, and who was Bound, as said is to repay the same, without necessity to call the Principal Party, obtainer of the Sentence to this Reduction, or any other representing him; and thereafter the Defender Alledging, that the Letter produced, which was the ground of the Reduction, was null, seing it wanted Witnesses, and Designed not the Writer according to the Act of *Parliament.* The *Lords* Found, that such privat Letters betwixt Merchant and Merchant, came not under that *Act* of *Parliament*, albeit the Missive Letter bore an Exoneration of a great Debt acclaimed by the Alledged Writer thereof, and also that thereby he was constitute beside, to be owing unto him, to whom it was Written, a great Sum of Money, whereby the Defender Alledged, that such privat Letters would be of a greater force than Authentick Writs, which may fall under the *Act* of *Parliament*, which was Repelled. *Item*, the Defender denying the Subscription of the Letters to be *Pyronons* hand writ; Likeas he produced a Letter, all Written and Subscribed by the said *Pyronon* before he died, whereby he declared, that he never

wrot

wrot ſucha Letter, and therefore Alledged, that the ſame could not make faith except it were proven to be all his Hand-writ, at leaſt that it were proven to be his Subſcription by Witneſſes, who ſaw him writ the ſame, ſeing he had no means to Improve the Letter, it being Privat and obſcure, as ſaid is: And further contended, that in ſuch caſes, this ought only to be tryed by the Parties Oath, who being now deceaſed, there reſted no other manner of Probation, but the Oath of the Defender, who is only found Party, what he knows of the verity thereof. The *Lords* Found, that the *Reducer* had no neceſſity, to prove this Miſſive Letter to be totally written by *Pyronon*, but that it was ſufficient, if he ſhould lawfully approve the Subſcription thereof, to be his proper hand-writ; and before they gave Anſwer in point of Law, if that Approbation ſhould be by Witneſſes, who were preſent, and ſaw him ſubſcribe, or not, The *Lords ex officio* ordained both the Parties, *viz.* the Reducer, to produce all ſuch Means and Documents as he had, to verifie the truth of the Subſcription of the ſaid Letter, and which he would uſe to that effect: And alſo the Defender to produce all ſuch Means and Evidents as he had, whereby he might derogat to the Faith of the ſaid Letter, and might make it appear not to be his Hand-writ; and after all were produced, They would conſider what faith in Law ſhould be given to the ſaid Letters and would give Anſwer to the Cauſe *in Jure*, concerning the ſaid Letter, and the Reaſons which are founded thereon. Actor. *Stuart*, *Lermonth* & *Hay*. Alter. *Nicolſon*, *Mowat* & *Gibſon*. *Hay* Clerk. *Vid. Feb.* 14. 1627. Betwixt theſe ſame Parties * *July* 1. 1631. *Maccubin.*

Pollocks contra *Fairholm*, *July* 13. 1632.

SOme *Pollocks* being Served Heirs to *Robert Halliday*, Purſues Reduction of two Bonds, of ſome Moneys, made by him, as being done on Death-bed, and ſo in prejudice of his Heirs. The Defender Alledging, that theſe ſame Bonds were given of theſe Sums, for Furniſhing made to the Defunct, *viz.* for furniſhing of Malt, as much as extended to 500 Merks, which was the Sum contained in the one Bond, and which was at ſundry times made to him, and whereupon the ſaid Parties having Compted, finding it to amount to this Sum, he then made, and Subſcribed this Bond. The *Lords* Found this Alledgance Relevant, to ſuſtain the Bond, albeit it was made on Death-bed, the foreſaid reall Furniſhing being proven to have been really made, equivalent to the ſaid Sum, and which the *Lords* Found probable by Witneſſes, the Furniſher alſo giving his Oath upon the Truth of the Furniſhing, after Probation. And it being alſo Alledged for the other Bond, containing other five hundred Merks, that the Creditor had recovered this Bond, for ſatisfaction of the like Sums owing before to him, and particularly which he had furniſhed to the Defuncts Father, which then the Defunct took on him by his Bond to pay. The *Lords* Found this Alledgance Relevant, for ſo many of the Sums, as the Defender ſhould prove furniſhed to the Defuncts ſelf, but Repelled that part of the Alledgance, anent the furniſhing made to the Defuncts Father, for the which they would not ſuſtain the Bond, except it were Alledged, that the Defunct was Heir or Executor to his Father, whereby in Law he would have been lyable to pay Sums, adebted by his Father to this Defender. *Gibſon* Clerk. *Vid. Feb.* 16. 1628. *John Byres. Jan.* 7. 1624. *Shaw. Penult July* 1635. *Richardſon.*

Stodart contra L. *Cockil-ferrie*, *Eodem die.*

ONe *Stodart* having Recovered a Sentence againſt *Cockil-ferrie*, for a Sum owing by his Bond made thereupon to this *Stodart*, in his own Name, albeit he acknowledged the Moneys to pertain to his Minor, to whom he was Curator; and immediately after the Decreet, the Minor becoming Major, *Cackil-ferrie* obtains a Diſcharge in his Majority from him of this Sum;

and thereupon Suspends, and desires to be freed of the Sentence obtained by *Stodart*, which Reason and Discharge Produced was not allowed, but *Stodarts* Decreet was ordained to have effect, seing after the Sentence, the Defender could not Transact, nor pay the Minor, albeit then Major, in prejudice thereof; for it might be, that *Stodart* the Curator, in his Curator-Compts, would be found super-expended, and so had just Reason to Intromet with the Minor's Moneys, and after Sentence the Debitor could not be reput to have done *bona fide*, to deal with any Party without him, at whose Instance Sentence was recovered against him. *Hay* Clerk.

E. of *Mortoun* and *Craufurd* contra the Feuars of *Muckart*, *Eodem die*.

THe Earl, and one *Craufurd* his Tacksman concurring, being Infeft in the Miln of *Muckart*, with the Astricted Multars used and wont, by the Bishop of St. *Andrews* (this Miln being the only Miln of the Barrony) Pursues the Feuars of the Lands of this Barrony, every one for their own Lands, for abstracting of the Multars, and to pay the same to his Tacksman of the said Miln; wherein the *Lords* Found, that the Earls Charter and Seasin foresaid, containing Disposition of the Miln, (being the only Miln of the Barrony) with the Attricted Multars, used and wont, and the continual use of the Defenders coming and Grinding their Corns of their Lands at the said Miln, was not a a sufficient Ground, or Titl, whereby the Defenders might be Compelled to come to the said Miln, and Grind their Corns thereat, as Thirled and Astricted thereto; for by that Infeftment, they were found not to be Thirled, which was Granted to the Pursuer, bearing *ut supra*, Nor yet by their use to come and Grind their Corns at the said Miln, how long soever they had so done, except that the Pursuer would Reply, and prove expres Astriction of these Lands, pertaining to the Defenders, to this Miln, either by their Evidents, bearing them to be Thirled thereto, or by some lawful Acts of Court, and Constitutions, whereby the saids Lands, and Possessors thereof, were so Thirled before the Defenders Infeftment, and no otherwise. Actor. *Nicolson* & *Dunlop*. Alter. *Stuart* & *Prymrose*. *Hay* Clerk. *Vid. July* 17. 1629. L. *Newliston November* 26. 1631. *Oliphant*. *Decem.* 20. 1632. L. *Innerwick*. *July* 12. 1621. Earl *Murray*.

Ardwel contra *M'culloch*, *July* 17. 1632.

IN a Removing, wherein the Tennent Warned, Alledging him to be Tennent to the Lady, Liferenter of these Lands, & who was living the time of the making of the Warning, & who was also Warned, & she being then living, albeit now dead, no Process ought to be sustained against him upon that Warning: And the Pursuer Replying, that albeit she was living when the Warning was made, yet seing she was dead before the *Whitsunday*, to which she was Warned, the Warning now and Process thereon, ought to be Sustained, her Right becoming extinct, even as if a Tack had been set, which would have endured to that *Whitsunday*, the Setter might have Warned before the *Whitsunday*, to Remove at the *Whitsunday*, which would have been Sustained: notwithstanding whereof the foresaid Alledgance was Sustained, and no Process Found upon that Warning, albeit she died before the Term, seing it is not alike, as if a Tack had been set of that endurance to the Term, seing there it was constant, that the Tack would then expire; But it is not so in Warning of a Liferenter, living the time of the Warning, for none can be certain that she will die before that Term, and thereupon to make the Warning upon uncertainty of Cessation of her Right: And it being Alledged, that the Warning was made at the Kirk of which is all ruinous, and not at the Kirk of to the which Kirk, the Kirk whereat the Warning is made, is unit by *Act* of Parliament, & only Divine Service used there-

at;

at; the *Lords* were of the mind to Sustain this Alledgance, and to reject the Warning therefore, but it was not decided, in respect of the discussing of the other Alledgances, *ut supra*. Actor. *Cunninghame*. Alter. *Nicolson*. Scot Clerk. *Vid. Decemb.* 24. 1642. *Young*.

La. *Borthwick* contra *Scot*, *Eodem die*.

THe Lady Pursuing for the Mails and Duties of the Lands of *Cathcum*, conform to her Conjunct Infeftment, after the Decease of the Lord *Borthwick* her Husband: And the Defender Alledging, that her umquhile Husband, had for Causes most onerous, *viz*. For satisfying of a Debt owing by him to the Excipient, granted a power and Letters of Commission to him, to Intromet with the Duty of these Lands, for payment of these Debts, ay and while he were satisfied thereof, and that they were not yet satisfied, and therefore the Duties ought to pertain to him, and not to the Lady. In this Process, it being questioned, if this Factory could be obtruded against the Lady, who Alledged the Factory not to be a real Right, and that it could not be obtruded against her, no more than a Right to bruik Lands, made to a Creditor, to be Possessed for payment of an Annualrent of Money lent, ay and while the Money were re-payed, could be admitted against a singular Successor, as she alledged, her self ought to be considered, seing she Alledged, that her Right flowed not from her Husband, but proceeded upon the Earl of *Lothian* her Brothers Resignation, who was Heretor of the Lands, and Resigned the same for Infeftment alike principally, to be given to my Lord her Husband and to her, and to the longest liver of them; And the other Party Answering, that the Factory was real, being for a Cause so onerous, specially against the Lady, who could not be repute a stranger, nor singular Successor, seing her Infeftment behoved to be repute to flow from her Husband, seing the Earl of *Lothian* was obliged to Resign in his favours and his Heirs, and not in her favours, so that her Infeftment behoved to be repute her Husbands Deed. The *Lords* Repelled the Alledgance, and Found that this Factory was not real, and could not be respected against the Lady, nor her Infeftment, which the *Lords* Found, ought not to be respected as an Infeftment or Donation, flowing from her Husband, seing she was equally Infeft with him, and that he could not Revock the same, not being his own Deed. Actor. *Nicolson*. Alter. *Stuart*. *Hay* Clerk.

Black contra L. *Pitmedden*, *Eodem die*:

ONe *Black*, upon a Compriſing of Lands from his Debitor, Charges *Pitmedden* to Infeft him, as being Superior of the Lands, who Suspending, that the Lands pertained to him in Property, and were so Possest by him, and his Authors, thir thretty six years by-past, so that he ought not be Compelled to Infeft any in his Property. This was Repelled, and the Compriser Ordained to be Infeft, without prejudice of *Pitmeddens* Right of the Property, which the *Lords* Declared should not be hurt by this Infeftment, but only Found, that the Compriser should be in that same estate, for his Right, as his Author might have been, from whom he Compriſed, and would not put the Parties to Dispute upon their Rights in this Judgment. Actor. *Baird*. Alter. *Vid. March* 11. 1636. *Margaret Scot*.

L. *Auchinleck* contra *Cathcart*, *Eodem die*.

THe deceast Lo. *Cathcart*, in his Bastard Daughters Contract of Marriage, is obliged to Infeft her and her Husband, during their Lifetime, and their Heirs, in some Lands, whereof the Daughter Sets presently a Back-Tack to the Lo. *Cathcart*, for payment of a Silver Dutie, of which Silver Dutie they were twenty years payed by the Father, but never got any payment from the Tennents, nor out of the Lands. The said Daughter Pursuing upon the In-

feſtment granted to her, following upon the ſaid Contract, which was a baſe Infeftment, holding of the Granter, the Tennents of the Lands for payment of the Mails and Duties, and they Alledging them to be Tennents to the L. *Affleck*, who was Infeft in the ſame Lands, by the Lo. *Cathcart*, holding of him ſicklike, and Confirmed by the King, and by vertue thereof ſix years in Poſſeſſion of the very Duties of the Lands from the Tennents, Occupiers thereof; Likeas, ſince the deceaſe of the Lo. *Cathcart* his Author, he Charged his Son to enter to the Superiority of theſe Lands, and for not doing has obtained Decreet of Tinſel of Superiority, whereupon he is Infeft by the King, & in Poſſeſſion both Real, by up-lifting from the Tennents the Duties, and alſo Civil, by obtaining Sentences againſt them; Likeas the Tennents thir thretty years by-paſt ever ſince payed their Duties to the Lo. *Cathcart*, while the L. *Affleck* Acquired his Right and Poſſeſſion, the Purſuers Infeftment being ever obſcure and unknown, nor ever cloathed with Poſſeſſion. The *Lords* Repelled the Alledgance, albeit it was alſo proponed for *Affleck* Compearing with the Tennents, in reſpect of the Purſuers Right, which was anterior to the Defenders, and that the ſame depended upon a Contract of Marriage, and that they got payment of the Back-Tack Dutie from the Lo. *Cathcart*, albeit they never had any other Poſſeſſion, either from the Tennents, or out of the Lands, and albeit theſe ten years by-paſt, they had got no payment, and preferred her to the Excipient, albeit Real Poſſeſſor. *Scot* Clerk. *Vid. July* 8. 1626. *Turnbull Jan.* 22. 1633 *Gordon.* and the Caſes there.

Irvin contra *Robertſon*, *July* 20. 1632.

BY Contract of Marriage betwixt one *Irvin* and *Robertſon*, Brother to his Siſter then Contracted, to be Married on *Robertſon*, is oblidged to pay to the ſaid *Robertſon*, in name of Tocher, the Sum of Two Thouſand Merks; and they being Married, after Procreation of a Bairn, who died before the Parents, but within the ſpace of a year after the Marriage, and a ſpace before the Expiring of the year, the Wife alſo died, and ſicklike the Husband; this Husbands Brother being Served Heir to him, purſues for Regiſtration of the foreſaid Contract, to the effect that he might have Execution, for payment to him of the foreſaid Sum Contracted, to be payed to his ſaid umquhile Brother, being Heretably Contracted. Wherein the Defender Compearing, and Alledging, that in reſpect the Wife and her Huſband out-lived not the year, but that the Marriage was diſſolved by Death within the year; therefore the Marriage *quoad omnia hinc inde donata*, was returned, as if it never had been; and that the Tocher could not be craved by the Huſband, albeit he were yet living, and albeit he had not died within the year; neither could the Procreation of a Bairn, who alſo died within the year of the Parents Marriage, make any Exception againſt the common Practique, whereby all is Reſtored *hinc inde*, where any of the Parties Married dies within the year: And the Purſuer Replying, that the Procreation of a Bairn once living, albeit both the Bairn and Parents died within the year, makes the Contract to be effectual, and that the Tocher ſhould be payed to the Huſband and his Heir, Sicklike as the Conjunct-fee would have been in due to the Wife, if ſhe had ſurvived. The *Lords* Repelled the Alledgance, and Found, ſeing there was a Bairn born of the Marriage, albeit both the Bairn and Parents died within the year, yet that the Tocher was due to the Huſband, and conſequently, after his death, to his Heirs, being Heretable, as ſaid is. Actor. *Stuart*, *Mowat* & *Davidſon*. Alter. *Nicolſon* & *Ruſſel*. *Scot* Clerk. *Vid. July* 23. 1634. *Maxwell*, and the other Caſes there.

Hamilton contra *July* 21. 1632.

IN a Reduction of a Conſent, given by the Wife to her Huſbands Alienation, of the Lands, wherein ſhe was Conjunct-fiar, deſired to be Reduced *ex capite*

pite metus, &c. and an Exception of her voluntar Consent being proponed; that she Compeared before the Baillies of *Glasgow*, and Town-Clerk, and before certain Witnesses, and made *Faith*, that she did it voluntarly, testified by a Note, written by the Clerk upon the back of the Contract, albeit neither that Note was Subscribed by the Baillie, nor Clerk, nor an Act Extracted and delivered to the Party thereon, nor no further extant in the Clerk-Books, to verifie it; whereby the Pursuer Alledged, that it ought not to be respected. The *Lords ex officio*, Ordained both the Parties Witnesses *hinc inde* to be condescended on, and the Witnesses mentioned in the foresaid Note, to be examined, and thereafter they would consider of the Reason of *metus*, and Exception, and Decide the Cause (for the *B*aillie and Clerk were dead) as was Decided *June* 27. 1632. betwixt *Cassie* and *Fleming*. Actor. *Nicolson* & *Dunlop*. Alter. *Stuart*. *Scot Clerk*.

Hume contra *Hume*, *Eodem die*.

THe deceast *Samuel Hume*, being Decerned by a Decreet Arbitral, to pay to his Mother yearly, a yearly Dutie of Victual, whereto she having made on her Assigney, which Assignation being Intimat at the Mercat Cross of the Head Burgh of the *S*heriffdom, where the Partie dwelt, and within the which the Lands lay, for which the Victual should be payed. The Assigney desiring this Decreet Arbitral, the same being *R*egistrat, to be Transferred in him *Activè*, and in the Heir of *Samuel Hume*, Partie obliged to pay the said Victual, *Passivè* who Compeared, and Alledged that the Mother, to whom the said Victual was payable, had Discharged to the said *Samuel* that Decreet, and granted her satisfied of that Clause concerning the payment of the Victual, and had exonered him thereof, and which, albeit it was confest to be done after the Assignation, and Intimation thereof, yet the said *Samuel* might lawfully do it, notwithstanding thereof seing, the said Intimation was never lawfully made to him, and the Assignation, and Intimation preceeding, made at the Mercat-Cross, could not put him *in mala fide*, to pay his own Just Creditrix, and to take Exoneration from her. This *A*lledgance was Found Relevant, notwithstanding of the preceeding Assignation and Intimation, which the Debitor was not holden to know, not being made to himself. For if the Intimation, had been made at the *D*ebitors dwelling House, it might have remained as obscure to him and unknown, as the Intimation made at the Mercat-Cross; Therefore it would be considered, if such Intimations at Parties dwelling Houses, be sufficient against them, or else they must be made Personally to them. Actor. *Mowat* & *Hepburn*. Alter. *Craig*. *Gibson* Clerk. *Vid. March* 25. 1635. Lo. *Yester*.

James Rule contra L. *Billie*, *July* 24. 1632.

ONe *James Rule* being Donatar to the Liferent of the Laird of *Billie*, and pursuing Declarator thereon, the Lands being holden of the Abbay of *Coldinghame*, and the Gift of Liferent flowing from *William Douglas* his Heirs, who had the Right of Superiority competent to *John Stuart*, to whom the Abbacy of *Coldinghame* was Erected. In this Process, *James Renton*, who had acquired the Right of the Lands controverted from the L. *Billie*, by vertue of a Compriſing, Deduced thereon by a lawful Creditor, who had Disponed the said Compriſing to him, and by vertue whereof he had been also diverse years in Possession; All this time the L. *Billie* being a free Leige, not at the Horn, by the space of four years after the Compriſing, in respect whereof he Alledged, that the Donatar had no Right to the Liferent of thir Lands, being Compriſed, as said is, before the Rebellion from the Vassal, and the Compriſer in Possession, and which Compriſing must be alse effectual to Seclude the Donatar, and Superior from the Liferent, as if the Vassal had by Contract *D*isponed his Liferent, he then being at no Horn, *quo casu* the subsequent Rebellion of the Vassal could ne-

ver have prejudged the Acquirer of his Liferent in his *Right* thereof, albeit no Seasin, nor other Deed had been done by the Superior, to acknowledge the same. The *Lords* Repelled this Alledgance, and Found the Liferent of the Vassal's Lands pertained to the *Superior*, notwithstanding that the same were Compriſed, and poſſeſſed by the Compriſer before the Vaſſal was Rebel; in reſpect that the Compriſer was not Infeft, nor Seaſed by the Superior, in the Lands; Nor had the Compriſer Charged the Purſuer to receive him upon the Compriſing, without which the *Lords* Found, that the Vaſſal becoming Rebel, albeit after the Compriſing, Forfaulted his Liferent to the Superior, wherein the preceeding Compriſing did not prejudge him; for not the Compriſing, but Seaſin makes the Real Right of Lands, *eo caſu* even as if there had been two Compriſers, the firſt Infeft, albeit laſt Compriſing, would have been preferred to the firſt Compriſer. And the *Lords* Found, that the *Lord* of Erection his ſubmitting of his Superiorities to the King, prejudges him not of his Caſualities of that Erection, but that the ſame pertained to him, he not being ſatisfied therefore by the King, which is the Condition of the Submiſſion. It was alſo Found, that *Billie's* Liferent Eſcheat of his Lands, holden of *John Stuart* fell under *John Stuarts* Liferent Eſcheat, albeit the time when *John Stuart* was Rebel year and day, his Vaſſal was not then Rebel, but was Rebel thereafter; alſo a Compriſer Infeft before *Billies* Annual Rebellion by the King, *Billies* ſelf being ſtanding Infeft by the King, by the Act of *Annexation*, prejudged not *John Stuart*, to whom that Benefice was Erected before that Compriſing, and Infeftment of the Compriſers thereon, ſeing the King by that Erection Ceaſed to be Superior, and *John Stuart* became Superior, of whom he ſhould have taken the Infeftment, for by that Erection, the Annexation of that Benefice was Reſcinded. *Actor. Stuart* & *Craig.* Alter. *Nicolſon. Gibſon* Clerk. *Vid. March* 8. 1628. L. *Wedderburn. March* 19. 1628. *Raith* Donatar, and the other Caſes there. *March* 28. 1632. L. *Lochinvar. March* 13. 1628. *Ker* contra *Coldingknows. Feb.* 16. 1631. Lo. *Cranſton.* and for the laſt Part of this Deciſion. *Vid. Feb.* 4. 1634 L. *Wedderburn.*

Mᶜkorinoch contra *Johnſtoun, July* 31. 1632.

ONe *Mᶜkorinoch*, Burgeſs and Indweller in *Kirkcudbright*, Purſues the Relict of umquhile who was alſo Burgeſs, and died in that Town, the *Relict* alſo being ſtill dwelling in that Town, before the Sheriff of the Sheriffdom, to make payment to him of certain prices for particulars furniſhed to her, extending to ſix or ſeven ſcore pounds, and whereof ſhe promiſed him payment; whereupon having obtained Sentence before the Sheriff, and thereupon Charging her, ſhe Suſpends upon this Reaſon, that ſhe being a Burgeſs Wife of the King's Burgh-Royal, and ſtill Reſidenter there, as the Purſuer alſo was, and a Burgeſs of that Town, ſhe could not be conveened but before the Provoſt and Baillies of their own Burgh, they being both *Concives*, and the Sheriff was not Judge to her, nor ſhe holden to anſwer to that Court. This Reaſon was not reſpected, but the Letters were Found orderly proceeded, notwithſtanding thereof, in reſpect the *Lords* Found, that Burgeſſes of Burghs-Royal might be Conveened by Con-Burgeſſes before the Sheriff, as well as before their own Magiſtrats of Burgh, albeit the Burgh was alſo Sheriffs within themſelves; for they were not privative, but cumulative Judges. *Gibſon* Clerk. Upon the laſt of *March* 1636. this was controverted in a Cauſe betwixt *Couts* and *Couts* Cook in *Edinburgh*, where the Maſter being Purſued by the Servant for his Fees, before the Sheriff of *Edinburgh*; and the Maſter deſiring Advocation, becauſe he was Burgeſs of *Edinburgh*, and therefore ought either to be Judged in their Court, as their Burgeſſes, eſpecially ſeing they were Sheriffs within themſelves, or elſe Advocated to the *Lords*; which Reaſon the *Lords* inclined to ſuſtain, but delayed to Decide it untill *June* next thereafter. *Dowglaſs*

Douglass contra L. *Ednem*, *Eodem die.*

IN an Action for wrongous Intromission with the Teinds of *Ednem*, of the Cropt 1631. The *Lords* sustained this Action, and Decerned according to the quantity of the Teinds proven; albeit the Defender Alledged, that he Intrometted according to a Warrand of the High Commission, giving him power to Intromet, he finding Caution to pay the quantity, to which the Teinds should be valued, as use is in that Commission; likeas the Teinds are Valued, and the Valuation approven by the *Lords* of the Commission, and he is content presently to pay the quantity, whereto it is valued; and therefore he Alledged, that the Decreet ought to be restricted to that quantity, and no further ought to be Decerned. This Alledgance was Repelled, and notwithstanding thereof the quantity proven was *Decerned*, and the Prices, but the smallest quantity that was proven was Decerned; and this was so Found, seing the Pursuer had not submitted, so that the Act of the Commission could not astrict him; albeit the Defender Alledged, that if the Lords of the Commission had not given him Warrand to meddle and lead the Teind, he would not have intrometted therewith; which was not respected, seing he sought that Warrand upon his own peril and hazard. And this is the first *Decision* where the quantity Proven was Decerned, notwithstanding of the Warrand to lead from the Commission, and notwithstanding of the approving of the Valuation. Actor. *Stuart* & *Craig*. Alter. *Nicolson*. *Gibson* Clerk.

Montgomery contra L. *Fergushill*, *November* 9. 1632.

A General Declarator of the Escheat and Liferent of being Pursued by *Montgomery*, the *Rebels* Creditor, and which he Declared he took and used only to recover payment of his own Debt; *Fergushill* Defender being also Donatar and Creditor of the same Rebel, Alledging, that the Pursuers Horning produced, whereupon the Gift of Escheat was given, was null, because the Debitor was not Charged, neither personally, nor at his dwelling-house thereby, in so far as the Execution bore, that the Messenger Charged the said Debitor, whom he Designed by the Style of his Roum of at his dwelling-place there, and the Execution *Designed* no dwelling place particularly, whereat he Charged him, as it ought. This Alledgance was Repelled, and the Horning sustained, for the Execution was holden, as if it had born to be done at the Parties dwelling-place, whereof he was styled by the said Execution, and the Pursuer abode at the Horning, as Execute at that dwelling-place. Thereafter the *Defender* Alledging, that he offered to prove, that the *Rebel* dwelt in another place the said time of the Charge: *And* the Pursuer *Replying*, that that Exception being *in facto*, ought not to be received to annul his Horning so summarly, by way of Exception, but he ought to Reduce thereon, and then he should *Answer* thereto. The *Lords* received the same Exception *hoc loco*, without necessity to urge the *Defender* to Reduce thereon, in respect of the Execution foresaid, which as said is, made no clear special expression of the place *nominatim*, whereat the Party was Charged. *And* thereafter the Pursuer *Replyed*, that he dwelt then in that same place, whereat he was Charged, which was sustained, and admitted to Probation. Actor. *Stuart* & *Gilmore*. Alter. *Cunninghame*. *Gibson* Clerk. *Vid.* 14 *Decem.* 1621. E. *Winton*, & 23 *March* 1630. *Oliphant*.

Hamilton of *Sheills* contra his Tennents, *Novemb.* 22. 1632.

IN a Removing Pursued by *Hamilton* of *Sheills*, the *Defender* Alledging, that by Contract past betwixt the L. *Dunrod*, who was Author of the Pursuers Right, and who had Disponed the Lands to the Pursuer Heretably, which Contract was before the making of this Pursuers Right, the said L. *Dunrod* had obliged him to Infeft this Defenders Author in an Annualrent out of the Lands,

Redeemable under Reversion of the Sums therein contained, by the which Contract he gave also power to the Excipients Author, to Set Tacks of the Lands Libelled to whom he pleased, and for the space contained in the Contract; according whereto he had Set Tacks to the Excipient, which were not yet expired. This Exception was Repelled against the Pursuer, who was singular Successor to *Dunrod*, seing the Wodset whereupon the Defender Excepted was constitute only by Contract, whereupon no real Infestment nor Security was exped; so that albeit it might work against the Contracter and his Heirs; yet it could not be received against the singular Successor; and as to the power to Set Tacks contained in the Contract, that was not respected against the singular Successor, seing according thereto no Tack was Set before the Pursuer acquired his *Right*, and the Tack Set since could not be valid against the Pursuer, in respect of his interveening Heretable Right, acquired before the Setting of the Tack; for that power in the Contract to Set Tacks, was but a Procuratory and Mandat, which was tacite, and in effect Revocked *rebus integris* by the Constituent, before the using of the power thereof by vertue of the said Heretable *Right*, acquired by the *Pursuer*: And it being further *Alledged*, that by the same Contract the L. *Dunrod per verba de præsenti*, Set a nineteen years Tack to the Excipients Author, which is yet unexpired, to begin after the said *Annualrent* was Redeemed: Likeas now he granted the same to be Redeemed, and discharged the Wodset, and confessed the payment of the Sum, and took him only to the Tack, which behoved to be respected, as if the Annualrent had been Legally Redeemed. This Alledgance was also Repelled, seing the Annualrent was never Redeemed, after which Redemption, the Tack was only appointed to take beginning; and the Defenders granting of Redemption could not be respected in his prejudice, who was singular Successor, to make the Tack have beginning, which was conferred to a time, which would never fall forth, seing the Wodset not being valid against this Pursuer, the samine would never be *Redeemed*, being only personal, and so as he needed never to know the Wodset, no more could he be obliged to the Tack; in respect whereof the Exception was Repelled: Actor. *Nicolson* & *Gilmor*. Alter. *Mowat* & *Gibson*. *Scot* Clerk.

Turner contra *Ker*, *November* 24. 1632.

ONe *Turner* Taylor in *Edinburgh*, Pursuing one *Margaret Ker*, for payment of the price of sundry Gowns and Abuilziments taken off by him, and furnished by him to her, and delivered, and which was Libelled to have been done by him at her direction. The *Lords* Found this Summons, concerning that direction and furnishing, should be proven by Writ, or Oath of the Defender, and Found it not probable by Witnesses, the price Libelled extending to 400 pounds. Actor. *Rigg*. Alter. *Mowat*. *Hay* Clerk.

Hind contra L. *Wedderburn*, *Eodem die*.

ONe *Hind* Pursues Removing, as Heir to his Good-sir, who was Infeft in some Husband-Lands in *Coldinghame*, against L. *Wedderburn* and his Tennents; and he Defending and Excepting, that his Father had obtained Decreet of Removing against this Pursuers Good-sir, to whom the Pursuer is Heir, by vertue of which Decreet his Father during his lifetime, and since this Defender, hath been in continual peaceable Possession of the Lands Libelled thir Thirty four years bypast; therefore the Pursuer, this Decreet standing, cannot Pursue Removing: And the Pursuer Replying, that the Decreet cannot be received to stay this Removing, except that the Defender would Alledge some Right, by vertue whereof he bruiks, and by vertue whereof the Sentence was obtained; which if he will Alledge, he will oppone a nullity

ty in Law, *viz.* That it is an Infeftment of Kirk-Land, not Confirmed, which can neither produce Action, nor Exception. Likeas *John Stuart*, now Laird of *Coldinghame*, and Author of this Pursuers Right Compeared, and Concurred with this Pursuer, and adhered to this Reply, and assisted the Pursuit, against whom no Decreet is obtained. The *Lords* Found, in respect of the said Decreet, clothed with so long Possession, obtained against this Pursuers Good-sir, to whom he was Heir, and Pursued by him *hoc Titulo*, was standing unreduced, therefore that the Pursuit could not be sustained, notwithstanding of the said Reply of Nullity, which is not receivable by Exception or Reply; for it was not Found necessar, that the Defender should Except upon his Right, so long as the said Decreet clothed with so long Possession stood unreduced: And the *Lords* respected not the Superiors Concurse, to sustain a Pursuit of Removing at another Parties instance, he not being Pursuer. Actor. Alter. *Nicolson. Scot* Clerk. *Vid.* 21 *December* 1629. *Clerk.*

Annand contra *Annand*, *Eodem die.*

IN a Pursuit by one *Annand*, as Executor to his Father, for payment of a Sum against the Defender, as lawfully Charged to enter Heir to his Father, Debitor of the Sum, conform to his Bond. The Defender offering to Renounce, where he was conveened as lawfully Charged, *&c.* And 2°. Alledging, under Protestation, that he past not from his Exception, and offer to Renounce to be Heir, that he offered to prove by this Pursuers own Oath, that the Bond was blank in the Sum all the time of the Lifetime of the Creditor, and was so Found by this Pursuer after his decease, and was since filled up by himself: And the Pursuer contending, that he cannot be heard both to propone this Exception, and also to Renounce. The *Lords* Found, that if the Defender would offer to Renounce to be Heir, he could not be heard to Propone any other Exception to Eleid the Pursuit, and if he would Propone any Exception for Eleiding thereof, that *eo casu* he could never be heard, neither at that same time, nor in that Process, nor in no time thereafter to Renounce; and so they permitted to his option, to elect any of the two; but Found, that he could not propone and use both; for if he succumbed in proving of the Exception, or any other peremptor Exception, which might Eleid the Cause, he could not use the Renunciation, having succumbed: albeit the Renunciation was proponed at that time when the Peremptor was proponed, which I think singular. Actor. *Baird.* Alter. *Gilmore.* *Gibson* Clerk. *Vid* 11 *June* 1631. *Tailzifer.* 11 *December* 1632. *Wood.* 16 *February* 1633. *Ker.*

L. *Haddo* contra *Johnstoun*, *Penult. Novemb.* 1632.

L. *Haddo* having conveened *Johnstoun* his own Tennent in his own Court, before his own Baillie, to hear it be tryed, that he had done wrong the time when he was Tennent of his Lands of in Ryving out the Greens and Swairds of the saids Lands Laboured by him, and in burning and wasting the Moss thereof, whereby he had deteriorat the saids Lands, and thereby had damnified the said Pursuer his Master in great Sums of Money Libelled; & whereupon Decreet was given in his own Baron-Court against the Tennent, for the Sum of 600 merks; Letters conform being sought to this Decreet, The Defender Alledging the same to be null, being given by himself in his own Baron Court, he being both Judge and Party in effect, seing he was Pursuer, and his own Baillie Judge, and the Probation behoved to be either by his own men and Tennents, who could not be Witnesses, being his Tennents, or else by others dwelling on other Mens Lands, and he had no Jurisdiction to cause them who are *extra Territorium*, to Compear to be Witnesses in his Court, and if they did, they were the more suspect; and it was a novelty that any Baron in his own

Court should Pursue, and be Judge to a Declarator of this nature, and of this consequence, to take Sentence to himself therein; but it was only proper to have been Cognosced, Tryed, and Decided in a Soveraign Judgment before the *Lords* of Session. And the Pursuer Replying, that the Baron-Baillie was a competent Judge to Decide in this Cause, for wrong done by his Tennent, far more than when he is Judge in Actions for breaking of Arrestments, which he may lawfully Judge upon. The *Lords*, in respect of the Alledgance foresaid, proponed against the Decreet, which they Found to be very considerable, Annulled the Sentence (the same was given *parte absente*) and Reponed the Party, to Dispute against the samine, as if it had never been given; and Ordained the Defender in this Judgment before the *Lords*, to Answer to the Deeds contained in that Libell, sicklike as he might have done *ab initio*, if he had been Pursued here before the *Lords*. Actor. Alter. *Mowat* & *Gibson*. *Gibson* Clerk. *Vid.* 6 *Feb.* 1633. Betwixt thir Parties.

L. *Kilkerran* contra *Ferguson*, *December* 1. 1632.

THe L. *Kilkerran* having Comprited certain Lands from one *Ferguson*, and having Charged the Superior to enter him therein; and the same Lands being thereafter Adjudged to another Creditor of this same common Debitor's, who was Infeft by vertue of the said Sentence of Adjudication therein, in *anno* 1626. And conform thereto in Possession of the Lands, but after *Kilkerran*'s Compriſing, and Charge given to the Superior, which preceeded the other Parties Adjudication, the said Compriſing being in *anno* 1625. Pursues this other Creditor, for re-payment of the *D*uties of the Lands, uplifted by the said other Creditor, by vertue of his Adjudication, of the years 1627, 1628, 1629, and 1630. wherein this Creditor defending himself with his Adjudication, Infeftment, and reall Possession, and thereby claiming preference, seing he Alledged, that *Kilkerran* was not Infeft, nor Seased, without which he could claim no Right to the Lands, especially against another Creditor Infeft as said is, and that his Diligence against the Superior could not be equivalent to a Seasin against this Excipient; And *Kilkerran* claiming preference, in respect of the anteriority of his Compriſing and Diligence. Likeas, in another Proces of double Poynding, wherein this same Excipient was Party, for the Duty of these Lands, *anno* 1631. He was Decerned to be answered of that year, which must give him alike *R*ight to all years since his Compriſing. The *Lords*, notwithstanding of the anteriority of *Kilkerran's* Compriſing and Diligence against the Superior, and Sentence for the year 1631, in his favours, which was given, this Party being absent, Found, that the Excipient ought not to repay the bygone years acclaimed: for the Sentence for the year 1631, was given upon the Duties of the Lands then extant, neither uplifted nor consumed, and the other years bypast now controverted were uplifted, and were *bona fide percepti*, *& consumpti*, conform to a true Title, and *bona fide*, the other Party having no real Right, and which could not be supplyed by his diligence, albeit prior to this Defender's, seing nothing followed thereupon: and the said Compriſer after he had Charged the Superior, did never prosecute his Charge, but suffered the same to ly still and sleep, and did no more while *July* 1632. At which time the Superior being of new Charged by him, and the Superior then Suspending, the Suspension was Discussed, and he ordained to be Infeft, paying to the Superior the years Duty then modified for his Entry, which yet he had not payed, and so in effect it was his own fault and Cessation, that he was not Infeft, which ought not to be prejudicial to another Creditor, as the Excipient was to use his lawful Diligence; and having so done, and being Infeft, and in Possession, he was preferred, and assoilzied from this Pursuit, especially the Question being for bygone years now not extant, but consumed, the Excipient having a just Title

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& possessionem bona fide acquisitam, & ubi præcedit titulus verus, vel etiam putativus quamvis ex errore si justus error sit, semper bona fides præsumitur, & possessor bona fide semper postea facit fructus suos, donec constiterit, de ejus mala fide, tunc vero ab illo tempore tenetur fructus restituere, ut ait. Bartol. in leg. qui bona fide, ff. de acquirendo rerum Dominio & in l. qui scit, §. finali. ff. de usuris, Idem in l. Usucapio. §. fructus. ff. de usurp. & usucapionib. ubi dicitur bona fidei possessorem, non teneri restituere fructus quamvis extantes si per triennium possederit, mala fides autem probatur per denunciationem possessori faciam. Item, si coram aliquibus dixerit se sciviſſe rem ab eo possessam fuisse alienam. Item, si fama fuerit in vicinia, eum mala fide possidere & ipse erat vicinus, ut ait Bartol. Leg. Celsus ff. de usurpationib. et usucapionib. Actor. *Mcgill.* Alter. *Mowat* & *Neilson. Gibson* Clerk. *Vid.* 22 *January* 1633. *Gordon.* 14 *Feb.* 1633. *Charters. Ult. January* 1632. *Ferguson.*

Hunter contra *Halyburton, Eodem die.*

THere being a Submission betwixt these two parties, who were both Burgesses of *Dundie*, to four Con-Burgesses, with power to them four to choose an Overs-man, and whatsoever the Overs-man so chosen, either by himself alone, or with one of the Judges Chosen for ilk Party, should Decern, they should abide thereat; whereupon Decreet being Pronounced by an Oversman, & by a Judge for ilk Party, but not by the other of the two Judges, Elected by one of the Parties; for these two Judges Elected for ilk side, and the Overs-man should have been chosen by all the four, albeit a Judge for ilk one of the Parties, with the Overs-man so chosen had power to Decern: and the Party Decerned to pay a Sum to the other, being Charged to do the same; Who Suspending, that the Decreet was null, because there was nothing extant to show, that that Overs-man was chosen by all the four Judges, as was appointed in the Submission; For albeit that the Decreet bore, *That he was chosen by the Judges*, yet seing it was not Subscribed by them all four, it could not be repute lawfully done, and that he was so chosen, and consequently was null; Likeas there was neither Witnesses named nor insert, neither in the Submission nor Decreet. These Reasons were Rejected, and the Decreet Sustained, bearing, *That the Judges had Elected the Overs-man*, and there was no necessity of Witnesses, seing the Submission was Subscribed by both Parties, and by the four Judges, who accepted the same, and the blank whereon the Decreet on the back of the Submission was insert, was also Subscribed by the Parties, and Oversman, and three others of the Judges, which was sufficient without Witnesses, being done amongst Con-Burgesses, and for a Sum of Money, not exceeding a Thousand Pounds, and not in an Heretable Matter. Actor. *Stuart & Pitcairn.* Alter. *Nicolson & Russel. Gibson* Clerk. *Vid. March* 7. 1633. *Bettie, March* 27. 1633. *Foster. Decemb.* 9. 1635. E. *Rothes.*

William Carnagie & Panter contra *William Dick, Eodem die.*

ONe *Panter* being Infeft in some Lands upon a Precept of *Clare constat*, by the Town of *Montrose*, Superiours of the Lands, as Heir to his Father, Pursues Reduction and Improbation of the Rights, made of that Land by his Father, to certain other persons particularly Libelled, and consequently, that the Compryfings flowing from these Parties, Alledged Acquirers of the Right from his Father, might fall, upon this Reason of Reduction, because his Umquhile Father had never made any Right thereof to them; Wherein the Defenders Alledging, that they being Infeft by the Superiour, in the Lands Lybelled before the Pursuers Precept of *Clare constat* granted to him, that Precept of *Clare constat*, he never being Served nor Retoured Heir to his Father, could not give him Interest as Heir to Instruct him *Activè* to be Heir, to furnish him a Title and Action, as Heir *Activè* to Reduce their Rights, anterior to his, and publick also;

this Exception was Repelled, and the Pursuer was Found to have sufficient Entry, as Heir Instructed by the Seasin, proceeding upon a Precept of *Clare constat*, mentioned therein, to Pursue this Action, as Heir *Activè* so instructed, albeit he was not Served nor Retoured Heir, in respect that the Pursuit was only for Reducing Writs, depending upon the Deeds done by his Father, to whom he was so qualified Heir, and in this Subject of Lands, wherein his Father was Infeft, and himself by vertue of that Precept, whereas if he had been Pursuing as Heir, by vertue of such a Precept *extra hoc subjectum*, the question had then been more considerable, if the Deeds quarrelled had not only depended upon his Fathers Fact; but it was Found that he ought to prove *cum processu*, that his Father was Infeft, and sicklike he should produce *in termino probationis*, the Precept of *Clare constat*, whereto his Seasin was relative. Actor. *Nicolson* & *Mowat*. Alter. *Stuart*. *Gibson* Clerk. *Vid. July* 5. 1632. Sheriff of *Forress*.

Drummond contra the Fishers of *New-Haven*, *Decemb.* 4. 1632.

James Drummond being Tack-man to the Lord *Hally-rude-house*, of the Teind-Fishes of *New-Haven*, and Pursuing Spuilzie against the Fishers of the year 1630. which was the first year of the Tack, and they Defending themselves with a continual use of payment of a particular Duty condescended on, of all years preceeding this year now acclaimed, and so Alledging they could be Conveened for no greater Duty of the year Lybelled, there being no Inhibition Execute against them, preceeding the said year, to make them thereby lyable to a greater Duty than they were in use of before; This Alledgance was Repelled, seing the Defenders Alledged not, that they were ever Tack-men, or had any Right made to them of the Teinds Libelled, for payment of the Duty excepted on, whereby after that Right Expired, they might have bruiked for the same Duty *per tacitam Relocationem*, not being ever interrupted, or that the Teinds Libelled were ever contained in the *Abbots* Rental, and given up and bruiked, as a stocked Rental for that Duty, which not being, the *Lords* Repelled the Alledgance, and Found no necessity of an Inhibition, but reserved the Modification of the quantity after Probation to the *Lords* themselves. Actor. *Gibson*. Alter. *Dunlop*. *Hay* Clerk.

Chisholm contra *Gordon*, *Decemb.* 6. 1632.

ONe *Chisholm* Relict otumqhile Mr. *Alexander Craig* & *Douglas* her Spouse, Pursues *Gordon* of *Park*, for payment of a Sum of Money contained in his Bond granted thereon: And the Defender Alledging, that the Pursuer since the Date of this Bond, accepted a posterior Security, in satisfaction of the said Sum in the prior Bond. The *Lords* Found this Alledgance Relevant to Eleid and Exclude all Action, which might be moved upon the said prior Bond, which they Found satisfied and taken away by the said posterior Security, the same bearing the Tenor foresaid, *viz. That it was given and accepted in satisfaction of the said prior Security*; Neither was it Found necessar, that the Defender should be compelled to say, that the said prior Bond was expresly Renounced and Discharged; for in effect, by accepting of the said posterior Security, in satisfaction, as said is, the same was Discharged. Actor. *Baird*. Alter. *Barclay*, *Hay* Clerk. *Vid. December* 7. 1631. *Scarlet*. *July* 23. 1633. *Lawson*. *March* 20. 1633. *Lyon*.

Stuart contra *Lundie*, *December* 7. 1632.

ONe *Stuart* Pursuing Sir *James Lundie* to Remove from an Husband Land in *Eymouth*, holden of *Coldinghame*, conform to an Infeftment, granted thereof by *John Stuart* to the Pursuer, to which *John Stuart*, *Coldinghame* was Erected, and Sir *James* Defending with an Infeftment, granted to him by the Earl of *Hume*, who was Infeft upon the Inhability of *John Stuart*, Declared in

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Parliament, conform to a Charge Execute against him as Superior by the said Sir *James*, who had Compryſed the ſaids Lands from *Thomas Lumſdane*, and conform thereto he has been ſince ten years in Poſſeſſion of the ſaids Lands, which ought to maintain him in this Judgment Poſſeſſor. This Alledgance was ſummarly Repelled in the ſame place, becauſe of the Reply underwritten, without neceſſity to Reduce, Becauſe the Inſeſtment Alledged by the Excipient, was Found ſummarly null, as ſaid is, ſeing the ſame was granted by the Earl of *Hume*, who, the time of the Charge given him to receive the Purſuer upon the Alledged Compryſing, was not then Superior, but only *John Stuart* the Purſuers Author, in reſpect before the Defenders Inſeſtment from the Earl of *Hume*, the Earl of *Hume's* Right was Reduced in Parliament, and *John Stuart* Declared to have the only Right to that *Abbacie*, to whom it was Erected, and ſo the Right being null, the ten years Poſſeſſion was not reſpected, and the Exception was Repelled.

Wood contra *Blair*, *Decemb.* 11. 1632.

ONe being Purſued as lawfully Charged to Enter Heir to his Father, and taking a Term to Renunce, and at the Term offering to Prove, that he had an elder Brother living, and ſo he could not be that perſon that could be Charged to Enter Heir to his Father, his elder Brother being alive: The *Lords* Found, he ought not to be heard to propone this Alledgance, and thereafter ſuffered to Renunce, if he ſuccumbed to prove the ſame. *Vid. Novemb.* 24. 1632. *Annand.*

Schaw contra *Crawford*, *Eodem die.*

Geils Schaw Relict of umquhile *Crawford* of *Slattertoun* being his ſecond Wife, Purſues his eldeſt Son of the firſt Marriage, as lawfully Charged to enter Heir to him, to Imploy to her in Liferent, and to her Bairns in Fee 3800 merks, conform to a Bond granted to her by her Husband of that Tenor: And the Defender Alledging, that the Purſuer was Executrix to her Husband, and was Intromiſſatrix with his Goods and Gear, and ſo ought to fulfil the ſame her ſelf, and was both Debitrix and Creditrix, and ought to relieve the Heir thereof. This Exception was Repelled, and albeit ſhe was both Executrix and Intromiſſatrix, yet it was Found, that ſhe had good Action againſt the Heir, and that the Executrix was not obliged to relieve the Heir of this Debt, which was Heretable, and whereto the Heir was lyable, without Relief againſt the Executrix, the ſame being Heretable. *Scot* Clerk. *Vid. penult July* 1630. L. *Carnouſie. July* 22. 1630. *Salmond. Decemb.* 7. 1627. *Porteous. March* 20. 1633. *White. Feb.* 7. 1635. *Watſon. Feb.* 17. 1632. *Kinnaird* * *July* 4. 1628. *Hamilton.*

Porteous contra Lo. *Herreis*, *Eodem die.*

THe Lo. *Herreis* being Purſued for 500 merks adebted by his Father, conform to his Bond, as Heir to him, who offering to prove, that the Purſuer had received yearly as much Victual, as in price would extend to this Sum, which he offered to prove by Witneſſes. The *Lords* Found it not probable by Witneſſes, but only by Writ or Oath of Party, to take away a Debt, Conſtitute by Bond in Writ. Actor. Alter. *Nicolſon. Gibſon* Clerk. *Vid. July* 23. 1633. La. *Abergeldie. March* 9. 1633. *Maxwel.*

L. *Lugtoun* contra L. *Edmonſtoun*, *Eodem die.*

ONe having Compryſed from the L. of *Edmonſtoun*, as lawfully Charged to enter Heir for his Fathers Debt, the Right of the Patronage of the Hoſpital of *Ednemſpittil*, which pertained to the Houſe of *Edmonſtoun*, with other Lands of *Ednem* Compryſed alſo, and thereafter the Compryſer having preſented a Preceptor to that Hoſpital, which Preceptor immediatly thereafter ſets a Feu, with conſent of the ſaid Compryſer, who was Patron by vertue of his Compryſing, of the Lands of *Falla*, which pertains and were Doted to the ſaid Ho-

ſpital, to another perſon for payment of a certain Duty to the ſaid Preceptor; Which Feuar ſo Infeſt, Purſuing the Tennents to Remove from the ſaids Lands, who Excepted, that they were Tennents to ſuch a Preceptor yet alive, who was preſented 25 or 30 years ſince to the ſaid Preceptory, by umquhile the L. *Edmonſtoun*, Goodſir to this now Laird, and which Preceptor has been theſe 25 years in poſſeſſion of the ſaids Lands, by receiving of 20 merks from the Poſſeſſors of the ſame Lands, as Duty therefore, and yet continues in Poſſeſſion thereof; ſo that this Preceptor being yet alive, no other Preceptor Conſtitute and preſented by the Compryſer, nor no Feuar made by him, can have Right to theſe Lands, ſeing this Compryſing, which is the ground of all, is but Deduced in *Anno* 1631, and ſo is 25, or 30 years after the other was preſented, and who ſince has continually been in Poſſeſſion: This Exception in this Judgment Poſſeſſor of Removing was Repelled, and not Suſtained to Defend the Tennents: For as it was Replyed for the Purſuer, The *Lords* Found the Right of Preceptory, made by the Patron, whereupon the Exception is Proponed, not ſufficient to make that perſon lawful Preceptor, ſeing the Preſentation thereto was not delivered to that Preceptor, but remained ſtill with the Patron, and became not the Preceptors Evident; and alſo ſeing the Alledged Preceptor was a Tennent of a part of the ſame Hoſpital Lands, and payed Duty therefore himſelf to the L. *Edmonſton* the Patron, who preſented him; And the *Lords* Found no defect in the Preſentation, albeit Collation and Inſtitution followed not thereon, as was Alledged by the Purſuer againſt the Excipients Preſentation, produced by him; For it was Found, there was no neceſſity of Collation, nor Inſtitution in ſuch Preſentations made by Laicks, for which *Vid. July* 4. 1627. *M'kenzie* Miniſter. And it was not reſpected, what the Excipient Duplyed, that there was no neceſſity now, after ſo long time, to prove Delivery of the Preceptors Preſentation, ſeing it was extant, and muſt be preſumed to have been Delivered. Likeas without Delivery it is ſufficient, in reſpect of the 25 years Poſſeſſion, as ſaid is, ſeing *in beneficialibus, decennalis & triennalis poſſeſſio pacifica* is enough, *etiam ſine titulo, vel præſumit titulum*, eſpecially the Preceptor being yet living and in Poſſeſſion, and againſt another Preceptor ſo lately preſented by this Compryſer; and the Patron's having of the Preſentation is no impediment, nor the Preceptors paying Duty for a part of the Lands; For the Patron, upon any condition betwixt him and the Preceptor, might keep this Preſentation, that it might appear on all occaſions requiſit, that he had made bargain with one, who was Preceptor. Likeas it is no Impediment, but that the Patron might ſuffer the Preceptor to bruik, and pay Duty for a part of the Land, after that he had Covenanted therefore with the Preceptor, and that the ſame Preceptor had received Duty for the reſt of the Lands belonging thereto; Notwithſtanding whereof, the Exception and Duply was Repelled. And thereafter the Defender Eiking to his Exception, that the ſaid Preceptor had ſet a Feu of theſe Lands to another, to the behove of the L. of *Edmonſtoun*, whereby he had done all Deeds requiſit to make a Preceptor; This was Suſtained, albeit this Right was made ſince the Compryſing, becauſe the Defender offered inſtantly to pay to the Compryſer, all the Sums for the which the Compryſing was Deduced, which was inſtantly permitted, without neceſſity to put the Party to a Redemption. Actor. *Stuart.* Alter. *Nicolſon. Scot* Clerk.

E. of *Hadingtoun* contra L. *Lamingtoun*, *Eodem die.*

WItneſſes being produced to prove a Contravention at the Earl of *Haddingtouns* Inſtance, and it being Alledged againſt them, that ſome of the Witneſſes were Sub-Tennents to the Earl of *Haddington's* Removeable Tennents, and ſome others were Sons to theſe Removeable Tennents. The Objection was Repelled, and Found that both the Sons and Sub-Tennents to the

the Masters Removeable Tennents, might be Witnesses to the Master of these Tennents in his Cause. Actor. *Stuart*. Alter. *Gilmore*. *Scot* Clerk. *Vid. July* 28. 1637. Lo. *Dunnipace* President.

Martin contra *Livingston*, *December* 12. 1632.

John Martin Inglishman having obtained Decreet against *Adam Livingston*, before the Admiral, for payment of twenty one pound *Sterling* for his Service in a Ship called the *Lyon*, which was referred to his Oath, and confest to be owing, and therefore Decreet given against him, to which Decreet *John Ker* in the *Cannongate* being made Assigney, and Suspending upon Compensation of eight pound *Sterling*, owing by the Cedent to *Livingston*, which being Reasoned, the *Lords* received the Compensation *eodem modo* against the Assigney, as against the Cedent; but because the Ticket Subscribed by the Cedent, of the Sum for which Compensation was craved, was dated before the Sentence, and the Term of Payment also, before the Sentence, and that the Decreet was given against the Suspender, Compearing, and granting the Debt, being referred to his Oath, at which time he neither Proponed the said Compensation, it being then Competent, nor made nò Defalcation of the Sum in that Ticket, nor nò mention thereof, at that time; Therefore the *Lords* Found, that it could not now be received against the Sentence, after the same, and not being proponed before the Decreet. *Gibson* Clerk. *Vid. December* 20. 1632. *Knox* and the Cases there cited.

Dalrymple contra *Douglas*, *December* 18. 1632.

ANdrew *Dalrymple* having Compriſed from *George Douglas* of *Waterside*, some Lands to be holden of the said *George* his Father, Superior thereof, and the Father being Denunced to the Horn, upon Letters of Four forms, for not receiving of the Compriſer; and thereafter he being received, and Infeft by the Lo. *Loudoun*, Superior to the Father of the Lands, Pursues Removing against the Debitor, from whom he Compriſed, and against the Father his Sons Superior, and against the Sons Son, and their Tennents: but the Title of this Pursuit, was only the Compriſing, and the Horning against the Guidsir, who was Superior to his Son, against which the Defender Alledging, that the said Compriſing, and Horning, was not such a real Title, as might Produce Removing, the Pursuer not being Infeft in the Lands, without which he could never be heard to seek any Person to be Removed, specially also seing the Horning is after the Warning, and so he could not Warn upon the first Charge, which only preceeded the Warning, all the rest of the Charges, and Hornings being sinsyne; and where the Pursuer Replyed, that he was upon the Superiors Disobedience Infeft, as said is, by the immediat Superior, he Duplyed, that this Pursuit was not Founded upon that Title, and he could not be heard to Reply upon a Writ, which is no Title of the Pursuit, and which ought to be produced *in ingressu litis*, and shown to the Party; and if it were Produced, and Lybelled, yet it is after the Warning, and so cannot sustain the Warning preceeding. The *Lords* Repelled this Exception, and Duply, and sustained the Pursuit fortified with the Reply, which was received by way of Reply, and sustained, to produce this Action, albeit both the Horning and Infeftment Replyed upon, were after the Warning; And this was the rather Found by the *Lords*, seing this Removing was sought only against the Debitor, from whom he Compriſed, his Son, and his Father, and their Tennents, and not against any other, who clothed themselves with any other Right to the Lands, which might have excluded this Compriſer, and maintained their own Possession; But the *Lords* superceeded the Execution of Removing while *Whitsunday*, betwixt and which the Defenders might Remove; and Declared they would grant no

violent Profers, the Defenders paying to the Pursuers, the Ordinar Duties of the Lands. Actor. & *Belshes.* Alter. *Gilmore*, *Gibson* Clerk. *Vid. June* 20. 1627. L. *Touch. March* 25. 1628. L. *Bar*, and the Cases there cited.

Maxwel of *Grubton* contra E. *Nithsdale*, *Decem.* 19. 1632.

THe deceast Lord *Herreis*, being bound as Cautioner for umquhile Lo. *Maxwel*, in *Anno* 1587. that he should depart out of the Countrey, and not to return without the King's licence, under the pain of Five Thousand Merks: the said Lord *Herreis* is conveened before the King, being then present, and before the *Lords* of Secret Council, to hear him Decerned to pay the Sum, because the Principal had contraveened, by returning without Licence; whereupon Decreet being given, and he Charged to pay, thereafter he makes Payment, and *Reported* the Thesaurers Discharge; *And* the *Donatar* to the Lo. *Herreis* Escheat; after *Declarator* thereon, Assigning and Disponing his *Right* of Relief against the Lo. *Maxwel*, and also the *Right* of a Sum of other 5000 Merks, falling under the same Escheat, which was conditioned to be payed to that same Lord *Herreis*, by the Lord *Maxwel*, in name of Tocher to *Maxwel* of *Grubton*, who pursues this Earl as Heir to the Person obliged to the Lord *Herreis's* Rebel, both for the *Penalty* payed, and whereof the Lo. *Maxwel* was obliged to relieve him, and also for the Tocher-Good: The Parties Compearing and *Defending*, the *Lords* Found, that the Pursuer, as having Right, by progres *ut supra*, nor the Lo. *Herreis* himself, if he were Pursuing, and living, could not seek this Relief, notwithstanding of the Sentence foresaid, by the King and Secret Council, and albeit he had payed conform to the Sentence, and albeit he had been Charged before he had payed, because the Principal Partie, *viz.* the Lo. *Maxwel*, who was Alledged to have Contraveened, and come against his his Bond, and thereby to have incurred the Penalty, was not called to that Sentence of the *Secret* Council, but the Cautioner only, against whom that Fact of Contraveening ought most properly to have been Tryed; neither did the Cautioner, who was Conveened, *Decerned* and Distressed, ever Intimat to the Principal that Pursuit, or Sentence, or Charge given to him, at any time before his Alledged payment of the Sum, as he ought to have done, and which, if he had done, the Principal now proponed a Defence, which was then competent before the Payment made by his Cautioner, which would have relieved both Principal and Cautioner, *viz.* Compensation of a greater Debt, owing by the King's *Majesty*, and which was confessed by the King, in presence of the Lords of Secret Council also, and there acknowledged to be true, and done before the Alledged Payment made by the Lo. *Herreis*, as Cautioner; in respect whereof the *Lords* Assoilzied from the Pursuit, and Found, the *Cautioner*, for omitting the Intimation of the said *Distress* before his *Payment*, could not seek Relief against his Principal, who was not cited to that *Pursuit*, and who had the foresaid *Defence* to liberat himself, and his Cautioner, if that had been Notified to him; and as for the other Part of the *Summons*, anent the Tocher-Good, the *Lords* Found this Exception Relevant, *viz.* That it was Subscribed by the Lo: *Maxwel* being then Minor, and having Curators, without their consents; neither was it respected, what the Pursuer *Replyed*, that albeit he was Minor, yet the Obligement was good, being done in a Contract of Marriage with his Sister, and upon that condition of Tocher the Marriage followed, and was perfected, and Bairns Procreat betwixt them now living, and the Sister renunced all Bairns Part of Gear Competent to her therefore; so that after 40. or 45. years since the Contract, it was not time now to Alledge this nullity, the Sister having Discharged more than she Received, and which could not now be conveniently Tryed, all the Parties being dead, so that the Probation of that which was due for her Bairns Part of Gear Discharged by her is now perished, notwith-

notwithstanding whereof the nullity was sustained; for *frater non tenetur dotare sororem L. cum plures* 12. § *cum Tutor.* 3 *ff. De administrat. & periculo Tutorum Tit.* 7. *lib.* 26. *et ita Glossa sed Bartolus contra*; the rather this was done, because the Parties were Married a year or more before the Contract, and the *Lords* Reponed also the Sister to that Discharge, given of her Bairns Part of Gear contained in the Contract done, in respect of the Condition of the Tocher, which was Found null, as said is. Actor. *Stuart* &. *Dunlop.* Alter. *Nicolson* & *Cunninghame. Scot* Clerk. *Vid. March* 6. 1623. *Sharp.*

Knox contra *Knox* of *Selbieland, December* 20. 1632.

JEan *Knox* having obtained Sentence, for payment of 1000 Merks against her Brother, as Heir to his Father, Granter of the Bond, upon that Sum to her; and having also obtained Decreet against a Suspension, and Reduction intented by her said Brother, for Reducing of that Sentence and Bond; thereafter the Charges for the said Payment being *de novo* Suspended, upon this Reason, *viz.* Because she was Executrix nominat to her Father, Granter of the Bond; and albeit she was not Confirmed, yet she had Intrometted with as many of the Defuncts Goods, as would extend to that Sum, and so she was payed in her own hand, and could not pursue the Heir therefore, specially seing the Bond is a Moveable Bond, and not Heretable, which ought to affect the Executor, and who ought to relieve the Heir thereof; the *Lords* would not receive this Reason, being Competent before the first Sentence given against the Suspender, then Compearing, and then known to him, but omitted, and not proponed; and therefore Found it not receivable now, specially seing it was offered only to be proven by Witnesses, that she had Intrometted, and was not offered to be proven by Writ or Oath of Partie; therefore it was not received in this Suspension against a Written Bond, and Sentence, being omitted of before *ut supra. Scot* Clerk. *Vid. Decem.* 12. 1632. *Martin. July* 10. 1632. *Hume. March* 18. 1630. *Frank. Feb.* 28. 1628. *Glen. July* 12. 1636. *Burrell.*

Sir *Alexander Hamilton* of *Innerweek* contra *Hamilton, Eodem die.*

BY Contract betwixt the Pursuers Father and the Defenders Father, the Pursuers Father is obliged and his Heirs to give Infeftment of the Lands of to the Defenders Father: Likeas the Defenders Father obliges him and his Heirs, they being Infeft, to Grind their Corns at the Pursuers Fathers Miln, as Astricted thereto, whereupon the Defender being Conveened, for Abstracting of his Multures; And the Excipient Alledging, that the Pursuers self had granted to the Excipients Father, and his Heirs, an Heretable Feu Infeftment of the Lands Libelled, with an expres Clause of *molendinis & multuris*, and in the *Reddendo*, containing a certain Silver Duty, to be payed *pro omni alio onere*, whereby he Alledged he was free of that Astriction. The *Lords* Repelled this Exception, in respect of the preceeding Obligation of Thirlage, contained in the said Contract; For by the same the one party was obliged to give an Heretable Right of the Lands, and the other party, *viz.* the Defenders Father and his Heirs were obliged, after they were Infeft, to the said Astriction, so that the Infeftment, albeit after the Obligation of Astriction, yet being given upon the necessity of Implement of that Contract, which bare *mutually either parties Obligation to others hinc inde*, albeit the Charter made no mention of that Contract, nor had any relation thereto; And albeit it was granted, not by the Contracter, but by the Pursuer his Son and Heir, yet was Repute by the *Lords*, to be done for fulfilling of his part of the Contract, and as if it had been instantly done the time of the Contract, and so could not derogat to the Contract, by the which the other party, when he was Infeft, obliged him and his Heirs to that Thirlage, except that the Defender would Alledge, that

after the Contract, or at the time thereof, the Pursuer or his Father had perfected another Charter of the Lands to him, for satisfying of the Contract, before this Infeftment, whereupon now he Excepted, *quo casu* if there had been any other Infeftment Expede of before, conform to the Contract, and that this Infeftment had been thereafter Acquired, having no relation to the said Contract, then the said second Right, with the Clause of Milns and Multures, &c. would have liberat the Defenders from the said Thirlage, and no otherwayes, except the said Thirlage had been expresly Discharged, which they Found not to be Discharged by the Infeftment, which behoved to be understood, as given conform to the Contract, there being no other given but only this, which containing the common Clause insert, of common Style of Court, could not derogat to the Contract, conform whereto it behoved to be taken as given, and was not *per expressum* Discharged, specially also seing the Pursuer offered to prove, that since the Contract and the Defenders Infeftment Alledged, he and his Father has been in use to come and Grind their Corns at the Miln Lybelled, Which the *Lords* Sustained; And thereafter the Defender Alledging the Contract to be Prescribed, being above fifty years since the Date thereof. This Alledgance was Repelled, in respect of the foresaid Reply, of coming and Grinding their Corns at the Miln continually since the date thereof, except within three or four years last by-past, whereby the Prescription (which takes place only *a tempore cessationis*) had no place in this case: And albeit the Defender Duplyed, that tho he came sundry times to Grind his Corns at the Miln Lybelled, which was a voluntar Deed, and not done as Astricted, but was done as a free Miller, for he was in use to Grind more frequently at other Milns in the Countrey yearly since the said Astriction, and which he offered to prove, and whereby he had prescribed a Freedom and Liberty; Which Duply was Repelled, and the said Reply Sustained, *ut supra*. Actor. *Stuart*. Alter. *Nicolson*. *Scot* Clerk. *Vid. Feb.* 8. 1628. Sir *James Dundass*. *March* 20. 1635. Bishop of *Glasgow*. *July* 13. 1632. E. *Mortoun*. *June* 26. 1635. L. *Wauchtoun*.

King's Advocat and *Denistoun* contra *Lindsay*, *January* 11. 1633.

IN a Contravention founded upon a Deed of cutting of Wood, to the quantity of eight Horse Load, within the Pursuers proper Wood of his Land, wherein he was Infeft. It being Alledged, that the Pursuer after the time of the cutting thereof Lybelled, granted Licence and Liberty thereafter, at another time to the Defender to cut some Wood, for the use of the Defenders House, whereby in effect he had Remitted *presumptivè* the Alledged preceeding wrong of cutting Wood done before, by granting of this Licence thereafter; This Exception was Found Relevant, to Eleid this Contravention, *quia dissimulatione tollitur injuria*; and this being an Action of Contravention, and so Penal, & *in qua agitur ad vindictam & pro pœna & non pro damno dato*, It was Sustained to Eleid this Penal Action; But the *Lords* not the less reserved Action to the Pursuer, to Pursue for his Damnage and Interest, sustained through the wrongous cutting of his Wood, and for repairing thereof against the Defender, albeit the Exception was Sustained to Eleid the Pursuit of Contravention; And the *Lords* Found, that this Exception upon the said Licence, granted by the Pursuer, was probable by Witnesses, and Found, that he ought not to be compelled to prove the same by Writ, or Oath of Party; Albeit it was Alledged, that the Pursuer being Infeft in his Lands, within the which the wrong Lybelled was done, and his Infeftment thereof produced, with no Reason could he prove by Witnesses any Deed, which might tend to give the Defender a Liberty within his Property, uncontraverted by this same Excipients self, For thereby the Defender by the Deposition of two Witnesses, might make his Land and Wood unprofitable to him, which not the less was Sustained, to be proven by

by Witnesses. And another Deed of Contravention being Lybelled, for Pasturing in the Pursuers Muir, this was not Sustained, in respect the Defender Alledged the Muir to be Part and Pertinent of his Lands, and qualified als strong Possession as the Pursuer did, Which the *Lords* also Sustained to purge the Contravention, and would not respect the Reply; Whereby the Pursuer Replyed, upon a Decreet betwixt the Tennents of the Defenders Lands and the Pursuers, done 40 years since, whereby their Lands were Divided, and this Muir Lybelled was Declared to pertain to the Pursuers Lands, and conform whereto the same was Alledged ever since to be so Possessed by him. Likeas, this same Reply was admitted to the Pursuers Probation, in an Action of Removing, Pursued by him against the Defender, for Removing from the same Muir, and therefore Alledged it to be alike Relevant here. And in fortification thereof he offered further to prove, that he had divers years before the Deeds Lybelled, Tilled a part of the same Muir, and Sowen and Shorn the Corns thereon, which was the greatest Deeds of Property that could be done, and the rest of the Muir he Possessed by Pasturing, and by debarring all others, specially this Defender: notwithstanding whereof the Exception was Sustained upon the Defenders Possession, by Pasturing thereon 40 years bypast, and by Alledged Debarring of this Pursuer therefrom, to purge the Contravention, ay and while the Process of Removing from the Muir were ended by a Sentence; But if the Pursuer would Restrict the Fact of Contravention, to be done specially on that part of the Muir, which the Pursuer Replyed to have been Tilled, Sowen, and Shorn, without respect to the Fact Lybelled, as Alledged done upon the rest of the Muir, not so Laboured, then The *Lords* would Sustain the Contravention for the Fact so done upon that Arrable Land allanerly, and no further. Actor. *Advocatus* & *Mowat*. Alter. *Cunninghame* & *Burnet*. *Gibson* Clerk.

contra *Bruce*, *January* 12. 1633.

IN a Pursuit of Registration of a Bond of 500 merks against *Bruce* of *Stanstill* in *Orkney*, as Universal Intromettor with the Defuncts Goods, who was granter of the Bond; The Defender was Found Universal Intromettor, and Decreet given *eo nomine* against him; albeit it was proven only, that he intrometted with an Hat of the Defuncts, an Iron Saw, and a Chest, and a Brasen Pistoller, pertaining to him, whereof no price was proven, and with an Horse, which was sold for eighty pounds, there being nothing further of any more Intromission proven to be had by the Defender, neither ever was it proven, what other Goods the Debitor had, or who had Intrometted therewith, nor that ever being enquired at the Witnesses, albeit the Debitor was a Gentleman who had Heretage; And it was not Found enough (as some of the *Lords* thought expedient) that the Defender should be Decerned to make the particulars and prices thereof, whatever the same might be proven to be worth, forthcoming to the Pursuer, and not thereby to make him lyable to the whole Creditors, as Universal Intromettor; For the *Lords* thought, that he being Vitious Intromettor, and without a Title, or probability of a Title, albeit he had Intrometted with any Goods of the smallest moment, and quantity that might be, and the Debt never so great, yet by that Intromission, which could not be warranted in Law, he was subject to pay the whole Debt, but this Process was Deduced against the Defender not Compearing. *Gibson* Clerk. *Vid. March* 28. 1632. *Maxwel*. *Feb.* 5. 1636. *Mowat*.

Mr. *Alexander Kinneir* contra L. *Eastnisbet*, *January* 15. 1633.

IN an Action for Registration of a Bond granted to Mr. *Alexander Kinneir* by the Defenders Father, the Defender being Conveened as lawfully Charged to enter Heir, for Eleiding whereof he Renunced, and being Conveened as Suc-

ceſſor to his Father, *poſt contractum debitum*, for verifying whereof two Infeſtments being produced, *viz.* The Fathers Right, and the Infeſtment given to the Defender, by his Fathers Diſpoſition; and the Defender Excepting, that this Diſpoſition could not make him lyable as Succeſſor, to pay the Debt of his Father, becauſe that Right made to him is Reduced; And the Purſuer Replying, that that Reduction is for Non-production only, the Defender being abſent, whereby he may Reduce when he pleaſes that Decreet Reductive, and therefore he ought either to pay the Debt Lybelled, or elſe to Renunce all Right, which he can pretend to the Lands, by vertue of that Right, that the Purſuer may otherwayes thereupon, either ſeek Adjudication or Compryſing of theſe Lands, contained in his Rights Alledged Reduced; The *Lords* Found that the Defenders Infeſtment produced, being ſtanding Reduced, (albeit for Non-production) could not prove him Succeſſor; Neither Found they it neceſſary to compel the Defender to Renunce all Right, as the Purſuer deſired; for the Right ſtanding Reduced made to the Defender, then the reſt ſubſiſted in the perſon of the Granter thereof, who was the direct Debitor, whereby the Creditor might Compryſe the ſame from him, and when ever the Defender ſhould obtain the Decreet Reductive taken away, then the Purſuer had his Action ſafe againſt the Defender, as Succeſſor unprejudged, which then he might proſecute as he pleaſed, and in the mean time he might Serve Inhibition againſt the Defender, that he might do no Deed to the Purſuers prejudice. Actor, *Craig*. Alter, *Stuart*, *Gibſon* Clerk.

E. *Mariſhal* contra his Tennents, *January* 18. 1633.

IN a Removing, wherein the Defenders Alledged, that they had Tacks for Terms to run, Set by the Purſuers Father; And the Purſuer Replying, that the Earls Father, long before the ſetting of theſe Tacks, was only Liferentar, and the Purſuer Heretably Infeft in the Fee by publick Infeſtment, whereby his Father could not ſet Tacks but during his Lifetime; who was dead many years before this Warning. It was Duplyed, that after the Purſuers Fee of the Lands Lybelled, by Contract betwixt him and his Umquhile Father, power was given to the Father, to ſet Tacks during his Lifetime, and for the ſpace of 15 years thereafter, which ſpace is not expyred. It was Triplyed, that by that Contract his Father had power, to ſet Tacks during that ſpace only, to ſuch Tennents as were kindly, and upon Proviſion that the Duties payable for the Lands ſhould not be diminiſhed, and the Tack Excepted on, is againſt both theſe Conditions; for the Defenders were never kindly Tennents, and the Tack-Dutie is leſs nor the Lands ever payed before this Tack. The Excipient Anſwering, that ſeing the Tack is Clothed with Poſſeſſion, during the whole Lifetime of the Setter, and by the ſpace of ten years ſince; And ſeing there are but three or four years thereof to run, the ſame cannot be taken away, for any of the Arguments adduced; but it is ſufficient to maintan him from Removing, until it be Expyred. The *Lords* Repelled the Exception, and admitted the Reply and Triply to the Purſuers Probation, which they received to take away the Tack, in this ſame Inſtance and Judgment of Removing, it being proven: But it was not Anſwered here by the Defenders, that the foreſaids Arguments proponed againſt the Tack, were not Competent to be Tryed ſo Summarly by way of Reply, in an Action of Removing, and that the Purſuer ought to Purſue Action of Reduction thereon, which if it had been Proponed, it might have been that the *Lords* would have Found ſo, that it ought to have been Tryed in a Reduction, and not ſo Summarly in a Removing; but this was not Alledged, but Contended, that the Tack was ſufficient, albeit it had theſe Defects. Actor. *Nicolſon*. Alter. *Falconer*. *Gibſon* Clerk. *Vid. December* 21. 1638. L. *Craigmiller*,

Cor-

Gordon contra *M'quhen*, *January* 22. 1633.

ONe being Infeft in Lands by a base Infestment Redeemable, to be Holden of the Granter, and having Set a Back-Tack to his Author of the saids Lands, for payment of a Silver-Tack-Duty, answerable to the Annualrent of the Money, whereupon the Land was Wodset; of the which Silver-Duty he had received payment divers years since the date of this Wodset, and thereafter the Defender having acquired the Heretable Irredeemable Alienation of thir Lands, from the same Author to the Pursuer, by a Publick Infestment, Holden of the Superior, and by vertue thereof being ten or twelve years last bypast in actual Possession of the Land, the Pursuer never claiming Right thereto all this time, neither by vertue of the Heretable Wodset, nor by the Sub-Tack, but being still silent, and thir Rights being obscure and unknown to the Defender, who acquired the Lands from the Heretor, being then Possessor; It was Found in an Action Pursued by the Pursuer, upon his foresaid Heretable base *Right*, for payment of the Maills and Duties of the Lands, of all the bygone years preceeding this year 1632. *viz.* by the space of 12 or 14 years bypast, and sicklike in time coming, and which Pursuit he Retrenched to the said Back-Tack-Duty, that the said Pursuer ought to be payed of the same by the Defender, who was Possessor and Heretor all these years, not only in time to come yearly, but also of all these saids bygone years, albeit the Pursuers Right was but base, and that the Defenders Right was Publick, and clad with so long Possession; and albeit the Pursuer had been so long out of Possession, and had never done Diligence all that time, to recover payment of his Back-Tack-Duty, seing his Right was once clothed with Possession, which the *Lords* Found, gave him preference to the posterior Publick Right for bygones, as well although they had been owing these 20 or 30 years bygone, as for the time to come; and Found, that the Defenders uplifting of the Duties of the Lands, of the saids years bypast, by vertue of the said Title, which was *Titulus verus & non putativus, & ubi fructus erant bona fide percepti & consumpti*, did not liberat him from the saids bygones; and Found, that the Pursuer ought not to be put to *Reduce* the *Defenders* Right, as he Alledged he ought in this Judgment, which he Alledged to be of that same nature, as if he were in a *Removing*, which was Repelled. Actor. *Cunninghame*. Alter. *Mowat* & *Gilmor*. *Scot* Clerk. *Vid.* 8 *July* 1626. *Turnbull*, & 14 *Feb.* 1633. *Charters*. 17 *July* 1632. L. *Auchinleck*, & 1 *December* 1632. L. *Kilkerran*. 5 *March* 1630. *Cant.* 12 *July* 1634. *Oliphant*. 21 *March* 1637. La. *Manderstoun*. 7 *Feb.* 1628. L. *Balveny*.

Scot contra *Brown*, *January* 29. 1633.

IN a Pursuit against one *Scot* and her Husband for his Interest, for payment of 100 pounds contained in a Bond given by her in her Widow-hood. The Husband Alledging the Bond to be null, because it was given by this Defender now his Wife (albeit then being a Widow) yet it was granted after her Bonds of Marriage with this Defender the second Husband were Proclaimed publickly in the Parech Church, and Marriage was compleated after the said Proclamations were ended immediatly, so that she could do no Deed after that Proclamation, which might oblidge her Husband. This Alledgance was Found Relevant, and received summarly against the Bond, without necessity of *Reduction*. Actor. Alter. *Burnet*. *Vid.* 8 *July* 1623. *Stuart*.

Daills contra *Mackison*, *Eodem die*.

HElen and *John Daills* Pursues *Eupham Harlaw*, as Executrix to umquhile *Barbara Harlaw* her Sister, Relict of umquhile *John Daill* and *John Mackison*, Spouse to the said *Eupham*, to pay to ilk one of thir two Pursuers the Sum of 100 merks, and a pair of Plaids worth ten pounds, adebted to the Pursuers by

umquhile *John Daill*, Husband to the said *Barbara Harlaw*, and which Sum the said *Barbara* immediatly after her Husbands decease promised to pay to the Pursuers, and therefore they craved the same against the said *Eupham*, Executrix to the said *Barbara* her Sister, who made the said promise, and against *John Mackison* her Husband for his Interest. The *Defender* Alledging, that the said umquhile *Barbara* her Sister, alledged maker of the promise, was Executrix to her Husband, *Alledged* Debitor to the Pursuers, who after the alledged time of her promise had obtained Sentence of Exoneration, and a Sentence against the Creditors of the said umquhile *John Daill* her Husband, wherein thir Parties were Called and Compeared, and other Creditors preferred to them, and they found not Creditors to her Husband; so that that Sentence being given against them, at which time they might have claimed the benefit of the promise, and did not, nor at no time thereafter during her lifetime, she living two years thereafter or thereby, they cannot now come back after her decease, to prove this promise against her Executrix, especially to be proven by Witnesses. The *Lords* Found this *Alledgance* Relevant, in respect of the said Decreet of Exoneration, given against the Pursuers Compearing, they never Pursuing the Defunct nor her Husband while they lived, except that they would prove the promise by Writ: And it was not respected, what the *Pursuers* Alledged and Replyed, That that *Decreet* Exonered her only of her Office of Executry, *qu nomine* this Sum is not sought, but only upon the ground of her promise, which cannot be prejudged by that Sentence; and in respect of the smalness of the Sum, *viz.* as if there were two Libels for one hundred merks ilk one. They contended, that the same was probable by Witnesses, which was *Repelled* as said is. Actor. *Alter. Burnet. Hay* Clerk.

L. *Weym* contra L. *Gairntullie*, *January* 31. 1633.

L. *Weym* younger Pursuing Contravention upon this Fact, *viz.* that after Caution of Law-borrows found to him, the Defender had cutt a great Ditch and Fousie betwixt the Pursuers Lands, whereby he had drawn in a Burn, which came within that Ditch with so great violence and impetuosity, that it overflowed the *Pursuers* Land, whereof he was Heretor and Fiar, and had run away a great part thereof, and was like thereby to continue and prejudge him greatly in time coming; And the Defender *Excepting*, that the said Ditch was casten by common consent of the Pursuers Father, who was Liferenter of the Lands, and of consent of this Excipient, and conform to a Decreet *Arbitral* betwixt them thereanent. And the Pursuer *Replying*, that his Fathers Consent or Deed, who was Liferenter only, could not be a Warrand to the Defender to do any Deed prejudicial to him in his Heretage. The *Lords* Found the *Alledgance* Relevant *ad hunc effectum*, to Assoilzie the Defender from this Action of Contravention, but they sustained this Action, being converted in a Pursuit, for reparation of his Interest, and Skaith sustained by the Fact Libelled, and for preserving of him therefrom in time coming; which the *Lords* permitted the Pursuer to do *hoc ordine*, and to turn his Summons into this desire, and that the Defender should Answer thereto now, without any Process or Action to be Intented thereon. Actor. & *Baird*. Alter. *Stuart*. *Gibson* Clerk.

Stevinson contra *Law*, *Eodem die*.

John Stevinson in St. *Andrews*, having sold to *Alexander Law* in *Dumfermling* certain Lint, the said *John Stevinson* finding thereafter the said *Alexander Law* in St. *Andrews*, by the priviledge of Burgh, Charges him to enter in Ward by the Town Officer, whereupon he finds Caution to Answer as Law will; and he and the said Cautioner being thereafter Conveened before the Magistrats of the Burgh, for payment of the prices of the Lint, he raises Advocation upon this

this Reason, That the Baillies of St. *Andrews* could not be Judges to him, who was actual Residenter in *Dumfermling*, and his finding Caution to Answer as Law will, which was done to eschew the danger of Warding, cannot make them competent Judges to him. The *Lords* Found this no Reason, whereupon the Action should be Advocat to the *Lords*; but Found the Magistrats of St. *Andrews* competent Judges, albeit the Party dwelt not within their Judicatory, in respect of the said Caution found to Answer as Law will; by the which finding of Caution, he became subject in that to the Jurisdiction of that Burgh; specially seing the matter, for which the Caution was Found, & for which he was conveened, was for Wares bought and Bargained for within that Burgh, and so *ratione rei* he was the more subject to that Judgment: And the *Lords* Found, that the finding the like Caution, ought to produce this effect, and that it tended not to that end to make the Party, who found the Caution, lyable to answer in his own proper Jurisdiction. *Vid.* 16 *Novemb.* 1636. *Stuart.*

L. *Cleghorn* contra *Crawfurd*, *Eodem die.*

IN a Removing the Defender Alledging, that she had a Rental. The Pursuer Replying, that she had tint the same, in so far as she had Set the Land therein to Sub-Tennents, which was against the nature of the Rental, and made the same thereby to expire. The *Lords* sustained the Exception, notwithstanding of this Answer; for they Found, that the in-putting of a Sub-Tennent to Labour the Land, was not of that force to make her tine her Rental, where there was neither Sub-Tack, nor any other Disposition, or Deed done by her in Writ, Alledged by the Pursuer. Actor. *Mowat.* Alter. *Gibson* Clerk. *Vid.* 26 *Feb.* 1630. *Lockhart*, and the Cases there. 21 *February* 1632. L. *Johnstoun.*

Hamilton of *Sheills* contra Tennents of *Miln-house*, *Eodem die.*

A Decreet of Removing being given against the Tennents *in foro contradictorio*, in *November* 1632. Suspended upon a Reason of a Tack Set to the Defenders Father for Terms yet to run, to whom they were appearand Heirs, which they Proponed as *noviter veniens ad notitiam*, and offered to make Faith thereon, and qualified the cause of their probable ignorance thereof, *viz.* That one of the Decerned Tennents, being one of the Daughters and appearand Heirs of the Tacks-man, who was in *Ireland* the time of the Sentence, and yet is there, had, and hath the Tack foresaid in her keeping, whereupon one of the Parties present made Faith, and sware the verity thereof, and that she never knew the same but since the Sentence. The *Lords*, before they would discuss, whether this Reason should be received, or not, notwithstanding that the Party contended, that it ought not to be received, in respect of the said Sentence given against them, Compearing, and that he Alledged, *res Judicata non debent retractari prætextu Instrumentorum noviter repertorum*; and also (notwithstanding that the Tack was not instantly produced, to verifie the Reason, as the Party Alledged ought to be done in the case of Instruments, new come to knowledge) they Assigned a day to the Suspender, to produce these Tacks, and to recover the same out of the Parties hands in *Ireland*, and reserved then to the Party after sight of the Tacks, to oppone what he might against the same, either why it should not be received then, or why it proved not the Reason; to which time all further proceeding was superceeded, *sed cum onere expensarum.* Actor. *Nicolson* & *Gilmor.* Alter. *Mowat. Scot* Clerk. *Vid. June* 9. 1624. L. *Touch*, & 20 *January* 1631. E. *Galloway.*

Wilson contra *Nicolson*, *Eodem die.*

THe only Bairn, surviving both Father and Mother, being Confirmed Executor to both, and thereafter dying before all the Goods were Execute,

the neareſt of Kine to the Mother obtains himſelf Executor Dative *ad non executa*, and Purſues for her Part of theſe Goods, wherein the neareſt of Kin to the Bairn, claiming the whole Right of all the Goods, as well not Execut as Execute, to pertain to him, as for the Mothers Part (which was only claimed by the Executor *ad non executa*) in reſpect that he Alledged, that that Bairn being the ſole Bairn of his Father and Mother, he had only Right to the Mothers Part of the Goods, he being the only Bairn, and having the only Right of Succeſſion to her, without Diviſion; for albeit the Bairn was Confirmed Executor to his Mother, yet that Confirmation, which was the only way that gave him a Right and Title to Purſue for the Goods, albeit not Execut in his Lifetime, yet took not away from him the Right of Blood and Nature, which gave him full Right to the total Succeſſion, *ex aſſe* to his Mother without Diviſion; for in this caſe, *quoad Matrem*, the Bairn, as he ſucceeds to her *in toto aſſe*, which is the Legitime, *quoad Matrem*; there being *quoad eam nulla diviſio vel diſtinctio aſſis per partes*, where no Teſtament is made by her, ſo that the Confirming of him Executor to her, could not derogat to that Right of his univerſal Succeſſion, as in other Executries, where the Executor will not have Right to the whole; for in this caſe he Alledged, that the Confirmation of the Bairn as Executor, is not the Confirming, nor giving an Office to him, as in other Caſes, where the Confirmation of an Executor is but an Office, which makes the Executor lyable to the neareſt of Kin, whereas here it is not an Office, which another may Execute, and become Comptable therefore; but the whole Right remains with the Bairn, and muſt follow ſuch as may be his Heirs; and therefore he Contended, that albeit the Bairn had not Execut the whole Goods before his deceaſe, yet there was no place to the neareſt of the Mothers Kin, to claim any part of theſe Goods; but the ſame pertaining to the only Bairn, muſt be tranſmitted in the Perſon of the neareſt of Kin to the Bairn. This Alledgance was Repelled, and the Right of the Goods un-execut by the Bairn, was Found (ſo far as might befall to the Mother for her third) to pertain to the neareſt of her Kin, and not to the Agnats of the Bairn; thereafter this Cauſe was Ordained to be heard in the *Lords* Preſence, and was heard, but not Decided. *Vid. July* 19. 1623. *Sibbald*;

Harpers contra *Hamilton*, *February* 6. 1633.

THe deceaſt *George Harper* having in his Teſtament left his Means to *George* and *John Harpers*, his Oyes, and therein appointing *James Hamilton* to be their Tutor, and the reſt of the Means left by him, to be payed to *James Hamilton*, for their Entertainment, ay and while they ſhould be of perfect Age; after the Bairns paſt Tutory, they having choſen Curators, the Curators purſues the ſaid *James Hamilton* the Tutor, to deliver the Bairns Writs, that they might have the Adminiſtration of their Means; and the ſaid Tutor Alledging, that the Writs ſhould remain with him, ſeing he had only Right to Intromet with the Annualrent of the Moneys left by the Guidſir, for the Bairns Maintainance, according to the Guidſirs Will. The *Lords* Found, that notwithſtanding, that by the Teſtament, the Guidſir had appointed the ſaid *James Hamilton* to be Tutor, yet that after the Tutory, the Bairns might chooſe others, to be Curators to them, than the ſaid *James*; and that the ſaid Curators had good Right to call the ſaid Tutor, for delivery to them of the Writs, containing the Means left to them by the Guidſir, and that they ought to Adminiſtrat the ſame: but Found that in reſpect the Guidſir had left him to be Tutor to his Oyes, and gave him the Rent of the Money for their Intertainment, while their perfect Age, which the *Lords* Found the Guidſir might do of Law in theſe things, which were left by him elf to them, That therefore the Rent of theſe Moneys, ſo left by the Guidſir ſhould be payed to the ſaid *James Hamilton*, even albeit the Bairns were paſt Tutory, ſo long as they were Minors, at leaſt ſo long as they remained with him

him in his Company; but the *Lords* Modified the Sum, which ſhould be payed to him for the Bairns Entertainment, to a reaſonable Sum, and would no allow, that the Annualrent of the whole Sums ſhould be payed to that end, but a part (which they Modified) and the reſt to be forth-coming to the Bairns Actor. *Gibſon.* Alter. *Heriot. Gibſon* Clerk.

Gordon contra *Mᶜculloch*, *Eodem die.*

IN a Removing from the Lands of *Ardblair*, againſt *Henrie Maculloch*, at the Inſtance of *John Gordon* of *Ardwell*, who had Compriſed the ſame from umquhile *William* Mᶜculloch of *Myrton*, Heretor thereof. The *Lords* Found this Right, and Defence thereupon underwritten, Relevant, to Defend the Tennent, *viz.* that the Defender had a Tack from the umquhile Heretor, before the Compriſing, which albeit it was expired before the Warning, yet the ſame bearing this Clauſe, *That the ſaid Setter received the Defender, and his Heirs, kindly Tennents to him and his Heirs in the ſaid Lands, after the expiring of the Tack,* This Clauſe was Found ſufficient to Defend the Defender from all Removing, during the Tennents Lifetime, albeit the Purſuer Replyed, that that Clauſe ought not to be reſpected againſt the Compriſer, who was a Singular Succeſſor; And that he Alledged, that it could laſt no longer than the Setter and Receiver lived together, and that it ſhould Expire by any of their deceaſes; Likeas the Setter was deceaſed, and ſo it ſhould expire, and the Clauſe it ſelf could not ſtand, neither was compatible with the Tack, ſo long as the Tack ſtood un-expired, and before it expired, that Clauſe could not take beginning, the Setter being dead, to whom he ſhould have been kindly Tennent admitted, and before that Clauſe could take effect, the Land being Compriſed, whereby it became void againſt this Compriſer, a Singular Succeſſor, which Reply was Repelled, and the Clauſe ſuſtained, as ſaid is. *Vid. March* 15. 1631. E. *Galloway.*

Hume contra *Hume*, *Eodem die.*

IN a Decreet obtained by *James Hume* againſt *Chriſtian Hume*, as Intromiſſatrix with her Huſbands Goods, for her Husbands Debts, before the Commiſſar of *Lauder*, and given *parte non comparente*, and upon Contumacie, for not Compearing to give her Oath, the Summons being referred thereto, and ſhe Summoned to that effect, was Reduced upon this Reaſon, *viz.* becauſe ſhe was not Summoned by a Meſſenger, nor yet by the ordinar Officer of Court, but by a common Boy; and alſo becauſe there were diverſe Defences given in by the Defenders Procurators for her, which was neither Repelled, nor Admitted, and ſo not diſcuſſed in Proceſs, nor no Minut therein, bearing Litiſconteſtation to have been made, as ought to have been; for albeit the Defences were no ways Relevant, but in effect a denyal of the Lybel, and that the Lybel was referred to the Parties Oath of verity, and that ſhe was Summoned to that effect, which the obtainer of the Sentence Alledged to be in effect Litiſconteſtation, and that the Defence needed not to be proported in the Proceſs to be Repelled, being only the denying of the Lybel in Subſtance; yet the *Lords* Found, that the Judge ought to have given his Anſwer formally to them, and ſhould have Repelled them, and admitted the Lybel by his Signator, and therefore that not being done, the Sentence was Reduced. Actor. *Craig.* Alter. *Gibſon* Clerk.

L. *Haddo* contra *Johnſton*, *Eodem die.*

LAird *Haddo* Purſues one *Johnſton*, who was his Tennent in the Lands of *Park* of *Kellie*, to reſound to him the damnage ſuſtained by the ſaids Defender's undutiful and un-uſual Labouring of the ſaids Lands, before he Removed off the Lands, and after he was Warned to Remove therefrom, through the Ryving and Tilling of the Greens and Swairds of the ſaids Lands, which were not Laboured in time preceeding, but was ay keeped for the Graſs, and Paſturage of

the Bestial, wherewith that Roum was Laboured, and for burning of the Mosses of the saids Lands, which were ever reserved for Feuel, and for casting of Peets to the Tennents thereof, whereby the Roum was deteriorat in the quantity and Sums lybelled, which were acclaimed by the Pursuer, seing he Alledged, that thereby no Tennent might pay the old accustomed Dutie for the Land; and the Defender Alledging, that this kind of Action was a novelty, and not usually heard of before, and so ought not to be sustained, seing it is lawful to any Tennent to labour the Land Set to him, in all the Parts thereof, where he is not restrained nor limited by any special condition, betwixt the Master and him, as he was not in this case, and that he Laboured but conform to the use of the whole Countrey. The *Lords* Repelled the Alledgance, and sustained the Action; for they Found that no Tennent, albeit no such condition had been specially made; might by his Labouring, rive out the old Swairds of Ground, nor yet burn the Mosses, whereby the Mosses might be made worse, but that the Roum should be left by the Tennent, as good when he Removed therefrom, as the time of his Entry thereto; and therefore they Ordained the Fact lybelled, and the estate of the Roum to be tryed by Gentlemen in the Countrey, who might both consider of the Case, wherein the Roum was at the Tennents Entry, and of the Facts done by him, before his Removing therefrom, and of the Quantity thereof, and of any damnage the Pursuer has Incurred thereby, against the ordinar Form usually keeped in that Part of the Countrey, in Labouring of such Roums, and what in their Judgment, the said skaith would extend to, and to Report the same thereafter to the *Lords*; after which they declared, they would determin upon the quantity of the skaith, the Modification whereof they referred to themselves, after Consideration of the said Report, and Tryal taken. *Actor. Baird.* Alter. *Mowat. Gibson* Clerk.

Lindsay contra *Dennistoun*, *February* 9. 1633.

Lindsay of *Bomull* Pursues *Dennistoun* of *Dalquharn* upon Contravention, for coming to the Pursuers Land of *Bomull*, and entering in the House of one, who was then Actual Tennent to the Pursuer, dwelling upon the saids Lands of *Bomull*, and then taking out of the said Tennents House a Kow, and breaking up of the Tennents Chest, and taking out thereof, and away with him three Bolls Oats, pertaining to the said Tennent, which the Pursuer Lybelled to be Deeds of breach of Law-borrows, seing thereby the Defender was bound, that the Pursuer his Men, Tennents and Servants should be Harmles at his hands, in their Lands, Bodies, Goods, *&c.* The *Lords* Found no Process upon this Contravention, upon this Fact lybelled, for taking away of the Tennents Goods, albeit being within the House of the Tennent, upon the Pursuers Heretage, seing the Tennent was not Pursuer, nor the Action at his Instance. *Vid. January* 28. 1632. *Grant.*

Govan contra *Richardson*, *February* 12. 1633.

Bessie Govan a Pupill, and her Father as Tutor and Administrator in Law to her, Charging *Margaret Richardson*, who was obliged by her Bond to the said *Bessie Govan*, in the Sum of 200 Merks, which Sum being consigned in a Suspension, to be given up, The Suspender being Found by the Judge, to be Exonered thereof lawfully, The *Lords* Found the Sum ought not to be given up to the Father, who desired to lift the Money as Tutor to his *Bairn*, until the time he found Caution to make the same forth-coming to her, at her lawful Age, in respect he was but a poor Man; and it was feared that he might spend the Money to the Bairns prejudice. *Vid. March* 17. 1636. *Wier. Decem.* 2. 1635. *Hume.*

Forbes of *Astoun* contra *Forbes*, *Eodem die.*

A Bond being desired to be Reduced, at the Instance of a Person Interdicted, because it was Subscribed by him then Interdicted, without consent of

of the Interdictors, there being two, whose consent by the Interdiction is declared to be requisit to all Deeds done by him; and the Bond quarrelled was not consented to by any two, nor by none of the Interdictors. And the Defender Alledged, that this Bond was Subscribed by one of the Interdictors, as Cautioner for the Person Interdicted, which was to be reputed, likeas if he had consented; Likeas who is another of the Interdictors, promised to Subscribe the Bond; and so the Bond must be as valid, as if two had consented thereto. The *Lords* Repelled this Alledgance, and Found the Subscribing of the Interdictor as Cautioner (he not consenting *eo nomine*, as Interdictor) and the Promise made by the other to Subscribe, he not having Subscribed conform to his Alledged Promise, not sufficient to sustain the Bond, which as it was produced, and is now quarrelled, wanted the Consent and subscription of two of the Pursuers Interdictors. In this Process it was thought by the *Lords* (albeit the Process ran not upon this Ground, neither was it then questioned, nor Decided) that the Creditor Contracting after Interdiction, without consent of the Interdictors, where the Person Interdicted was known to be *rei suæ providus*, and was in use to Contract in the Countrey, and the cause of Interdiction was not tryed, nor allowed by the Judge, might Reduce that Interdiction, and his Bond might stand, albeit neither the Person Interdicted, nor his Interdictors should assist the Pursuit, even as a Creditor may Reduce an Inhibition, which is but the Judges Interdiction, as the other is the Parties voluntar Deed. *Actor. Baird.* Alter. *Gibson* Clerk. *Vid. July* 26. 1631. Bishop of the *Isles*, for this part of the Consent.

Rankin contra *Williamson*, &c. *February* 14. 1633.

THe Defenders being Pursued to pay the Sum confest by their Subscribed Ticket to be owing, and they Alledging that the Ticket was null, as wanting Witnesses; It being Replyed, that he referred the verity of the Subscription, that it was their Hand-writ, and that it was their proper Subscription, to their Oaths, so they needed no Witnesses. The other Duplying, that that was not enough, unless he referred also to their Oaths, the verity of the Debt to be Resting Owing un-payed. The *Lords* Found, that the said Ticket, wanting Witnesses, ought not to be sustained, by referring to the Defenders Oaths, that the Subscription thereof was their proper Hand-writ; except that they also referred therewith the verity of the Debt resting owing, if it be yet owing un-payed; which was the rather done, because the Debt acclaimed was sought by this Ticket, whereupon the Pursuit was Founded, being of the date in *anno* 1608. now by the space of 25 years since, and no Claim therefore while now. It was Replyed, that seing the Writ was Subscribed by four Persons, whereof ilk one of the four was adebted in his own several Sum, their Subscriptions being all at one time, might supply want of Witnesses; for ilk one of them might be Witneses to the other, which was Repelled. *Hay* Clerk. *Vid. July* 1. 1624. Lo. *Conservator. Feb.* 9. 1631. *Barrens. Feb.* 11. 1634. *Irvin. July* 10. 1632. Lo. *Fenton.*

Grierson contra *Grierson*, *Eodem die.*

A Charge for Payment of 200 merks being Suspended, because 75 merks thereof was payed, as the Parties Discharge thereof bears; and the Charger Alledging the Discharge to be null, because it was only Subscribed or marked with the mark, and two Initial Letters of the Chargers name, which he denyed to be his Subscription; and albeit it were, it was not sufficient, to oblige him in this Sum, not being Subscribed by himself, nor yet by a Notar for him, as use is. The *Lords* Repelled the Alledgance, and sustained the Discharge, the Suspender proving by the Witnesses insert in the Discharge, that the same was

so marked, and the saids two Letters put to by the Chargers self, to the Acquittance, at the time of the date thereof; which the *Lords* Found sufficient to sustain the same, notwithstanding of the Alledgance. Actor. *Oliphant*, Alter. *Mowat*. *Vid. January* 20. 1631. *Houston.*

L. *Lochinvar* contra *Graham*, *Eodem die.*

IN a Removing, *Graham* the Defender Alledging, that he is Tennent to the Appearand Heir of one *Graham*, which *Graham* was Heretably Infeft in the Lands lybelled, and by vertue thereof 30 years in Possession of the saids Lands lybelled, at least the Defender bruiked by the Tolerance of the said Appearand Heir, and he is not Warned. The *Lords* Repelled this Alledgance, except the Tennent should Alledge, that the said umquhile *Graham* was lawfully Infeft, and that his Infeftment was lawfully Confirmed, seing they were Kirk-lands, which were Controverted, and Found that the Tennent ought to Alledge this, otherways that the Alledgance should be Repelled, and that he ought to condescend, by whom that *Graham* was Infeft. Actor, *Gilmor*. Alter. *Gibson* Clerk.

Keith contra *Heriot*, *Eodem die.*

NAthanael *Keith* being adebted to *Heriot* in the Sum of 1000 merks, by Heretable Bond, which bore Infeftment to be given by the said Debitor, of an Annualrent Redeemable, & payment of the Principal Sum, not to be made, but upon Requisition to be made on the part of the Debitor to his Creditor, upon 40 days Warning to receive the same; & thereafter the said *Nathanael Heriot* being Debitor to *Nathanael Keith* in some Sums, by Bonds conceived only in payment of a Moveable Sum: The said *Nathanael Keith* Pursues *Heriot*, and *Alexander Heriot* his Assigney made to the said Heretable Bond, to hear him give an Acquittance of the said Heretable Bond, as Compensed with the other Bonds foresaids, granted to him by the said *Heriot*; In which Action it was Found, that this Compensation was as receivable against the Assigney, as against the Cedent. It was also Found, that this Moveable Bond of this Tenor, not bearing any Clause of Annualrent, ought to compense the other Bond, albeit Heretable, and bearing Infeftment and Premonition, which the said Debitor was astricted to make to the said Creditor, before he louſed the Sum; and so thereby the Defender Alledged, that he could not compense, seing he could not pay the Sum, but upon Requisition first made to the Creditor, to receive the same upon 40 days, and which not being done, far less was this Compensation by Pursuit now receivable, where the Party was not Charging this Pursuer for that Sum, which was Repelled. Actor. *Mowat*. Alter. *Burnet*. *Gibson* Clerk.

Charters contra L. *Balmaghie*, *Eodem die.*

ONe *Charters* Pursuing Removing against the Laird of *Balmaghie*, the Pursuer being Infeft in the Lands Libelled, as Heir to his Father, who was Infeft by *Alexander Livingston* of *Airds*, above 45 years since, by an Infeftment to be holden of the Granter, and by vertue thereof was divers years in Possession of the Land, ay and while the Relict of the said *Alexander Livingston*, being Liferenter of the Lands, after her Husbands decease, by vertue of that her Liferent-right, became in Possession thereof, wherein she continued by the space of 36 years or thereby, ay and while the time of her decease; after whose decease immediatly the L. *Balmaghie* Defender apprehended the Possession, and hath continued therein now by the space of 5 or six years bypast, he being Infeft by Progress from his Predecessors and Authors, by five several Heretable Infeftments, in five several his Authors persons, flowing from that same *Alexander Livingston*, common Author to both the Parties, and all by publick Infeftments, to be holden of the Superior: Whereby it was Alledged, that in this

this Judgment possessory, the Publick Infeftment ought to defend against the base Right, which was now extinct, being out of Possession these 40 years bypast, and so Prescrived. The *Lords* nevertheless Repelled this Alledgance, in respect that the Pursuers base Right, was Alledged once to be clothed with Possession; whereby it was once a good Right, and ought to be preferred to the posterior Right, albeit Publick; and Found that this Possession, albeit after so long time (and albeit tending to destroy the publick Infeftment with so long progress) was probable by Witnesses, and receivable *hoc ordine*, without Reduction; and Found that the Prescription had no place in this case, seing the desuetude and out-lying of the Pursuer out of the Possession, was by the Liferenters Right and Possession, she living, and being Possessor above 30 years and more, which Suspended both Parties Rights and Possession, that Prescription could not run against them *medio tempore*; and the Defenders Possession since her decease was not sustained, to exclude this Pursuit. Actor, *Cunninghame*. Alter. *Gilmore*. *Gibson* Clerk. *Vid.* 22 *January* 1633. *Gordon*, and the Cases there. 11 *Feb.* 1630. *Ross.* 1 *July* 1634. *Durie.*

Haliburton contra *Hunter*, *Eodem die:*

BY Contract betwixt Mr. *William Hunter* on the one part, and *Janet Finlason* his Mother on the other part; The said Mr. *William* is oblidged to pay to *Margaret Hunter* his Sister the Sum of 3000 merks, and to the rest of his Sisters mentioned in the said Contract, to ilk one of them a particular Sum, at a Term appointed for that effect; and in case of any of their deceases before the Term, the Sum Contracted to her who so died, to accresce to the rest of the Sisters surviving, equally amongst them, and that in satisfaction of all Sums, which they might crave by decease of umquhile *David Hunter* their Father, or which they might crave from the said Mr. *William*, as Heir or Executor to him; the said *Margaret Hunter* being Married to *Alexander Haliburton*, Pursues the said Mr. *William* for that part of the Sum which was Contracted, to be payed by Mr. *William* to *Barbara Hunter*, who was deceased before the Term of payment, and which thereby accresces to the Sisters survivers, according to that proportion thereof, which falls to her and her said Husband. And the said Mr. *William* Alledging, that the said *Margaret* and her said Spouse had no Action therefore, in respect that they had by their Discharge, granted the Receipt of the Sum, wherein Mr. *William* obliged himself to the said *Margaret* for her Tocher; In the which Discharge they had not only Exonered him of that Sum, but likewise had Discharged him of all Sums whatsoever, which they might seek of the said Mr. *William*, wherein he was obliged to the said *Margaret*, either in her own name, or in any other persons name to her behove; which he Alledged ought to comprehend and extend to this Sum, now Acclaimed, seing it was Claimed as pertaining to her by her Sisters Decease, and that he was obliged to pay it to the rest of the Sisters surviving, she being one of the survivers, and craved *eo nomine*, which was alike as if her name had been specially expresst; for it is so craved, as being obliged to be payed to her behove. The *Lords* Found, that this Discharge, which was specially granted, of a special Sum Contracted for Tocher to the said *Margaret*, with the general Clause foresaid therein contained, did not extend to this Sum now Acclaimed, seing the same was not specially Discharged, as it ought to have been, if the Discharge should extend thereto; for that Sum was a Debt, als principally owing as the Tocher; and the Tocher being only received and payed, and the general Clause not extending to any Sums, which might fall to her by her Sisters decease, nor no such thing treated on, nor mentioned among them the time of the Discharge, it could not extend *ad non cogitata neque tractata*, except the Conception thereof had been made more ample, to have comprehended the same: seing the said general Clause

might subsist, and the said Clause obligatory also remain in its own strength, in respect the said generality might be interpreted to extend to all other things, which the Pursuer might seek from the Defender, by her Fathers decease, or from him as Heir or Executor, or wherein he was particularly obliged to her self, and not to that which fell to her by accident of her Sisters decease; for if it could receive that Extension, then of the like reason, if any, or all the rest of the Sisters should die hereafter, the Pursuer would by the same Discharge be excluded from all Claim of her part of their Portions; which were hard to extend it to Casualities, not then in *rerum natura*, but which were uncertain, except the Discharge had been specially conceived for all things, which might thereafter befall to her. Actor. *Russell.* Alter. *Hay* Clerk. *Vid.* 24 *February* 1636. L. *Ardkinlas.*

Stuart contra *Bannerman*, *Feb.* 16. 1633.

A Decreet of Ejection being obtained at the instance of *William Kairney*, against umquhile *Robert Stuart* and *Christian Bannerman* his Spouse, for Ejecting him out of the Lands of Set in Tack to the said *William* by them; the saids Lands being the said *Christian Bannerman*'s Conjunctfie Lands, Provided to her by another called *Stuart*, who was her prior Husband; And they having Suspended that Decreet, the Letters were Found orderly proceeded against them both, whereupon they both being Denunced Rebels, *James Stuart* is Donatar to both their Escheats; the second Husband being then also dead before the obtaining of the Gift, and he seeking Declarator against the said Relict, the *Lords* Found the Horning null, and that no Declarator could pas thereon, and that the Womans Escheat fell not by that Horning, seing it was done and Execute against her, she then having a Husband, in whose lifetime no Horning could be effectually used against the Wife, for then she was under the power of her Husband, who ought to have defended her, and she had no person to Suspend, or Relax, or do any Deed, but as her Husband should please to do for her: Neither was it respected, where it was Replyed, that the Decreet was given against her *ex proprio facto*, *& ob proprium delictum*, and in her own Conjunctfie-Lands; for it was Found, that even in that case, that *stante Matrimonio*, albeit the Woman should fault as well as the Man, yet the Husband was lyable therefore; and that no Civil Execution by Horning could be validly Execute against the Wife therefore, till after the Husbands death: And the said Nullity was received summarly, without necessity to Reduce thereupon. This would appear to give great liberty to Wives to do wrong, their Husbands living; and if the Husband should die before reparation of the wrong, that no redress should be had of the Relict; albeit in Bonds, or contracting of Debts it may so hold; but the case may appear otherways in Deeds unwarantably done by the Wife her self, which in the case above-written, may be thought the more hard, where the Wife was still Rebel Unrelaxed, after her Husbands decease, and the wrong no ways shown to be purged after two Sentences standing; but here the Party Obtainer of the Sentence of Ejection Compeared not, nor was Party in the Cause, but only the Donatar. Actor. *Stuart.* Alter. Absent. *Vid.* 18 *July* 1622. *Caldwell.*

Harper contra *Cockburn* and *Johnston*, *Eodem die.*

Beatrix Johnston having Comprysed from *Cockburn* of *Borthwick* his Lands, upon a Denunciation after *Whitsunday*, and being Seized before *Martinmas* thereafter, and thereby claiming the whole years Duty of the Lands, being Victual Farm, after the Terms of *Yule* and *Candlemas* were past, and another Creditor of this *Cockburns*, having after the Denunciation Arrested the saids Farms; The *Lords* Found, that the Arrester ought to have the half years Farm, viz.

viz. The *Whitsunday's* duty, and that the Compryser ought be Answered only of the other half of that years Duty, albeit the Denunciation was before the Arrestment, and albeit the Compryser Alledged, that his prior Denunciation, and subsequent perfected Comprysing, and Seasin also expede before the *Martinmas*, affected all that years Duty, and gave her only Right to the Land, and that years Fruits thereof, *quia fructus soli, præsertim fructus pendentes, sunt pars fundi*; And seing the Ground is hers, so must the Farms, otherwayes the Arrester must have the like Right to the *Martinmas* Duty as to the *Whitsunday*, he having Arrested before the Term, and before his Comprysing was perfected, specially also the Lands being Set for Victual to be payed at a Term, and not for Silver Duty, payable at *Whitsunday* and *Martinmas* equally, Which was Repelled, Actor. *Craig. Gibson* Clerk. *Vid. March* 1. 1623. *Hamilton*, and the Cases there, *Decemb.* 13. 1628. *Huntly. Nov.* 22. 1633. *Warrock. March* 23. 1624. *Brown.*

Ker contra *Ker*, *Eodem die.*

James Ker having Pursued *Mark Ker*, for payment of a Sum contained in a Bond, which was Registrat by Compearance and Consent of Procurators, and he offering and taking a Term to Renunce, being Charged to Enter Heir to the Granter of the Bond, and Pursued *eo nomine*. It was Found, that he might pass from that offer to Renunce, and propone another Exception, notwithstanding of that Term Assigned to him, and thereafter he Proponing Improbation of the Bond Lybelled: It was Found that this Exception of Improbation, ought not to be received against a Bond Registrat, but reserved him Action, to Pursue Improbation thereon, albeit the Registration was only by a naked Consent, and that the Clerk had the Bond then ready, to be produced in this same Process, being recently only done. *Gibson* Clerk. *Vid. Nov.* 24. 1632. *Annand* for the first part of this Decision. *March. ult.* 1637. *Veitch* for the last part.

Oliphant and *Auchterlony* contra Tennents, *February* 19. 1633.

One *Oliphant* and *Auchterlonie* his Tutor *Testamentar* for his Interest, Pursues the Tennents of the Lands of to pay to the said Minor, as appearand Heir to his Father, the Mails and Duties of his Lands, wherein the *Lords* Found, that seing this Pursuit was moved by the Pursuer, only as appearand Heir, he not being Infeft in the Lands, nor yet Retoured Heir to his Father, and his Fathers Seasin produced, nor yet it being Answered, that these Defenders had ever acknowledged the Pursuer to be their Master, by paying of Mails and Duties to him of before, therefore that they could not be Conveened in this Pursuit by the appearand Heir; And Found this Defence Competent to the Defenders, although they were only naked Tennents, and had no Right in their own Persons to the saids Lands; Thereafter upon the 26 of *February*, the *Lords* Sustained this Pursuit at the Instance of the appearand Heir, he finding Caution to relieve the Defenders, who Alledged no Right in their persons for Retention of the Farms, and to make the same forthcoming to all Parties having Interest, which was done the rather, least the Tennents should become *non solvendo*. *Hay* Clerk.

Lenox contra *M'moran*, *February* 20. 1633.

One *Lenox* Pursuing *M'moran*, who was Minor, for Reduction of a Feu Infestment, granted to the Defenders Father, upon the Act of Parliament 1597, for not paying of the Feu-Duties many years by-past: And the Defender Alledging, that he was Minor, *& sic de jure non tenebatur placitare super hæreditate paterna*; This Exception was Repelled, in respect he was Conveened for his Fathers Fault; and also the Minors self was holden to Answer, in respect of the Act of Parliament, from which Minors are not excepted. And it being further Alledged, that in the Feu-Infestment, called to be Reduced,

it was specially Provided, and set down therein, *That if the Party failed to pay the Feu-duty at the Term appointed, then it should be lesum to the Giver of the Feu, and his Heirs, to Poynd the Land for the double of the Feu-duty*; By the which Conventional Condition, agreed upon betwixt the Parties, which they had conveened upon as an expres Penalty, set down to supply the Failzie of not payment of the Feu-duty, the said Pursuer could never have Recourse to claim any other thing, which might ensue upon that Failzie, neither by the Act of Parliament, nor by no other ground, but only that which was agreed to come in place of the Failzie, as said is, and therefore could never be heard to Reduce this Right: This Alledgance was Repelled also, for the *Lords* Found, that that Condition conveened betwixt the Parties, did not derogat, but that the Pursuer might seek the benefit of the Act of Parliament, from the which he was not secluded by that Clause of the Intestment, seing the Party might seek any of them as he pleased, specially also the Act of Parliament being since the Intestment. Actor. *Craig & Beithes*. Alter. *Cunninghame*. *Gibson* Clerk.

La. *Athol* contra E. of *Athol*. *Eodem die*.

A Submission being made by the Lady *Athol* to the Earl of *Kinghorn*, the Lairds of *Auldbar*, *Inchmartine* and immediatly after her Husbands Decease, of all which she could crave of the Earl of *Athol* by any Right competent to her, and they Decerning her to have yearly 500 merks for all: This Decreet being desired to be Reduced upon the Reason of most *Enorme Lesion*, qualified in that she was provided to a Conjunct-fee of fifty Chalders of Victual, beside that she was one of the Heirs of the Earldom of *Athol*, for all which Rights the saids Judges had ordained only the saids 500 merks yearly, which was *vehemens lasio*, and so unsufficient for the Entertainment of the meanest person whatsoever, far less for one of her Birth and Estate; That the *Lords* who were Supream Judges, ought to Repone her against that unjust Decreet, which was so partially Pronounced by the Arbiters, wherein they had not behaved themselves as *boni viri*, according to Trust committed to them, and therefore ought to be mended by the *Lords*, who were Soveraign Judges, and to whom Recourses were permitted in Law, as to the best men, to Rectifie such Wrongs: the Parties being heard to Reason in this Cause at great length, and having considered the Defenders Exception, specially that in Law it was Alledged, that both in *ff.* and *C.* it is expresly Decided, *Quod sit standum sententiæ arbitri sive æquæ sive iniquæ, & sibi imputet qui compromisit, nam & minus probabilem sententiam ferre debet æquo animo*: And the Pursuers Answers in Law made thereto, as may be more particularly considered in my other Book of Notes, *Fol.* 27. And also the *Lords* having heard the Defender, upon declaring the Burthens, wherewith the Conjunct-fee-Lands were alledged to be Affected, before her Conjunctfee granted thereof to her and whereby he Alledged the most that was free to her, did not exceed 19, or 20 Chalders of Victual; So that he Alledged, that the *Lesion* was not so great, to Reduce the Decreet given by so honourable Arbiters, granting that that *Lesion* was a cause of Reduction, which he altogether denyed. The *Lords* Found this *Lesion* to be most *Enorme*, and that it was a Cause to Rectifie the said Decreet Arbitral, notwithstanding of the Alledgance; And therefore they Found, that the Lady ought to have yearly given to her, in place of the 500 merks Decerned, 1200 merks yearly in all time coming, during her Lifetime; for which Sum they ordained the Lady to have Right sicklike, as if that Sum had been Decerned by the Sentence; And also they ordained to be payed to her for the space of a year, which was expyred since her Husbands Decease, 1000 Pounds, by and attour 500 Merks, which she had gotten payed to her before; And this the *Lords* ordained to stand,

25

as if it had been expresly Decerned by the Arbiters in their Sentence. Actor. *Stuart* & *Baird.* Alter. *Nicolson* & *Nairn.* *Hay* Clerk.

Colledge of *Glasgow* contra *Stuart*, *Eodem die.*

THe Colledge of *Glasgow* Charging by General Letters, Mr. *Patrick Stuart* of *Rosland*, for certain Rental Teind Bolls due to the Colledge, who Suspending, that these 20 or 30 years last by-past, the Colledge received some years *ipsa corpora*, and other years such Duties for the Teinds, as he and they agreed upon, at the sight of Persons, chosen by them to estimat the Teinds, and so that he was not holden to pay the Rental Bolls acclaimed the year lybelled, seing he was content, and offered to pay whatever the Colledge should prove the worth of his Teinds extended to this year lybelled; and the Colledge Answering, that they had diverse Decreets, whereby the Rental was established, for the quantity whereof they now Charged this year; and whatever payment has been made since, different from that Rental, it cannot prejudge the Colledge in their Rental, the same being done without their Consents, and not being a constant Tenor of Payment, which might have made another Rental. The *Lords* sustained the Rental for the year Controverted, which Rental was Found, not prejudged by the Posterior use of Payment of *ipsa corpora*, or other Deeds contained in the Reason; and the *Lords* Repelled the Offer made by the Suspender, to pay all the Teinds the yearly belled, which shall be proven his Teind extended to, notwithstanding whereof they Found him subject in payment of the Rental Bolls acclaimed, albeit the Teinds of the Cropt lybelled did not extend to the quantity thereof, in respect the Suspender, before the time of Teinding the year lybelled, did not Intimat to the Colledge, that he would not pay these Rental Bolls, and required them to draw their Teinds; which either he should have done, or otherwise transacted with them thereanent, as he was in use to do other years before, in which he payed not the Rental Bolls, and having done no such thing, he was Found lyable the year lybelled, and all other years thereafter, wherein he should not do the same, in the quantity of the said Rental. Actor. *Nicolson* & *Neilson.* Alter. *Cunninghame* & *Burnet*, *Gibson* Clerk. *Vid. March* 22. 1626. *Lenox* of *Branshogil.*

L. *Swinton* contra L. *Westnisbit*, *February* 26. 1633.

THe L. *Swinton*, as appearand Heir to *John Swinton* his Brother, and to *Robert* L. *Swinton* his Father, Pursues L. of *Westnisbit* and his Spouse, for Exhibition of the Writs of the Lands of *Swinton*, as being in their hands, and also of all Bonds made by his said Brother, to the Defenders, or their Children, that after sight thereof the Pursuer might advise, if he will enter Heir to his said Father, or Brother, or not; wherein it being Alledged, that the Pursuer, as Appearand Heir, could have no Action to Pursue for any Writs, made by the Pursuers Brother to the Defender; It never being lybelled, that these Writs were either the proper Writs of *John Swinton*, and his Appearand Heir, nor yet common to them with the Defenders, without which they ought not to be Exhibit to the Appearand Heir, specially tending to found an Action to the Pursuer against themselves. This Alledgance was Repelled, and the Pursuit sustained, at the Appearand Heirs Instance, for production of the Writs, and Bonds, made by the Pursuers Brother, to the Defenders, albeit the same contained nothing in favours of the Maker, nor of his Appearand Heir, nor Heirs, to this effect that the Pursuer after sight of these Writs, might consider if he would enter Heir or not to the Maker; for as he had liberty in Law to advise within year and day, if he would enter Heir or not to his Brother, so the year not being expired, he might use all the means conducing for that end, which might inform, if he would enter Heir or not, the chief whereof was the sight

of these Bonds. Actor. *Nicolson* & *Stuart*. Alter. *Advocatus* & *Cunninghame*. *Gibson* Clerk.

Rutherford and *Turnbul* contra their Creditors, *Eodem die*.

ONe *Turnbul* Relict of *Rutherford*, being Confirmed Executrix to her Husband, Pursuing Exoneration against her Husbands Creditors, by offering of the Goods in the Testament, to be divided amongst them. The Bairns of *John Pringle* of *Cockle-fertie* desiring to be preferred to other Creditors Compearing, seing they Alledged, they had obtained Sentence against the Relict, for the Debt owing to them by the Defunct, and that they had Arrested in the hands of certain Debitors, Sums owing by them, to the Defunct their Debitor, whereby they claimed to be preferred to other Creditors, who had done no Diligence at all, notwithstanding whereof the *Lords* refused to give preference to this Creditor, and respected not his Diligence; but Found that all the rest of his Creditors, albeit they had done no Diligence, should come in equally with him, in partaking of the Goods of the Testament, according to the Proportion of the Debts, seing the Diligence was not respected in this Case, where the Defunct had died within thir nine Moneths, or thereby, last by-past, and where the Relict was only Confirmed Executrix, within thir six or seven weeks last by-past, so that for the shortness of time, there could be no great negligence, nor omission imputed to the other Creditors. Actor. *Craig* & *Gibson*. Alter. *Sandilands*. *Gibson* Clerk. *Vid. Novem.* 19. 1633. *Ker. Jan.* 20. 1631. the Creditors of *William Broun*.

L. *Conheath* contra L. *Earlston*, *Eodem die*.

Maxwel of *Conheath* being made Assigney to certain Goods, by *Katharin Glendinning* owner thereof, which were Intromet ed with by *Gordon* of *Earlston*, and for which he was Pursued by the Assigney, and he dieing *pendente lite*, the Action was transferred in the Heir of *Earlston*, who Compearing, Alledged that the Cedent was at the Horn, before the making of the Assignation, and he has obtained the Gift of her Escheat, and Declarator thereon, which albeit it be after the Assignation, yet the Horning is anterior to the Assignation, after which Horning she could do nothing in prejudice of the Fisk, which might derogat to the Escheat. This Exception was Found Relevant, and admitted to the Defenders Probation; whereby the Donatar was preferred to the Assigney, made before the Escheat was Gifted; seing the Cedent was at the Horn, when the Assignation was made by her, at which time she could do no Deed to prejudge the Fisk. The Act of Litiscontestation in this Cause is dated *Decem.* 6. 1631. and it was Decreeted *Feb.* 23. 1633. Actor. *Cunninghame*. Alter. *Nicolson* & *Mowat*. *Scot* Clerk. *Vid. Feb.* 2. 1632. *Lindsay. Decem.* 6. 1631. betwixt these Parties.

Beatie contra *Dundie*, *March* 7. 1633.

CHarges upon a Decreet Arbitral being Suspended, because the Decreet was insert in a blank on the back of the Submission, and the same was only Subscribed by the Judges, to whom the Matter was submitted, and was not Subscribed by the Parties Submitters, as ought to have been done in such Cases. The Reason was Repelled, and the Decreet was sustained, albeit the Blank was not Subscribed by the Parties, but by the Judges only, in respect the Submission on the other side of that Blank, wherein the Decreet is insert, is Subscribed by the Parties, and there is no necessity Found, that the Decreet should be Subscribed by the Parties, but by the Judges only. Actor. Alter. *Gibson*, *Hay* Clerk. *Vid. December* 1. 1632. *Hunter. March* 27. 1633. *Forrester*.

L. *Covingtoun* contra Lo. *Balmerinoch*, *Eodem die.*

THe Lord *Fleming* having Compriſed ſome Lands of the Laird *Covingtouns* from him, which were holden by Ward-holding of the Lord *Balmerinoch*, the L. *Covingtoun* being Minor, and having Charged the Lo. *Balmerinoch* to Enter him, who Suſpending, it was Diſpute if the Superior could be in Law compelled to Enter the Compriſer, during the Minority of the L. *Covingtoun* his Vaſſal; for he Alledged, he could not be compelled to do the ſame to the Compriſer, no more than he could be compelled to Enter the Minors ſelf during his Minority, the Minor holding Ward of him, during which ſpace he could not be urged to change his Vaſſal, and tyne his Commodity of the Caſuality of that holding. And the Purſuer Alledged, that he ought to Enter him the Compriſer, who was, as he Alledged, in another caſe than the Minor, from whom he Compriſed, ſeing he was content that the Superiors Entering of him, ſhould be without prejudice of all his Caſualities in Law due to him, *prout de Jure*; but this Queſtion upon hope of agreement, was ſuperceeded to be Decided. Actor. *Stuart.* Alter. *Nicolſon.* *Gibſon* Clerk

Gordon contra *Worlie*, *Eodem die.*

IT was queſtioned betwixt *Gordon* of and *Mary Worlie* an *Engliſh*-woman, who was Married upon the ſecond Son of the ſaid *Gordon*; and her Husband being dead, craved to be ſecured in the Conjunct-fee, Contracted to her by her Contract of Marriage, and wherein the ſaid *Gordon* her Father in Law was obliged to Provide the ſaid Relict, after all Legal manner, conform to the Laws of *Scotland*: this Contract being made in *England*, where the Parties & the Father alſo then dwelt and remained for the time, and being made after the manner of *Engliſh* Securities, by way of Indenture, wherein each Party was mutually obliged to other in their own part, and the double of which Indenture was mutually interchanged, every one of the Parties having one for their Security of the others Obligments: Likeas the perſon obliged to give the Conjunctfie, and to whom the Tocher was to be payed, for his further Security of the payment of his Tocher, received a Bond beſide the Indenture, whereby the Party was obliged to pay the ſame to him, of a Date ſome days poſterior to the Indenture. The Defender Alledging, that there was a Sum promitted to him in Tocher by the ſaid Contract, which was not payed; and it was the Form and Practique of the Laws of *England*, that no Conjunctfee ſhould be given to the Wife, untill the Tocher were firſt payed, and ſo no Action could be ſuſtained here in *Scotland* againſt him, while that part were firſt performed to him, ſeing he ought in this caſe to be ruled by the *Engliſh* Laws, being done in *England*, and the Tocher of an *Engliſh* Woman, and all the Parties dwelling then in *England*; and the other Party opponing the Contract, bearing, that the Woman ſhould be made ſure after the Laws of *Scotland*: Here it offers to be conſidered, how far *Engliſh* Writs, Bonds, or other Securities ſhould be admitted, to produce Action or Exception in *Scotland*, and what Form is required to looſe ſuch Securities, whether they may be looſed after the Laws and Cuſtom of the Realm, where they are made, or if the Law of this Realm ſhould be obſerved, in proceeding to Diſpute thereon, either for maintaining of Purſuits thereon, or for Eleiding of the ſame by Exceptions qualified, and to be tryed and proven after the Laws of this Realm, or of the Realm where the Writs were made, and whether it may be Alledged, that ſuch Tryal would be there admitted. *Vid.* 27 *July* 1633. Betwixt the ſame Parties. *Vid.* 15 and 16 *Novemb.* 1626. *Galbraith.*

Johnſton contra L. *Johnſton*, *Eodem die.*

IN a Declarator of Liferent of the Lands of pertaining to umquhile Captain *Johnſton* of *Lochouſe*, holden of the Viſcount of *Drumlanrig*, Lord

of the Regality, within the which the Lands lyes, being sought by the Donatar made by the Lord *Drumlanrig*, Lord of that Regality: It was Found (according as the L. *Johnston* Alledged, ought to be first done) that no Process could be granted upon that Gift, except that the Lo. *Drumlanrig* his Infestment of that Regality were first produced *in ingressu litis*, and shown to the Party. And where it was Replyed, That he who was Donatar, ought not to be compelled to produce the same *in initio litis*, it not being his own Evident, seing he offered to prove and produce the same *cum processu*, which ought to be sustained, as in Actions of Spuilzie by Sub-tacksmen such Pursuits are sustained, if the Sub-tacksman offer to prove *cum processu*, that his Author was Tacksman; and no necessity is found of instant Production of his Authors Tack. This Reply was Repelled, and not respected. *Actor. Advocatus*, *Nicolson* & *Burnet*. Alter. *Stu. art. Gibson* Clerk.

Maxwell contra *Welsh*, *March* 9. 1633.

ONe *Maxwell* Donatar to the Lo. *Herreis* Escheat (which was confessed to be to the Lo. *Herreis* own behove) Pursues by a special Declarator *Thomas Welsh* Messenger, to resound certain Bolls of Meal, intromerted with by the Defender, pertaining to the Rebel yearly, of the years 1624, and sensyne. And the Defender Alledging this Action to be Prescrived, conform to the Act of Parliament *anno* 1579. Whereby such Actions are declared to be Prescrived, except they be founded upon Writ, or Oath of Party, and that they are not probable otherways. The *Lords* Repelled this Alledgance, and Found this Intromission and Action Libelled, might be proven by Witnesses, and that the same came not under the Act of Parliament excepted upon, which extended to Housemaills, Merchant-Compts, and others of the like nature, under which Clause they Found Intromission with Duties and Farms of Lands, and Victual of Lands, came no ways; for albeit the Master should not seek his Farms within three years, it was Found, that Pursuit therefore might lawfully thereafter be sustained, and was probable by Witnesses; But in the Cause noted here under, it was refused by way of Exception: But there the Pursuit was upon Writ. *Actor. Nicolson. Gibson* Clerk. *Vid.* 11 *Decemb.* 1632. *Porteous.*

L. *Renton* contra L. *Blaikader*, *March* 19. 1633.

ONe being Donatar to the Liferent of the L. of *Wedderburn*, in the Lands of holden of *John Stuart*, and Pursuing special Declarator thereon; the L. *Blaikader*, who was one of the Defenders called, Alledging, that he was Infeft in these Lands by the L. of *Wedderburn*, before he was Rebel, for most onerous Causes, so that he had Right to the Maills and Duties thereof, and not the Donatar, by vertue of any subsequent Rebellion after his Right. The *Lords* Repelled this Alledgance, and Found, that the Donatar had Right thereto, in respect the Infeftment Excepted upon, was confest to be a base Infeftment, and not clothed with Possession, and therefore could not be valid to seclude the Donatar, no more than the base Infeftment foresaid would have excluded a posterior Publick Right, acquired after the base, being clothed with Possession: But this instance of the Publick Right, clad with Possession, meets not this case, where none of the Parties are in Possession, but are presently claiming the same; and if in the Instance Adduced, the prior base Right, and the posterior publick, were contending for the Possession, the same scruple would remain; *Actor. Stuart*. Alter. *Nicolson* & *Belshes*. *Gibson* Clerk.

Lyon contra *Stuart*, *March* 20. 1633.

HElen *Lyon* being Liferenter of the Lands of received a Bond from *George Lyon* her umquhile Son, whereby he obliges him and his Heirs, to pay to her yearly for the said Lands 100 merks, seing she was content that her said

said umquhile Son should bruik the same during her lifetime. This was the Tenor of the Bond, personally conceived to her Son, not making mention of his Heirs, but only of himself, albeit the Son had obliged himself and his Heirs to her, for payment of the said yearly Duty by the same Bond. Thereafter divers years the Son being dead, the Mother Pursues Removing against the Relict of her Son, who Defending her self with that Bond, and that she had tollerance of her Son, who was Heir to his Father, Granter of the Bond, and who had the benefit thereof, and of the Pursuers Liferent thereby; the *Lords* Repelled the Alledgance, and Found, that this Bond, albeit it was accepted of the Pursuer, and produced out of her own hands, bearing, that she was content that her Son should bruik, during her lifetime, that the same was only a personal favour granted to her Son personally, and not to his Heirs; and that his Heirs nor Relict had no Right to bruik thereby, but was expired by the Sons decease, who granted the same: And albeit the Bond bore, that the Son and his Heirs were bound to pay that Duty yearly, during the Mothers lifetime; whereby it might appear, that the Mother might Pursue the Heir of her Son therefore, and that he was obliged thereby to her; yet the *Lords* Found, that she gave that Benefit only personally to her Son, and that she was not obliged by the Tenor foresaid to continue the same, after her Sons decease to any others his Heirs or Relict, but at her own pleasure. Here I conceive not how the Heirs can be obliged to her, and she not to them. Actor. *Hope*, Alter. *Vid.* 6 *December* 1632. *Chisholm.*

Simpson contra *White*, *Eodem die.*

Anthony White being obliged to his Son in Law *Alexander Blair*, in the Sum of 1000 merks, to be payed the first Term after his decease, and to be imployed at the payment by the said *Alexander Blair* upon Annualrent: This Sum being Arrested by *John Simpson* Creditor to *Blair*, the *Lords* Found, that it was Arrestable, albeit it was destinat to be imployed by the said *Blair* at the Term of payment, and Found it not an Heretable Sum, as not subject to Arrestment, in respect of the said destination, seing there was no Annualrent conditioned to be payed therefore by the said *Anthony*: And als Found, that Sentence might pass therefore, albeit the Term of payment was not come the time of the Arrestment, but that it was conferred to a Term after *Anthonies* decease, and albeit *Blair* himself could not seek it before the Term; for this Cause was considered as a Declarator in favours of the Arrester, to prefer his Diligence, and Superceeded the Execution of his Decreet while the Term of payment should come; the Pursuers Sum was owing by an Heretable Bond, bearing Annualrent yearly. Also the *Lords* Found, that this Sum Arrested should be made forth coming to the Pursuer at the Term of payment, not only for the Principal Sum adebted to the Pursuer, and the Annualrents owing the time of the Arrestment, but also for all the Annualrents thereof in time to come, ay and while the foresaid Term of payment were come, to the which the said Sum Arrested is conferred to be payed, and that the Pursuer needed not to Arrest yearly hereafter for the Annualrents that shall be owing. Actor. *Gilmor.* Alter. *Barclay. Gibson* Clerk. *Vid.* 21 *Novemb.* 1623. *Logan.* 7 *February* 1635. *Watson.* 21 *June* 1626. *Murray.* 11 *Decemb.* 1632. *Shaw.*

Cow contra *Craig*, *Eodem die.*

One *Craig*, as Heir to his Father, being Pursued to pay the Sum of 600. merks, contained in a Contract, wherein his umquhile Father was obliged, and a Cautioner with him, to pay the same to the Pursuers; and he Alledging the Contract to be null, being Subscribed by two Nottars and four Witnesses, which was not done by them at one time, but was Subscribed by one of the Nottars in one day, and by another Nottar seven days thereafter, whereby it

could not be repute as a lawful Deed, conform to the Act of Parliament, which requires the Subscription of two Nottars, whereas there being only one at ilk time, it must be repute as if there had Subscribed only one Nottar of all. This Alledgance was considered by the *Lords*, as sufficient to brangle the Contract; but because the Contract was also Subscribed by the Cautioners self, who was bound therein, and that the Pursuer produced a Charter granted by the said umquhile *Craig*, relative and conform to the Contract, of an Annualrent for the said Sum, albeit Subscribed as the Contract was, and so *laborans eodem vitio*, with a Seasin upon the Charter; and that the Pursuer Replyed, that he had been 20 years in Possession of the Annualrent of the said Sum, conform to the saids Writs; therefore the Exception was Repelled, in respect of the Reply, which was admitted. Actor. *Barclay*. Alter. *Gibson* Clerk. *Vid.* 14 *March* 1634. *Johnston*. 23 *January* 1624. *Black*.

The King's *Majesty* contra E. of *Strathern*, *Eodem die*.

THE King's *Majesty* Pursuing the Earl of *Strathern*, for Production and Improbation of all Writs and Charters under the Great Seal, and Retours of any of his Predecessors, of and concerning the Earldom of *Strathern*. The *Lords* Found, in the consideration of these Writs called for to be produced; That albeit Charters under the great Seal might be extant in the King's publick Register, and that Retours might be extant at the Chancellary, whereby it might be doubted, if they ought to be Decerned, to make no Faith for not Production, before the said Registers were sought by the Parties Pursuing such Causes, and that it were made known to the *Lords*, if any such Writs were Extant or not, by the Officers intrusted with the Custody of the Registers, Rolls, and Director of the Chancellary; for if they were extant, it might be thought, that the Pursuer should produce them; And that they could not be taken away for not Production, as said is, albeit the Defenders called were absent, or did compear, and not produce them, even as Writs Registrat in the Books of Session, will not be Decerned to make no Faith, for not Production, nor Reduced, albeit the Defender produce them not. The *Lords* Found, that the Pursuers of such Causes, either of Improbation, or of Actions of Reduction, are not holden to search the Registers, nor Chancellary for such Writs, *viz.* Charters or Retours, nor to Extract, or Produce them; albeit they were Extant there; But if Parties Defenders called to that effect, did not satisfie the Production thereof themselves, that the Certification of the Summons should, and ought to pass against them; and this Case of Evidents differs from Cases of Decreets of Session, or Writs Registrat in the Books of Session, which are known thereby, to have past *in rem Judicatam*, whereby that which is Decerned by the Judge, cannot be taken away for not Production, seing their Clerks ought to be Answerable therefore, and to Extract the same, or to Exhibit the Warrand Registrat; whereas the other foresaids Charters and Retours are Original Securities, properly concerning the Parties, wherein no other Person has Interest; and in this Case of the King's, this was the rather Found, because the Earl Compeared, and did not Alledge this. Actor. *Advocatus Regis*. Alter. *Mowat*, *Prymrose* & *Neilson*. *Hay* Clerk. *Vid. Feb.* 17. 1624. E. *Mar*. *vid. infra March* 22. 1633.

Keith contra *Gray* and *Carmichel*, *March* 21. 1633.

MR. *Alexander Keith* Minister at *Stra-brock*, who being Parson thereof, and having Set a Tack of the Teind-Sheaves of the said Paroch, to Mr. *William Oliphant*, for a certain Tack-dutie: and the said Mr. *William* having Wodset some of his Lands, with the Teinds thereof to Mr. *James Gray*, and *Thomas Carmichell*, who having Set Back-Tacks to the said Mr. *William*, for payment of 10 for ilk 100 of the Sum, for which they received the Wodset, both

both for Stock and Teind. The Minister having Charged thir Wodsetters for payment of the Tack-Duty of Mr. *William Oliphants* Tack, Set to him by the Minister, as they who were adebted therein to him, being a Part of his Stipend; seing by this Wodset, and Back-Tack Set of the Teinds with the Stock, they must be Reput Intromettors with the Teinds, and they should be Subject to the Ministers Stipend, who ever meddles with the Teinds: They Suspending these Charges, the *Lords* Found (albeit the Reason of Suspension bore the Contrair to this Decision) That the Minister had good Right to seek the Tack-Duty, the same being a Part of his Stipend, from whatsoever Person, who had Intromission with the Teinds of the Parochin, if their Intromission did extend to as great a quantity of Teinds, as the Duty for which they were Charged was, and Found the receiving of the Wodset, both of Stock and Teind, and the Setting of both back again, made them lyable to the Minister, as Intromettors with the Teinds, to be subject to him in such Proportions of their Tack Duties, as the Teinds Wodset would extend to, even to the whole Duty, if the saids Teinds did extend to so much; and Found, that the saids Wodsetters might seek their Proportionable Relief of the Payment to be made by them, from the rest of the Intromettors with the remanent Teinds of the Parochin *pro rata*, and that the Minister ought not to be urged to seek the same from ilk one of the Parochin, nor yet ought to be restricted to seek the Dutie from his own Tacksman; but that he might seek it from whatsoever meddlers with the Teinds, his own Tacksman specially being become not able to pay; Neither was it Found sufficient to liberat thir Defenders, that they Alledged, they were only naked Wodsetters, and received no more for their Money, either in Stock or Teind, but only Ten for ilk hundred, and which they Alledged, they ought to possess free of any Burthen, and that they were *in bona fide* so to Contract with the Tacksman, being then Heretor; which Reason was Repelled, and the *Lords* Found *ut supra*, That the Minister might Charge any that has Intrometted with als much of the Teinds as may pay him, and that he ought not to be molested to Charge sundry Intromettors therefore, but that he had Election to Charge whom he pleased, as said is; and the Persons Charged might seek their Relief *ut supra*. Actor. *Stuart*. Alter. *Gilmor*. *Gibson* Clerk. *Vid. July* 23. 1633. betwixt the same Parties. *Decem.* 20. 1622. *Preston*.

The King's *Majesty* contra E. *Strathern*, *March* 22. 1633.

IN the Cause mentioned 20 *March*, betwixt the King and the Earl of *Strathern*, which was both an *Action* of Improbation and *Reduction*; and whereby the King and his Thesaurer and Advocat, craved Reduction of two Retours, and Services, whereby this Earl of *Monteith* was Served neareſt Heir of Blood to umquhile *Eupham* Countess of *Strathern*, and *Patrick Graham* her Spous and also to *David* Earl of *Strathern*, Son to King *Robert* the Second; to the which *David*, the said *Eupham* was Designed by the said Defender, in the same Retours, to be the only Bairn and Daughter, and of which *Eupham* the Defender was Retoured, the Just, Lawful, Neareſt Descendent, in manner, and conform to the Progress expreſt in the Retours; and also the K. craved all Writs to be Reduced, whereby it might be qualified, that the said Progres was instructed to the Assysers, and which yet might instruct the same; or that *Eupham* was Daughter, and only Bairn to *David*, or that *Patrick Graham* was her Spouse, and that the Defender is neareſt Descendent to them in that Marriage, and that *Melissus*, to whom the Defender Alledged himself to be Heir, was the Son Procreat betwixt *Eupham* and *Patrick Graham*, as the Retour bears; And generally all Writs which might qualifie any such thing, were called to be Reduced, and Improven, and also a Renounciation of the Lands of the Earldom of

Strathern made by the Earl of *Monteith* Defender, in favours of the King, and which was accepted by the King's Advocat for the King, wherein the Earl designed himself neareſt Heir to the Perſons foreſaids, which Renounciation preceeded the *Retours*; Likeas at the Services, the Advocat produced this Renounciation, and took Inſtruments, that the Services ſhould proceed for Corroboration of the Renounciation made by him as Heir, and alſo a Charter granted by the King, which alſo preceeded the Services was deſired to be Reduced, whereby the King gave to the Defender ſome of the Lands of the Earldom of *Monteith*, which were Excepted in the foreſaid Renounciation. In which Charter the King confirmed the Defender, and gave the Lands to him as Heir to the ſaids Perſons. The Reaſons of Reduction were, that the Defender was not that Perſon who could be Heir to them, and was neither qualified to the Aſſyſe to be Heir, nor can be yet ſo ſhown to be deſcended, and neareſt to them; but by the contrair, that the King was Heir to Earl *David*, ſeing he died without Succeſſion, as all the other Brethren of Earl *David* died without Succeſſion; and the King's *Majeſty* was neareſt, having lineally deſcended of *Robert* the Third, Brother to Earl *David*; of which King *Robert* there was only Succeſſion extant: and as to the *Renounciation* made by the *Defender* as Heir, and accepted *eo nomine* by the King and his Officers, and the foreſaid Charter of the Tenor foreſaid, which preceeded the Service, with a Patent of Honour of the Earldom, and Dignity of *Strathern*, given to him as Heir foreſaid to *David*, ſince the Service, they were craved to be Reduced, becauſe they proceeded upon wrong Information made to the King, affirming him to be Heir, who was not truly ſo, and the King being now better Informed might Reduce theſe Deeds, and could not be prejudged by ſuch Confeſſions made, when the contrair in verity is truly tryed, and his Officers omiſſion cannot prejudge the *King*; but yet he might be heard, notwithſtanding of any ſuch ſiniſtruous affirmation made to the Prince, whereupon the Writs proceeded. Thir Reaſons were ſuſtained, and Found Relevant to Reduce the *Retours* and Services; and it was *Declared*, that the Defender was not Heir, neither could be to theſe Perſons; and that he was not of Blood to them, but Declared, and it was Found that the *King* was ſole and only Heir: And it being Alledged, that the *King* had no Intereſt to quarrel the Retours, in reſpect of the Writs foreſaids, wherein he conſeſt the Defender to be Heir, and that his Officers Compearing at the Service, was a conſent thereto. The Exception was Repelled, and the *Kings* Intereſt ſuſtained, notwithſtanding of theſe Writs; and Found that the *King* might now quarrel the ſame, and the wrongous Information, and omiſſion of the Officers could not prejudge the *King*; and in this Proceſs, Error being alſo concluded againſt the Aſſiſers, they were Aſſoilzied from all *Error* and *Puniſhment*, becauſe it was Found, that they had juſt and probable Cauſe to have Served him Heir, where the King's Advocat Compeared the time of the Service, and did not oppone thereto; but proteſted that the Proceeding therein, ſhould be for Corroboration of the Renounciation made in the King's favours, whereby in effect *tacite* he conſented thereto, and which was Found ſufficient to liberat the *Aſſyſers*, together with the Charter granted by the King, bearing that *Deſignation*, whereby it appears, that the Officers are hereby taxed for ſuggeſting to the King, that which was un-warrantable. *Actor. Advocatus. Alter. Mowat, Neilſon* & *Prymroſe. Hay* Clerk. In this Cauſe the Theſaurer-Deput ſat, and Judged, Reaſoned, and Voted, albeit he was Purſuer.

Forreſter contra *Gourlay*, *March* 27. 1633.

A Matter being Submitted to Mr. *Da. Forreſter*, Miniſter at *Leith*, and *David Gourlay* by Submiſſion, in the blank on the back whereof, the Decreet Arbitral

bitral should have been insert, and a Minut of the Decreet being drawn up in sundry Articles, which were not formally conceived, but were Subscribed by the Judges, and also Intimat to the Parties in due time, before the expyring of the day appointed to Decern; Long after the expyring of the said day, one of the Parties Intents Action and Summons against the other Party, and Judges, to hear the said Minut of Decreet, so Subscribed, Extended in Form, and to be insert at length in the blank: And the other Party Alledging, that now after the day was so long since expyred, there was no liberty left to the Judges, to meddle any further upon these Matters submitted, without a new Submission and Consent of both the Parties, and now he dissents altogether therefrom. The *Lords* Found, That if it should be qualified, that this Minute was Intimat to the Parties *debito tempore*, and so Subscribed by the Judges, before the expyring of the day, that the saids Judges might yet, albeit after that day, insert their Decreet *Arbitral*, by a formal Extension thereof, and inserting of the same in the blank, on the back of the Submission, conform to the Substance, and Matter pronunced by them, and contained in these *Articles*, Subscribed by the Judges, but that they might insert no other thing Material, differing from these *Articles*, and only ought to insert and fill up in the blank, that which was well warranted by the *Articles* foresaids, and no more. Actor. Alter. *Gibson. Hay* Clerk. *Vid. March* 7. 1633. *Beatie. December* 1. 1632. *Hunter. March* 2. 1636. L. *Altar.*

Oliphant contra *Oliphant*, *July* 11. 1633.

Sir *James Douglass* having Married the only Bairn & Daughter of umquhile the last Lord *Oliphant*, & she being Served Heir general to her immediat Predecessor, who died before her said Father, Pursues *hoc titulo*, as Heir to her said Predecessor *Patrick Oliphant*, neareſt Heir-male in Bloud to her said Father, for annulling a Contract made betwixt him and her Father, whereby he Dispones all his Lands, together with the Title & Dignity of the Lordship of *Oliphant* to the said *Patrick* and his Heirs-male, which failling, to return to the Disponer and his Heirs-male, containing a Procuratory of Resignation, to hear & see it Reduced, because it was a paction for Honour, which is not *in Commercio*, not being allowed by the Prince, *qui est fons omnis honoris*, and so is null, and the Defender to be Decerned to have no Right to that Title, and that the Title pertains to the Pursuer as neareſt Heir *in recta linea* to him, to whom that Title belongs, notwithstanding of the said Contract; The *Lords* considering, after that the Parties Reasons were *hinc inde* heard, and at length Dispute in presence of the *Lords*, that the Pursuer had founded the Pursuit upon her Claim, as Heir to her Grandsir, and not upon any Succession, as Heir to her Father, which Father was Served Heir to the same Person her Goodsir, before his Decease. Likeas her Father had bruiked the Title of Lordship during his Lifetime, by Ryding in Parliament, and by being Designed in the Infeftment of his Lands, Granted to him by the King (his Cousin) with the Title of Lord *Oliphant*, and by doing of all other Acts, whereby it might appear that he was Lord *Oliphant*, there being no Writ more extant, nor Patent, to show any Erection of it in a Lordship, or whereby he or his Predecessors were Created Lords, but only the custom foresaids, and such Acts as is before mentioned. They Found, that this use was enough conform to the Laws of this Realm, to Transmit such Titles in the Heirs Female, where the last Defunct had no Male Children, and where there was no Writ extant to exclude the Female; And because by the Contract foresaid, the Pursuers Father had Disponed the Title to the Defender, *ut supra*; In the which there was a Procuratory of Resignation, albeit the King had not conferred the Honour according thereto. The *Lords* Found that the Pursuer had no Right to claim this Honour, in respect her Father was last Possessor, and died in Possession, by the Acts foresaids, (there being no Seasin requisit for the

Title thereof) and therefore seing her Father had Disponed the same, as said is, she could never misken him, who behoved to be repute as *in tenemento*, and pass to her Grandfir in an higher degree, to eschew the Deed of her Father, whose Deed she behoved to warrand, if she pursued as Heir to Him, or by *Right* competent to her as neareſt to him, and therefore the *Lords* Excluded this pursuer, as not having *Right* to this Dignity, seing the King had not conferred the same upon her, and that her Father, as said is, by the foresaid Contract had *Renounced* his *Right* thereof, which albeit it was not Found by the *Lords* to be a sufficient *Right*, to establish the honour in the Person of the Defencer, which no Subject can Dispone, without the Approbation of the Prince, which being Acquired, then the Act Convalesces; Yet it was Found enough to Denude himself, and his Descendents, ay and while the Prince should declare his Pleasure, and either confer the Honour on the Pursuer or Defender, at which time the Act would take perfection; And in the mean time, seing the Prince had not Interponed himself to allow any of these Acts, They Found, that none of the saids Parties could claim the said Honour, but it remained with the King, which he might confer to any of them he pleased: For albeit Honour be not Annailziable by buying and selling, yet the *Lords* Found, that the Party having it, might quite his own interest, which albeit it would not avail him in whose favours he had done it, unless the Prince should allow it, yet it was enough to Denude him as said is. Actor. *Nicolson*. Alter. *Stuart*. *Advocatus* for the King present.

Branden Baird contra *July* 18. 1633.

IN a Suspension raised by the Superior, of Charges raised against him, to receive a Compryser, wherein the *Lords* Found, that Deduction ought to be made to the Superior off the first end of the years Duty acclaimed by the Superior, for his Entry of the Compryser, of so much proportionally as that Land was affected with any Burden, which really was thereupon acknowledged, and flowing from the Superiors own consent; and because the Compryser Alledged, that the Lands were also affected with a Liferent in the person of yet living, during whose Lifetime the Compryseing could not be effectual to him; and which Liferent also was Authorized with the Superiors consent, and proceeded from him, therefore he desired some Defalcation of the years Duty payable, and Acclaimed by the Superior, for his Entry, which would not be profitable during the Liferenters lifetime. The *Lords* Found that they would grant no Defalcation therefore, but Declared, that whatever should be modified, and Decerned to be payed to the Superior by the Compryser, that the payment thereof should be Superceeded to the Liferenters Decease, and that he should not be subject to pay the same, so long as she lived. Actor. *Baird*. Alter. *Gibson* Clerk. *Vid. July* 20. 1633. *Black. March* 11. 1636. *Scot.*

Kirkwood contra *Ferguson*, *July* 19. 1633.

MArgaret *Kirkwood* Pursues *Robert Ferguson* for Spuilzie of Goods out of her House, committed in *February*; and the Defender Excepting upon a Disposition preceeding, made by the Pursuer to him of these Goods, for Relief of his Cautionry, wherein he was bound for the Pursuer; In which Disposition she gave him power to Intromet with the Goods at his own hands, and Renounced all Action of Spuilzie, and all other Action competent to her therefore, by vertue whereof he Intrometted, and so Alledged, he ought to be free of Spuilzie. The Exception was Repelled, and the Action Sustained, because the Sum wherefore he was Cautioner for the Pursuer, was not payable till *Whitsunday*, and the Spuilzie was committed in *February* before that time, so that neither the Term being come, nor he Distrest any wayes therefore by the Creditor, that Disposition could not Sustain his Intromission had at that time foresaid; But the *Lords* Re-

Reserved the Modification to themselves after Probation. *Vid. Decemb.* 14. 1633. betwixt the same Parties.

La. *Rothemay* contra *Ogilvie* and *Abernethy*, *July* 20. 1633.

THe La. *Rothemay* as Infeft in the Lands of in Conjunct-fee, Pursues *Janet Ogilvie* and *George Abernethy* her Son, for the Duty of the saids Lands, divers years by-past; Who Alledging, that she bruiked by Tollerance and Right from her said Son, who was appearand Heir to *Ogilvie* his Father, which Father had a Right of Heretable Infestment of Wodset of these Lands, from the Pursuers Husbands Authors, before the Right made to her umquhile Husband, by by vertue whereof her Husband was in Possession: And the Lady Replying, that the Defender, *viz.* The Relict of the Obtainer of the Wodset, had taken Tacks from the Pursuers Husband, wherein she had obliged her to pay the Duty now Acclaimed; And albeit that Tack was Expyred before the years now Acclaimed, Yet seing she bruiked *per tacitam Relocationem*, she ought still to pay the Duty, which she has not only payed during all the years of the Tack, but divers years after the expyring thereof, and before the years Acclaimed she payed the same Duty, and her Son who was appearand Heir to his Father in the Right of the Wodset: And it being Duplyed, that by the expres Condition of the Tack, it was Provided, that after the Expyring thereof, none of the Parties Rights, should be prejudged, so that thereby the Heirs Right of Wodset must Convalesce, and the payment made by the appearand Heir of the Wodsetter, after the Expyring of the Tack, cannot Astrict this Defender the Relict, who left the Roum, whereof the appearand Heir became in Possession, by Right of his Fathers Wodset, and who, if any Possession she now has, it is as having Tollerance of another Son, the appearand Heir to his Father, that Son being Deceast, who was in Possession, and is Alledged to have payed a years Duty to the Pursuer, after the Expyring of the Tack, whose Deed cannot now prejudge this appearand Heir, who succeeds to his Fathers Wodset, and not to his Deceast Brother, who was never Infeft, and consequently cannot prejudge the Mother, bruiking by her Sons Tollerance, after she had left the Roum, which Interrupts tacite Relocation, specially there being a more Soveraign Right standing in the Person of her Son, thereby to bruik, which takes away all tacite Relocation: and it being Provided in that Tack, that both Parties should return after the Ish of the Tack, to their several Rights, as said is, By the which Clause the Wodset revives, and the Pursuer can never Conveen them, as bruiking *per tacitam Relocationem*; Notwithstanding whereof the Exception and Duply was Repelled, and the Defenders were Found as bruiking *per tacitam Relocationem*, still Debitors in payment of the said Duty Acclaimed; For the tacite Relocation was not Found Interrupted by her Sons Interveening Possession, seing she had Acquired the Possession again, after her Sons Decease, who while he lived, payed the same Duty, and so she Entering thereby, became Debitor of the same Duty as Possessor *per tacitam Relocationem*, wherein she must be Repute to have continued, seing she never Renounced her Possession, which she had by the prior Tack, as she ought to have done. Actor. Alter. *Nicolson* & *Baird*. *Hay* Clerk.

Brown contra *Maxwells*, *Eodem die*.

MR. *Robert Brown* Charges Mr. *William* and *Patrick Maxwells*, for payment of the Maill of a Chamber Set to them, conform to a Contract made betwixt them; who Suspending, that they cannot pay the Duty, as that Contract obliges them, because by that Contract the Charger is obliged to enter them precisely at *Whitsunday* to that Chamber: And it is true, that ten days after *Whitsunday*, by Instruments they required him to enter them thereto, which was not done, but the Possession still retained by him, who possest it,

about 20 days thereafter; so that it being a Moneth after the Term ere the House was made void, they were forced to take another Chamber, being in this time when the King was in *Scotland*, where they had necessity of a Chamber to ease their Friends, who came home with him, and therefore they ought to be free of this Tack. And the Pursuer opponing the Contract, and that it is not the custom of the Town, to Remove so precisely at the Term; and it is no reason that for so usual delay in Removing, this Tack should be made void, and he so heavily prejudged. The *Lords* nevertheless sustained the Reason, and Suspended the Charges upon the Contract against them *simpliciter*. Actor. *Hart*. Alter. *Hay* Clerk.

E. *Annandale* contra E. *Nithsdale*, *Eodem die*.

THe Earl of *Annandale* being Infeft by the Earl of *Nithsdale* in an Annualrent out of the Lands of *Glendinning*, raises upon his Seasin *Arrestment*, and Arrests in the hands of the Tennents the Mails and Duties, adebted by them for the saids Lands, and thereupon pursues the Tennents to make the same forth-coming to him, for satisfying the said Annualrent. And the Tennents Alledging, that such an Action is a great novelty upon a Seasin of an Annualrent, to convein the Tennents personally to pay the Mails, and to *Arrest* the same, there never being any preceeding Sentence, neither against the Ground, to Poynd the same, nor against the Heretor, nor no other Pursuit, but this upon a naked Arrestment, raised upon a Seasin, and against a third Person, who cannot be so conveened, but are purchased *periculo impetrantis*, no Party being heard, nor cited thereto; which Alledgance was Repelled, and the Action sustained. *Actor*. Alter. *Cunningham*. *Gibson* Clerk. *Vid.* 12 *July* 1625. *Tromp. Feb.* 28. 1631. L. *Garthland*, and the Cases there.

Black contra L. *Pitmedden*, *Eodem die*.

ONe *Black*, a Compriser Charges *Pitmedden* to enter him to the Comprised Lands, & he craving a years Duty; the Compriser Answering, that he had possessed the Lands Comprised himself a whole year since the time of the Charge, given by him to the Superior to receive him, which he was content to allow to him for the years Duty now acclaimed for his Entry. And the other Answering, that the years Duty ought not to be allowed, for the year due to him in Law, for his entering of the Compriser, because he had an undoubted Heretable Right to the Lands, by vertue whereof he intrometted; and if this Compriser may Evict that years Rent of the Lands from him, by vertue of the Comprising, he shall refound the same; But there is no reason that upon that pretext he should quite his Lands, and receive a Compriser, unless he pay the ordinar usual Duty, done by all Comprisers to the Superior, for receiving of a Vassal in Lands Comprised; and if he can make him, in the ordinar Pursuit moved thereanent, to be lyable in Law for any Intromission with the Duties of the Lands, whereto the Compriser may claim *Right*, he shall make answer in its own time and place thereto; but it is not proper to be handled in this place, where in Law the years Duty is justly Acclaimed and payable by the Vassal. The *Lords* Found nevertheless, that seing the Superior had Intromett with a years Duty of the Land, since the Charge given by the Compriser, and that after the Parties had Dispute upon their *Rights*, which either of them might claim to that years Duty, that the same was due to the Compriser, and not to the Superior, albeit he was that year, and many other preceeding years in Possession of the Lands, by the space of 20 or 30 years preceeding, by vertue of an Heretable Disposition made to him of the Lands; and therefore the same being due to the Compriser, seing he allowed that years Intromission to the Superior, they Found, it should Compense for the years Duty Acclaimed for Entering of the Compriser, and that they would not Astrict the Compriser to pay a years Duty, and reserve his Action against the

the Superior, for his Intromission; but Found, that the one should compense the other, and therefore Ordained the Superior to Enter the Compriser, without paying of any other new Duty. Actor. *Stuart*. Alter. *Nicolson* & *Baird*. *Hay* Clerk. *Vid.* 18 *July* 1633. *Branden Baird*, and the Cases there.

La. *Aberzeldie* contra her *Son*, *July* 23. 1633.

THe Lady *Aberzeldie* Charging her Son, for payment of three Chalders of Victual addebted to her, conform to a Contract betwixt them thereanent; and also to pay to her the Duties of the Lands of intrometted with by him, which Lands were given to her in recompence of the Lands, which she had Renounced to him, being her Conjunct-fee of before: And her Son Suspending, that the Victual was payed, this Reason was Found probable by Witnesses to be produced at one Term, without mo Dyets; albeit the Charger Alledged, it could not be Proven but by Write, the Debt being Constitute by Writ, which was Repelled, seing the Party was obliged to pay her Victual yearly, and the delivery thereof was probable by Witnesses, and that it was for the same cause, was also presumable, if the delivery were proven; seing the Party could qualifie no other cause of Debt, to which the delivery of Victual could be ascribed: and for the Lands given in recompence for the Lands Renounced, the Suspender Alledged, that she could seek no more but according to the avail of the Lands Renounced, the just yearly Rent whereof he was content to pay to her, even as in Lands given in Warrandice of other Lands Evicted, the Warrandice will not exceed the Eviction; but albeit the Lands of Warrandice were more worth, the same will be limited to the worth of the Principal, and no further. This Reason was rejected, and the Suspender found lyable in the avail of the whole Lands given in recompence, albeit of more yearly avail than the Lands Renounced were. Actor. *Nairn*. Alter. *Nicolson*. *Gibson* Clerk. *Vid.* 11 *December* 1632. Lo. *Herreis*. 8 *March* 1632. *Logan*.

The Parson of *Strabrock* contra *Wodsetters*, *Eodem die*.

IN this Cause, whereof mention is made 21 *March* 1633. The Wodsetters Alledging, that they ought not to pay the whole Duty of the Tack to the Minister, albeit the worth of the Lands should be more, and exceed the Tack-duty, and that they can only be holden to pay the old *Rental*-duty, which their Wod-set-Lands were in use to pay before the Setting of this Tack, and that the Minister should seek the rest of his Tack-duty from the rest of the Parochioners, Intromettors with the rest of the Teinds: And the Minister Alledging, that the paying of the old Rental-duty was interrupted by the acceptation of the Tack by the Heretor, Author of thir Defenders Rights; who as he could not oppone this to the Minister, no more can they who have Right from him. The *Lords* Found this Eiked Reason *Relevant*, & that thir Wodsetters, who had received *Right* from the principal Tacks-Man, could not be subject in payment of more of this Tack-duty, but only that proportion, which these Lands payed before the Tack of Rental-Bolls, seing the same was not interrupted by Inhibitions, and Found, the taking of this Tack was no interrupting of the old use of payment against thir Suspenders; albeit it was sufficient against the Tacks-mans self. *Partibus ut illic*. *Vid.* 21 *March* 1633. betwixt these Parties, & 19 *Feb.* 1629. *Kirk*. 20 *Decemb.* 1622. *Preston*.

Mr. *John Lawson* contra *Scot* of *Whitestead*, *Eodem die*.

THe deceast *Scot* of *Whitestead*, being Cautioner for *Scot* of *Thirlstane*, for the Sum of to his Creditor, the Rights whereof being come in the person of Mr. *John Lawson*, who seeking transferring of the Bond against *Whitestead*, as Heir to his Father; he Alledged, that the Principal had given to the Creditor Infeftment of his Land, in full satisfaction of that Sum,

whereby in effect that Bond was satisfied, and the Creditor could never have recourse to the prior Bond, neither against the Principal, nor any of his Cautioners, but ought to be content with that Infeftment given in full satisfaction, as said is. 2°. He Alledged, that the Creditor had Compriſed the Debitors other Lands and Teinds, and by vertue thereof acquired Poſſeſſion of a part of the ſame, which Poſſeſſion, conform to the ſaid Compriſing, ought to be found as payment, ſo that he could never return, neither perſonally againſt the Debitor, nor his Cautioner, nor no otherways, ſeing the Debt behoved to be Compted as payed. The *Lords* Found the firſt Alledgance Relevant, notwithſtanding that the Purſuer Anſwered, that that Infeftment bearing, *To be given in full ſatisfaction of the Debt*, could not be repute as payment, but behoved to be repute as further Security for payment, as it was indeed; and that Adjection of the Clauſe which bore, *in full ſatisfaction*, could mean nor import no more, but that when he might be payed by the Infeftment, it ſhould fully ſatisfie; but the making it of that Tenor, could not take away this prior Security, except that prior Right had been *ſpecificè* Diſcharged; for *Novatio non fit niſi expreſſè*, where the prior Security was expreſly Diſcharged, which was never done by the Purſuer, who without he had ſo done, could never be prejudged of his Debt, albeit he had received 20 Securities for his Sum, likeas he Renounced *omni habili modo* that Infeftment; notwithſtanding whereof the Alledgance was ſuſtained, and by the receiving of the Infeftment of the Tenor foreſaid, it was Found, that the prior Security was extinct: And as to the ſecond Alledgance, the ſame was Repelled; for the *Lords* Found, that a Compriſing, albeit the Compriſer was in Poſſeſſion *ex parte*, if he were not totally payed thereby, ſeing the Purſuer Renounced the ſame, could not prejudge the Compriſer, to have recourſe to his prior Security; but whatſoever he had recovered by the Compriſing, it might be admitted as partial payment *pro tanto*, but he might nevertheleſs ſeek the reſt otherways, not being payed totally. Actor. *Stuart*. Alter. *Cunningham*, *Gibſon* Clerk. *Vid. 6 Decemb.* 1632. *Chiſholm* & *Douglaſs*. 30 *January* 1628. *Meldrum*, and the Caſes there.

Dickſon contra *Halidayes*, *July* 24. 1633.

Robert Dickſon Purſues Spuilzie of certain Ews againſt *Halidayes*, who Alledging, that they could not be conveened as Spuilziers, becauſe they were only Compryſers of the Goods Lybelled, and aſſiſted the Officers only to Compryſe the ſame, in Execution of their Office, who, by vertue of two Sentences, Recovered before the Stewart of the Earldom of *March*, againſt this Purſuer, for Blood committed by him, wherein he was Decerned in the Unlaw of fifty Pounds, for ilk one of the two Bloods done by him, the ſaids Goods were lawfully Poynded, and therefore this was ſufficient to Abſolve the Compryſers, who had no further medling: And the Purſuer Replying, that theſe Decreets cannot be Warrand to excuſe the Excipients, whereupon any Poynding could be Execute, ſeing the ſame are not given upon any lawful Tryal, by an Aſſiſe, or elſe the Parties own confeſſion, without which, no Sentence for Blood, and Unlaw thereof, could have been given, but the moſt the Judge could do, was to Unlaw the Party for Contumacy, and not as Convict in the Blood, and the Judge could no otherwayes proceed; Attour the Purſuer is not ſubject to that Juriſdiction, ſeing he dwells not within the Stewartry, but within the Bailliary of *Melroſs*: And the Defenders Alledging that the Decreet ſtands, and bears, *That this Purſuer was preſent, and would not give his Oath*, therefore the Judge Decerned againſt him, likeas this is not the place to Diſpute the Nullity thereof, ſpecially to theſe Defenders, who are not the principal Parties in theſe Sentences, but are only here conveened as Spuilziers, which they ought to be freed

freed of, as said is, in respect of the saids Sentences, and the Officers Executions of Poynding, which they allanerly assisted, as said is; Notwithstanding of which Exception, the *Lords* Sustained the Spuilzie against them (for there was no other Person Called in this Action, but only they) and Repelled their Alledgance; For the said Decreet was not found a Ground, whereupon Poynding could be lawfully Execute against the Pursuer, he neither being Convict of the Blood, nor confest it; For his Compearance and refusing to give his Oath, was not a sufficient Reason, to infer such a Sentence of Conviction, and so could not defend these Defenders, albeit they were only Compryſers, seing it could not defend the Obtainer of the Sentence, and so he could not lawfully Poynd; But the *Lords* reserved the Modification, after Probation to themselves. Actor, *Craig*. Alter. *Bellshes*. *Gibson* Clerk. The like done betwixt *Robert Winraham* and a Wife in *Leith*. *Primrose*, *pro reo*, the Pursuer *per Baird*. *Gibson* Clerk. *July* 27. 1633. *Vid. February* 13. 1634. Baillie of *Melross*. *Novemb.* 26. 1633. *Lindsay*.

Mitchel contra *Law* and *Stuarts*, *July* 25. 1633.

David Mitchel having Raised Caption against *Alexander Barclay* younger of *Maters*, who was Rebel at his Instance, for Sums of Money, whereupon a Messenger at his Instance having past to Apprehend him, and having met with him, Mr *George Law*, *George* and *Robert Stuarts* being in the Rebels company, Impeded the said Officer, and debarred him from taking of the Rebel, and put him away with violence, with drawn Swords and Pistols, whereupon the said *David Mitchel* Intents Action against them for payment of these Sums, for which the Rebel was to have been Apprehended, and for which he was Rebel at the Pursuers Instance: The Defenders Alledging, that this was an Action of the Nature of Deforcement, which ought to be Pursued after the manner of a Cause, at the Kings Advocats Instance, and should conclude, as is ordained by Act of Parliament *Anno* 1581. That the Deforcement being Tryed, the Deforcers Escheat should be Adjudged to the King, and the Creditors to be payed in the first end thereof; But whereas it is Pursued for Payment of the Debt, for staying of an Officer, and to be so proven by two Witnesses, it were of dangerous consequence, the like whereof was never Pursued before, nor can be now Sustained. The Exception was Repelled, and the Action Sustained upon the Deed Lybelled, to Infer the Conclusion Lybelled, which the *Lords* Found ought to be Proven by sufficient unsuspect Witnesses, and Found it not necessar, to urge the Pursuer to Intent an Action of Deforcement, as the Act of Parliament prescribes; Seing the Act Prohibits not the Party hurt to seek any other lawful Redress, as in Law he best might; For if that Action was Competent to him, which was more, far more this Action, whereby less Punishment is craved against the Defenders, and the Pursuer having his option of two Causes, he might choose any of them as he pleased: And this Pursuit was Found very allowable, and if the Kings Advocat, or any Party having Interest, pleased to Intent a Deforcement against these Defenders, that Action was also free to them to Pursue, unprejudged by this Pursuit. Actor. Alter. *Advocatus*. *Scot* Clerk.

Gordon contra *Worlie*, *July* 27. 1633.

IN this Action, whereof mention is made, *March* 7. 1633. The *Lords* Found that Exception proponed for the Defender, upon the Customs and Laws of *England*, where the Indenture was made, to be Relevant, *viz.* that the Party to whom Tocher should be payed by an Indenture, and who again is obliged to give a Joynture or Conjunct-fee to the other Party, if he send at the first Term to seek that Proportion of the Tocher, which by the Indenture is appointed to be payed at that first Term, and receives not payment accordingly, that *eo casu* he is not obliged to give the Joynture or Conjunct-fee, neither can Action be

moved against him therefore, which was so Found, albeit the Defender was obliged to provide the Conjunct-fee to the Woman, after the manner and Laws of *Scotland:* for the *Lords* Found, that Provision should be made to her, seing the Lands lay in *Scotland*, if the Indentures were obligator against him; but this Exception tended to make the Party free of all Obligation thereby: thereafter it was Replyed, that the Tocher behoved to be reput as payed, seing *Instrumentum Cancellatum apud debitorem repertum præsumit Liberationem*; And it is true, that this part of the Indenture, which the Defender had, with the Bond granted thereafter, was found in the Parties hands, who was obliged in the Tocher, and is now Cancelled in the Pursuers hands. This Reply was not respected, but the Exception sustained notwithstanding thereof, because that Presumption of the Law holds not, where there is other Probation competent to prove the Debt, by and beside that Writ Cancelled, which is in the Debitors hands, as in this same Case where the Pursuit was founded upon the Title of the other Part of the Indenture produced by the Pursuer, which bearing this Clause of Payment of the Tocher, the Defender might in Law propone any Exception upon the Writ which was used against him, to liberat him, and the Retiring of the other Part of the Indenture prejudged him not thereof; for the Party pursuer, haver of the other Part of the Indenture ought to have taken a Discharge from the Party, of that Clause conceived in his favours, if she had intended to be free of her obligation, by retiring of the Writ, without which the retiring thereof, could not free her, in respect the other double of the Indenture, which was in her own hands, would ever prove the Debt against her, if she had intention to Pursue thereon, and to use it; and this was done so, because the Defender offered to prove, that he sent his Son with these Writs to crave the Tocher in *England*, from the Woman obliged, and thereafter his Son dieing, this Pursuer and her Mother Intrometted with these Writs, whereupon he was ready to make Faith, having no other Probation, which was thought the more favourable, seing it was never Alledged, nor could be shown, that ever any Part of the Tocher was payed at all. And thereafter the Pursuer Answering, that she offered to prove that Bonds, being so found in the Debitors hands, as she has Alledged in this Cass, is sufficient to liberat the Debitor for ever, according to the Laws in *England*, perpetually observed. This Reply was sustained upon the Custome of the Laws of *England*, and admitted to the Pursuers Probation. Actor. *Stuart* & *Macgill*. Alter. *Nicolson* & *Gilmor*. *Gibson* Clerk. *Kid. Feb.* 18. 1631. *Houston. Novem.* 15. 1626. *Gilbraith. July* 3. 1634. *Melvill.*

Grant contra *Grant*, *November* 16. 1633.

ONe *Grant* by his Contract of Marriage with his future Spouse, being obliged to Infeft her in Lands, which he had in Wodset from the Laird of *Grant*, and the Contract bearing, That he should take a new Security of the Lands from the L. of *Grant*, to himself and to her, and the longest liver of them, and the Heirs to be Procreat betwixt them, which Failzieing to his Heirs, and after the perfecting of the Marriage, he having within Three or Four Moneths thereafter, obtained Infeftment thereof to him and her in Liferent, and to his Heirs, failzieing of Heirs betwixt them; which Infeftment had no Relation to the said Contract, nor made no mention thereof; Thereafter the Husband dieing within the year after the said Marriage. And another *Grant* being Infeft by the Superior in that Land, as Heir to that Husband deceast, being his Brother, or Uncle, there being no Bairns of the Marriage; which Infeftment was granted upon the Superiors Precept of Clare-constat, and not upon Retour; and this Heir diverse years thereafter, pursuing the Relict for the Mails and Duties of the Lands foresaids, of all the years after her Husbands decease

ceaſe and which were Intrometted with by her, and which ſhe had good Right to uplift, as ſhe Alledged, by vertue of the ſaid Seaſin both for bygones, and alſo in time coming: And the Purſuer Replying, that her Seaſin was become invalid and extinct, by the Huſbands deceaſe, within the year, as ſaid is, which put both Parties in that caſe, for Conjunct-fee, and Tocher, as if no Marriage had ever been Contracted, and reſtored them to their own Rights thereof *ſine inde*: And ſhe Duplying, that her Seaſin had no Relation to that Marriage, nor Depended thereon, and albeit it ſhould Depend upon that Contract, yet it was ſufficient for all bygone years before this Purſuit, which ſhe had up-lifted and conſumed, and muſt of Reaſon be repute to have been up-lifted *bona fide*, by vertue of her Right foreſaid, ſtanding unquarrelled, and ſhe never being interrupted in her poſſeſſion before this Purſuit. The *Lords* Repelled the Exception and Duply, and Found the Reply, upon the Huſbands deceaſe within the year, Relevant, which Reply was not only ſuſtained for the years to come, but alſo for all by-gones, for which the *Lords* Found the Relict had no Right, and that ſhe could not meddle with the ſame *bona fide*, in reſpect of her Huſbands deceaſe within the year; and therefore that ſhe ought to refound the ſame, albeit her Poſſeſſion was never interrupted before this Purſuit, and albeit alſo that ſhe Alledged, that the Purſuer by vertue of his Seaſin only upon a Precept of Clare-conſtat, not being Retoured, ought not in Reaſon to claim the by-gones before the Precept, ſince her Huſbands deceaſe, but that her Intromiſſion therewith was favourable, for theſe years before his Right; which Alledgance was Repelled, and the ſaids years ſince the Huſbands deceaſe, were all Found due to the Heir, albeit only received by the Superiors Precept, ſeing the Superior, nor none other claimed theſe by-gones by Non-entry; and alſo this Seaſin, albeit making no mention to be given to the Wife *intuitu Matrimonii*, nor having no reference to the Contract, yet expreſſing no other Cauſe, and no other Cauſe thereof qualified by the Party, and being the ſame Deed, whereto the Huſband was obliged in the Contract, the ſame was Found to be done for Implement thereof, and to depend thereon. Actor. *Gibſon*. Alter. *Baird*. *Gibſon* Clerk. *Vid. July* 23. 1634. *Maxwell*.

Warnock contra *Anderſon*, *November* 22. 1633.

ONe *Warnock* having obtained Decreet againſt *Hamilton* of *Peill*, and his Tennents, before the Commiſſar of *Hamilton*, Decerning the Tennents to make the Farms addebted by them to the ſaid *Hamilton* of *Peill* their Maſter, of the Cropt 1631. forthcoming, for payment of a Debt owing by him to the ſaid *Warnock*; and the Tennents Suſpending that Sentence, Compeared in the Suſpenſion, one *Anderſon*, who by Contract had acquired the Heretable Right of thir Lands from *Peill*, before the Arreſtment Execute by *Warnock*; which Contract contained a Back-Tack Set to *Peill* by *Anderſon*; Likeas, before the Arreſtment upon the ſaid Contract, a Charter was alſo Subſcribed, and albeit Seaſin thereon was not exped while after the Arreſtment, and albeit the Seaſin was alſo after the Terms of Payment, yet he Alledged, he ought to be preferred to the Arreſter, in the Farms Controverted, ſo far as concerns the Back-Tack Duty, contained in his Heretable Contract foreſaid, ſeing the Seaſin ought to be drawn back to its own Cauſe, *viz.* to the Contract and Charter, and the interveening Arreſtment can be no Impediment thereto, no more than an Inhibition Interveening before the Seaſin execute by another Creditor, would have derogat to the validity of the Right and Seaſin ſubſequent to the Inhibition, the ſaid Seaſin depending upon a Cauſe anterior to the Inhibition, which Seaſin he could not take the time of the Contract and Charter, ſeing the Lands held Ward; And before he purchaſed the Superiors Confirmation, he could not adventure to take Seaſin, therefore he Alledged, that he ought to be prefer-

red to the Arrester in the Farms, in so far as his Back-Tack Duty did extend unto; for by the Tack foresaid the Tennents were in effect become his Tenneats; and the Arrestment could not affect the Back-Tack *Duty*, which pertained to this Party Excipient, and not to *Peill* the Arresters Debitor; notwithstanding whereof the *Lords* preferred the Arrester to the Wodsetter, in respect the Seasin, which was the only ground of a compleat Real-*Right* of the Land, was after the Arrestment, and in prejudice of the said Arrestment, it could not give him Right to that years Farm, and albeit a Creditors Inhibition could not have hindered the *Party* to perfect his Heretable *Right*, which had a true and real preceeding Cause, yet the Arrestment was not alike, which behoved to work upon an existent Body, which then fell not to be claimed, but by an Heretor Infeft: And therefore *Andersons* Alledgance was Repelled, for the Duty of the Back-Tack acclaimed. Actor. *Alter. Gibson*, *Gibson* Clerk. *Vid. March* 5. 1630. *Cant. Feb.* 16. 1633. *Harper. July* 12. 1634. Sir *James Oliphants* Creditors.

Lindsay contra *Fairfoull*, *November* 26. 1633.

ONe *Lindsay* Procurator-Fiscal, and *Scot* his Informer, having obtained Decreet before the *Stuart* of the *Regality* of St. *Andrews*, against *Fairfoull* Cautioner for one *Reid* to enter him, being cited for a Blood, committed upon the said *Scot*, and the Decreet being given against the said Cautioner upon the same day, at which by his Act, he is obliged to enter him; and the Decreet Decerning the said Cautioner, either to enter the *Party* foresaid, or else to pay Fourty Pounds, which was the pain of the Act; and also Decerning the principal Party, to pay Fifty Pound *in Panam contumaciæ*. The Principal and Cautioner being Charged to pay thir two Sums *respectivè* to the *Procurator*-Fiscal, and to the Party hurt, who had both obtained the said Sentence, and the said Principal and Cautioner Suspending, The *Lords* Suspended the Decreet, and Charges thereon for both the Sums, because the same Judge by an Act of his Court, 22 days after the foresaid Sentence, had declared the Cautioner to be free of that *Penalty*, in respect he had entered then in Judgement the said Party, whom he was Cautioner to enter: Neither was it respected by the *Lords*, That the entry was so long after the Sentence, and after that day on which he was obliged to enter him, seing the Decreet bore only *either to enter him, or to pay the Sum*, and bore not purely to pay the Sum, because he had failzied to enter him, and so by this entry he obeyed the Sentence; neither was it Respected, where the Party Alledged, that the Entry was elusory, seing it was not made when this Cause was Agitat before the Judge; but was done on another Court day, this Party not knowing thereof, and never being Intimat to him, nor being warned thereto, as he ought, and the Person entered not being committed to Ward, that he might have been *Pursued* by the Party hurt: but instantly when he was entered, being dimitted by the Judge, notwithstanding whereof the Entry was sustained; and if the Judge had done any wrong, the *Party* had his Action against him therefore, which would appear to be a hard Decision, specially in so mean a matter, and betwixt mean Parties, to put them to so long and expensive Pursuits; and also the *Lords* Suspends for the 50 pound Decerned against the Principal, for Contumacy, in respect that the Judge after Sentence had Discharged him of that Sum; And it was Repelled, which was Alledged, that the Judge after Sentence given by him, *erat functus officio*, and so could not Discharge the Pain of that Sentence, which was obtained by the Procurator-Fiscal, and the Party hurt, specially, seing before the Discharge, the Suspender was Charged by the Judges Precept, as the Tenor of the Precept raised on the Decreet bore, *To pay the pain decerned to the Procurator-Fiscal, and to the Party hurt obtainer of the Decreet*, so that the Judge

Judge, after that Charge could not Discharge him; and it were a great Frustration of Justice, when Parties pursue for Blood, if the Judge shall only Decern against the other Party complained upon not Compearing, for a Penalty to himself, and have no respect to the Parties Satisfaction, specially the Pursuit being intented, not by the Procurator-Fiscal only, *quo casu* it might appear, that the Judge might Decern a Penalty for Contumacy, as an obvention and emolument of his Court, proper to himself; But the Pursuit being also moved, at the Instance of the Party grieved, it were iniquity, that he should be deprived of all benefit in that Pursuit, by his Parties absence, and to apply the same to the Judge: For so Parties hurt should be deterred to pursue for such wrongs, but should be forced to bear the same without redress, which Alledgance was Repelled, and the said Pain for Contumacy in this, and all other the like cases, was Found to pertain to the Judge; and that he might discharge the same after Sentence, obtained by the Procurator-Fiscal, and albeit the Party was also obtainer thereof; For they Found, that the Judge might have tryed the Fact of Blood committed, albeit the Party Compeared not, and after tryal punish the Party committer, and appoint satisfaction to the Party hurt, but no Tryal being taken of the Fact, no censure could pass upon the Party therefore; so that the Pain was for Contumacy, and contempt of the Judge, and was not to be taken, as if any part thereof were given to the Party hurt, who might pursue his Action for Damnage and Interest, notwithstanding of this Sentence against the other Party, as he pleased. *Scot* Clerk. *Vid. July* 24. 1633. *Dickson.*

Parochioners of *Aberscherder* contra Paroch: of *Gemrie*, *Decemb.* 7. 1633.

THe Minister and Session of the Kirk of *Aberscherder*, Pursuing the Minister & Parochioners of the Kirk of *Gemrie*, for Restitution of a Bell, pertaining to the said Kirk of *Aberscherder*, and which was borrowed by one of the Parochioners of *Gemry*, and ever detained by them since, undelivered again for the space of fourty years, and more since the borrowing thereof; and they Excepting upon Prescription of the said Action, in respect of their Possession, uninterrupted for the space of fourty or fourty five years by-past, during which time they have Possessed the said Bell in their Kirk, by using the same all manner of ways, as other Bells are in use to be used in other Kirks in the Realm, by Conveening of the Parochioners to Sermon, and other Exercises of holy Action in their Kirk, as occasion Required, and as are used in other Kirks and Parochions: And the other Kirk Replying upon their Property to the said Bell, and that it hang ever in their Steeple before the lending thereof to thir Defenders, and that they only borrowed the same from them, and albeit they had a long lend thereof, yet that ought not to make the Pursuers to want their own, and to give to the Defenders unjustly that which is not theirs, and Prescription cannot be admitted in this case, *Ubi agitur de causa bonæ fidei ex parte Actoris, & ubi intervenit mala fides Rei* in a Sacred Matter, as in this case of borrowing of Kirks Gear, specially seing Prescription ought to proceed, conform to a lawful Title, but bare Possession, *Sine Legittimo titulo, qui sit probabilis ad transferendum dominium*, ought not to be Sustained to induce Prescription, neither can Prescription have place in favours of one Kirk against another, specially *in materia odiosa, nam privilegiatus contra privilegiatum non gaudet privilegio*; Notwithstanding of the which Reply, the Exception was Sustained, and in respect of the fourty years Possession by-past, uninterrupted, no *Action* was Sustained for the Bell Lybelled.

Kirkwood contra *Ferguson*, *Decemb.* 14. 1633.

ONe *Kirkwood* Pursuing *Ferguson* in *Galloway*, for Spuilzy of her Goods out of her House in *Glasgow*; The Defender Excepting that he was Cautioner

er for the Pursuer in a Sum owing by her to her Creditors, for his Relief whereof the Pursuer had Disponed to him these Goods; In which Disposition she gave him power for his Relief, to Intromet with these Goods Lybelled at his own hand, without all danger of Spuilzie, or any *Action* to follow thereon against him, which she Renunced, according whereto fearing his Relief to be uncertain, and seing that the *Pursuer* Disponed some of the saids Goods (whereby his Relief might be frustrat) he Intrometted, and he was content being relieved, to restore all again with which he Intrometted. This Exception was Found Relevant by the *Lords*, to Liberat the Defender from all Action of Spuilzie, and to *Assoilzie* him therefrom *simpliciter*, notwithstanding of the Reply, That the Pursuer offered to prove, that any *Alledged* Disposition that she had made of any of the Goods, whereupon the Defender Excepted, was only of a Brewing Caldron, which she had only Set out to one for Hyre, *viz.* of so much Money to be weekly payed therefore, and upon Bond to deliver the same again to the Pursuer, after the time of Hyring conveened upon; by the which Deed the Excipients case, and the Disposition made to him, was no ways prejudged, and he could not Alledge, nor condescend upon any other of the Goods lybelled, to have been Disponed by her, and this was lawful for her to do; neither could the Exception be sustained upon that Disposition made to him for his Relief, to give him Power at his own hand, without Authority of any Judge, or Magistrat, to meddle with the same Goods, specially seing the same was made for his Relief, and before his Distress, he could never have Intrometted; Likeas he was never Distrest, nor yet is Distrest therefore, nor able to show any Distress, and of Law *qui rem, quam vis suam, non jure occupat, punitur ut invasor, & cadit à jure, quod in re habet*; And the Pursuer having sundry Gentlemens Sons in Boording, by this malicious Meddling with her whole Gear, and plenishing of her House, and leaving nothing therein for her use, they had deserted her, she having nothing left her but the bare Walls, which has redacted her to great Misery; which Reply was rejected, and the Exception sustained, albeit there was no Distress Alledged. *Vid. July* 19. 1633. betwixt these Parties.

Bishop of St. *Andrews* contra *Wyllie*, *Decem.* 18. 1633.

THere being a Pension granted of Victual, by the Bishop of St. *Andrews*, in *Anno* 1584. *Cum potestate transferendi*, in favours of an Assigney, and with Power to that Assigney *de novo* to Assign to another, who should bruik during his Lifetime; The Pensioner having made his Daughter Assigney, who being thereafter Married upon one *Wyllie* a Writer, and she *durante matrimonio*, having made her own Husband *Assigney* to the Pension, who after that Assignation, obtained *Decreet* at her own instance, with consent of her Husband, of Letters conform to the Pension; Likeas certain years after this Assignation made to her Husband, she and her said Husband miskenning the first *Assignation*, Assigned the Pension to their Daughter, procreat betwixt them, by the which second deed the Daughter acclaimed the Benefit of the said Pension, during her Lifetime; the Matter and Right to the Victual contained in the Pension, being Disputed in a double Poynding, whether she as Assigney, or the Bishop should be Answered thereof; For the Bishop Alledged, that the said Pension was become expired, by the said prior Assignation, made by the Wife to her Husband, after which there was no Power by the *Pension*, to Assign *de novo*, specially seing the Husband had obtained Possession, conform to his Assignation, and after his Wifes decease, had granted two Discharges of the *Duty* of the said Pension *proprio nomine*, and as having Right in his own *Person*, and whatever Assignation was made to the *Daughter* after the first, being keeped up betwixt them, to make use thereof, as they pleased, and to the evident intended prejudice of the *Bishop*, it ought not to be respected, the Daughter on the

the other part, Alledging, that the first Assignation was null, being done betwixt Husband and Wife, *inter quos donationes factæ de Jure non valent, nisi morte confirmentur*; Likeas this is revocked *tacitè* (which is sufficient) by the Assignation made to the Daughter, which is done with consent of the Husband, and who, as Father, and Administrator to her, obtained Decreet at her Instance upon that *Assignation*; & whatever Acquittances the Father has thereafter granted, must only be reput as *Administrator* to her; so that the first Assignation, if any were, took never effect, and is null in Law, and cannot be respected, as if thereby the Pension were extinct. The *Lords* Found, that the Bishop ought to be Answered and obeyed, and that the Daughter the Assigney had no Right, and Repelled her Alledgance; for the *Lords* Found, that the first Assignation denuded the Pensioner, that thereafter she could not make any other Assignation to her Daughter, neither Found they the Posterior Assignation to be such a Deed, as whereby the first was Revocked, in prejudice of the Prelat *cui jus erat acquisitum* by the first Deed, specially that *Alledged* Deed of the second Assignation, whereby it was *Alledged* to be Revocked, being done by himself, and his Wife also, which could not be thought as a Revocation in Law, that he should be both the Revocker, and the Person from whom it was Revocked, and being privat Deeds betwixt most Conjunct Persons, which they might use and destroy at their Pleasure, and which was not allowable. Actor. *per Advocatum Regis* & *Stuart*. Alter. *Nicolson* & *Mowat*. *Hay* Clerk. *Vid. June Penult.* 1622. Bishop of *Aberdeen* and the cases there cited.

L. *Weym* contra *Stuart*, *December* 21. 1633.

THere being mutual Actions of Molestation Intented betwixt the said Parties, before the Sheriff of *Perth*, which were by consent of Parties, Advocat to the *Lords*: And the L. *Weym* being permitted to mend his Precept, and to turn it to a Declarator, for finding the Property of the Lands, and others lybelled, to pertain to him, as his own Property, which Action being pursued at his Instance and his Sons, who was Fiar, and himself Liferenter. The *Lords* Found Process, and sustained the Action, at the Fathers Instance, who was Liferenter, albeit the Fiar was debarred by the Defender by Horning, seing the Father Liferenter might seek this Declarator upon the Property, that the Fie given to his Son might be profitable and effectual to him; and this Action was not sustained, as meerly Peritory, but as mixed with the Possessory, for maintaining of the Pursuers Possession, as he lybelled within his Property, albeit the Defender Alledged, and claimed contrair Property and Possession: And also this Action was sustained, albeit the Defender *Alledged* his Property could not be Disputed, except that his Superior, of whom the Defender held the Lands, wherein he was Infeft, and whose Vassal he was, were expresly called to this Pursuit, who not being called, his Right could not be questioned, nor he Prejudged of his Right, by calling of his Vassal only, and not calling of himself, who was only the Just party, who should, and might maintain his own Right; which was Repelled, and this Process and Action against the Vassal, who was Heretor, was sustained. *Actor. Stuart. Alter. Mcgill. Hay* Clerk. *Vid. Feb.* 1. 1631. *Williamson. July* 9. 1630. *Fisher*, and the cases there.

Hepburn contra *Hepburn*, *January* 15. 1634.

SIr *Robert Hepburn* being Charged by his Son, and Sir *John Seaton* his Father in Law, to pay to his Son 20 Chalders of Victual, conform to the Obligement contained in their Contract of Marriage, and Sir *Robert* Alledging in his Suspension, that his Son had promised to him, and sworn by his Oath, (which Promise the Father then accepted) that he should be content with 18 Chalders, and never seek more from him; and the Son Replying, that he was then Minor, and yet is presently, and now Revocks that promise,

as done to his Enorm hurt and Lesion; Likeas Sir *John Seaton* the Father in Law Alledged, that the said promise, for the said Reason Alledged by the Son, was not in Law obligator; Attour that he was a Party Contracter, and now Charger in Favours of his Good-Son, and his Daughter, for whose Aliment this Provision was Contracted, and so his Good-Son could not Discharge any part thereof, specially being done by Contract of Marriage, which is *Contractus optimæ fidei*, and the Father could not in prejudice thereof, accept any promise made by the Son, being then, and yet Minor, without his consent, who was Contracter. The *Lords* Found this Reason Relevant to be proven by the Sons Oath, albeit then, and yet he was Minor; seing it was Alledged to be sworn by the Son, and that it was accepted by the Father, the Son being the time of the making thereof 20 years of Age, and so *proximus Majoritati*; and Found that this promise tended not to his Enorm Lesion, the Oath and Promise, if the Son should confess it, being made to the Father in his old Age and Sickness, and who only did retain two Chalders of twenty, in respect of the Authentick: *Sacramenta puberum: Cod. si adversus venditionem*, neither respected they *in re tam minuta*, where the payment was only to be made, during the Fathers Lifetime, who was in heavy Sickness, and like shortly to die, that the promise was not Alledged to be made and Judicially Sworn, but that it was Extrajudicial, betwixt the Father and the Son; but Found that the Acceptation by the Father ought also to be proven by the Sons Oath, and the Son being Sworn, denyed, that the Father Accepted of the promise, albeit he granted the making thereof, and so the Father was Decerned therein, albeit he Swore he had Accepted of the promise. Actor. *Stuart*. Alter. *Nicolson* & *Nairn*. *Hay* Clerk.

Tutor *Balmaghie* contra *Maxwell*, *January* 16. 1634.

IN a Pursuit of Removing, of Tutor of *Balmaghie* contra *Maxwell* of *Cobilex*, upon a Compriſing and Infeftment thereon; wherein the Defender Alledging, that the Compriſing was extinct, conform to the *Act* of *Parliament*, 1621. anent Compriſings, in so far as either the Pursuer has Intromitted, or at the least might have Intromitted with the Mails and Duties of the Lands Compriſed, and which would extend to as much, as would satisfie the said whole Sums, for which the Compriſing was Deduced. The *Lords* Repelled the Alledgance, being so alternatively proponed, and Found, that the Compriſer was lyable in no further for the Land, but only in so much, wherewith he actually Intromitted, and was no ways lyable for any thing, wherewith he might have Intromitted, in respect that they Found the *Act* of *Parliament* made him only comptable for that, wherewith he actually meddled, and no further; and that in such Cases, Compriſers are not lyable, upon that ground, as if they might have Intromitted, and Found, that they are not holden to do Diligence, to recover Payment, or Intromiſſion, but only that they may seek the same, or omit it, as they think expedient, at their own pleasure, and no otherways. In this Case the Estate of the Debitor is very hard, whose Lands being Compriſed, neither the Compriſer is holden to do Diligence against the Tennents, and Poſſeſſors thereof, nor can the Debitor have any meddling therewith, being debarred by the Compriſing, so that the Mails and Duties may periſh to all Parties, and the Tennents may become Bankrupts without Remedie. And it being further Alledged, that the Appryser, that had Intromitted with diverse years Duties, for years Running before the Expiring of the Compriſing, which albeit they were up-lifted, after Expiring of the Compriſing, yet being for years before the Expiring, must be alike, as if the Intromiſſion had been before the same. And the Pursuer Answering, that seing the Compriſing was Expired before his Intromiſſion, whatever Intromiſſion he had thereafter, was justly his own, and he was not Answerable therefore, neither did the *Act* of *Parliament* in that case

case militat against the same. The *Lords* Found this Alledgance Relevant, founded upon the Pursuers Intromission had for the years Duties, owing for years before the Compriſing was expired, although they were not received, nor Intrometted with, while the Compriſing was expired; And because this Intromiſſion extended not to more, nor effeired to the ordinar Annualrent of the Principal Sum, therefore they Found it could defalk no part of the Principal Sum, and so the Compriſer was in no part prejudged thereby, and Repelled the Alledgance. Actor. Alter. *Mowat. Gibson* Clerk, *Vid. Feb.* 11. 1636. *Colquhoun: July* 1. 1624. L. *Rankilor*, and the other cases there, for the 2*d.* Part.

Horn contra *Pow*, *February* 1. 1634.

John Horn Nottar, in his Testament leaves his Writs and Regiſters to one *Pow*, and ordains the said *Pow* to pay to his Son *George Horn* therefore 100 Merks, which *Pow* promiſed to do: in this Testament umquhile *John Horn* gives up a Debt of owing by him to *George Grieve*, which *George* had payed, as Cautioner for the said *John*; And after the said *John Horns* deceaſe, *George Grieve* Arrests this 100 Merks in *Powes* hands, for satisfying of that Debt, and obtaines Decreet against him therefore, and by vertue thereof recovers payment. Thereafter *John Horns* Son conveens *Pow* for payment of the said Sum, who excepting upon the said Decreet and payment. The *Lords* Repelled the Exception, and Found that the said Sum was not Arreſtable for the Debt, owing by umquhile *John Horn* to his Creditors, being promiſed to be payed to the Son, and never being in *bonis defuncti*, whereby it could be subject to his Debts; and it was not reſpected, that the Party Alledged, that the Money was promiſed to be payed for a Legacy of Writs left by the Defunct, who could never leave any Legacy effectually, which could not be subject to his Debts, ſpecially seing in this same Testament, which bore *The Writs to be left for this Sum*, the Defunct acknowledged this Debt, and so he could leave no Legacy in prejudice thereof, which was Repelled, and the Sum Found due to the Son, according to the Promiſe made by the Defender, and not to the Creditor, who as he could not Arreſt the Writs left to *Pow*, no more could he Arreſt the Money promiſed therefore. *Actor.* Alter. *Craig.*

Murray contra *Oliphants* Wife, *Eodem die.*

Sir *Patrick Murray* having obtained Decreet of Removing against Mr. *William Oliphant* his Wife, for Removing from the Lands of *Midletoun*, and *Powflat*, she Suspends, that she is Infeft in the Lands and Mains of *Uphall* in Liferent (she being now Divorced) of the which Lands thir are a part; and the Party Anſwering, that her Infeftment, albeit bearing *The whole Mains*, cannot extend to these Lands, contained in his Decreet, because the same bore *Her to be Infeft in the whole Mains, containing the Lands underwritten, viz.* (for thir were the Words of her Infeftment) *the Lands poſſeſſed by particular Tennents, ſpecially enumerat and expreſt in the ſaid Infeftment*; And true it is, that these Lands were not then, nor at any time before Poſſeſſed by these Tennents, and so she cannot claim the same, seing he offers to prove, that these Lands were then poſſeſt by other Tennents, *viz.* And the Suspender Anſwering, that albeit some of the Mains was Poſſeſt by the Tennents Designed in her Infeftment, yet that was not enough to exclude her from the reſt; for that Word (*viz.* Poſſeſt by these ſeveral Tennents) is not of that force to take away the Right of the reſt of the Mains from her, ſpecially seing by her Contract of Marriage, she is ordained to be provided to the Lands worth 20 Chalders Victual yearly, and wanting thir Lands controverted, she will inlack Three Chalders Victual thereof. The *Lords* in reſpect of the said Infeftment, bearing the foreſaid Clauſe, *viz.* Poſſeſt by the Tennents ſpecially Designed therein, Found, that the Suſpenders Liferent could extend to no more of the

Mains, but to so much thereof, as was then Possest by the saids special Tennents, and could not extend to thir Lands acclaimed, wherein this Defender was Infeft, albeit after her Contract of Marriage; and Found these Words (*Possest by these Tennents*) not to be Demonstrative, but to be Taxative, and to restrict her Right to so much of the Mains, as then was Possest by them, and that she could have Right to no more; Therefore admitted to the Defenders Probation, that thir Lands acclaimed, were at that time of the Suspenders Infestment Possest by other Tennents condescended on, and Repelled the Answer made by the Suspender, bearing the same to be a part of the Mains; for albeit they were so, yet by the Restriction of her Infestment, she had no Right thereto. *Scot* Clerk. *Vid. December* 13. 1631. L. *Whittingham. Feb.* 2. 1630. *Douglas.*

L. *Wedderburn* contra *Stuart* of *Coldingham*, and others, *Feb.* 4. 1634.

John Stuart of *Coldingham*, and *Robert Douglas*, who was Donatar to *John Stuart's* Liferent, and which was Declared, and whereby the said Donatar had also Right to the Liferent of the Lands of which pertained in Feu to the L. *Wedderburn*, holden by him in Feu of *Coldingham*, through *Wedderburns* Rebellion year and day, whereby the Liferent of these Lands fell to *John Stuart*, and consequently to the Donatar of the said *John Stuarts* Liferent, as a Casuality accresceing to the Superior; and consequently coming under his Liferent, and so pertaining to the Donatar. The said Superior, and the said Donatar recovers Decreet, Reducing and Annulling the said L. of *Wedderburn* his Feu of the saids Lands, upon the *Act* of *Parliament*, for not payment of the Feu-duty; which Decreet being desired to be Reduced at the Instance of the L. *Wedderburn* upon this Reason, that no such Sentence could been sought, nor no such Action pursued, at the Instance of *John Stuart*, because the same was only competent, by vertue of the Alledged Right of Superiority of the saids Lands; And it was of verity, that before that Pursuit, he ceased to be his Superior, in so far as he had Resigned all his Right of the Superiority long before that Pursuit, in His *Majesties* hands, to remain with the King perpetually in all time to come, and so that Pursuit being an Accident, befalling to the Superior, and he not being Superior, the Decreet Recovered by him, ought to fall; And the King's Thesaurer and Advocat Compeared, and concurred with the Pursuer, and Insisted on this Reason: And the Defender Alledging, that this Reason was not Competent to the Party, and the King had no Interest to Pursue or Concur, because the King Pursued not this Cause Principally, and it could not be sustained by the Concourse of his Officers; Attour the King had a Benefit by the Reduction of the Feu, for thereby the Property of the Lands did belong to him, by *John Stuarts* Resignation; whereas if the Feu stood, and the Decreet Reducing the same should fall, the King would get nothing but the Feu-duty allenarly, which Alledgance was Repelled, and the King's concourse sustained, and the Reason Found Relevant, to Reduce that Decreet, obtained by the Superior, after he was denuded of his Superiority, in favours of of the King, as said is. And the Defender further Alledging, that this Decreet could not be Reduced, albeit *John Stuart* were excluded, seing it was Recovered at the Instance of the Donatar to *John Stuarts* Liferent, to whom this Casuality of his Vassals Liferent fell, and which accresced to the Donatar, who had obtained Declarator upon that Liferent of the Vassals, upon a Pursuit moved at his Instance therefore, before *John Stuarts* Resignation of the Superiority, so that the Donatar had competent Action to Pursue that Action for annulling of the Vassals Feu, sicklike as the Superiors self might have done before the Resignation; for his Liferent being Gifted and Declared before the Resignation, it gave the Donatar the same Right, as if the Superior had Disponed that

that Casuality to him before Resignation, *quo cessante* the subsequent Resignation, nor no Deed done thereafter by the Superior, could prejudge the Donatar, and therefore the Decreet ought to stand at his Instance, at least the Feu should fall or sleep, during the Vassals Lifetime. The *Lords* Repelled this Exception, and sustained the foresaid Reason also, at the King's Instance, as said is, against this Donatar, for Reducing of this Decreet controverted, in so far as it was obtained at this Donatars Instance; for the *Lords* Found, that Actions, for annulling of Feus, for not payment of the Feu-duty, were not proper to be Pursued by the Donatar of the Superiors Liferent: These Actions being of that kind, *quæ sapiunt naturam rerum Hæreditariarum*, which were not Competent to Donatars of Liferents, whose Rights being Temporary, could not produce such Actions against the Vassal, to take away his Property; neither was it Respected, that the Donatar restricted the Sentence to have effect only during the Vassals Lifetime, seing the Feu could not fall upon that Reason, of not payment of the Feu duty for that space, and thereafter revive again, the Cause being perpetual, and might be only urged by him, who was capable to bruik the Property, as the *Donatar* was not, who having, by vertue of the *Right* of Liferent, good Right to the Maills and Duties of the Lands, or to *Remove* the Possessors therefrom, could not conveniently seek this Declarator of nullity, to endure, during his *Right* only, as he retrinshed it, seing he might attain to the effect of that, by vertue of his said *Right*, by which he had the sole Power of the Land, and the whole Commodities thereof, during that space; and it was not well Compatible to seek the full Profits of the Lands, as he had done, by Recovering of Sentences therefore, and also to seek the Feu to be annulled, for not payment of the Feu Duties, which Feu-Duties the Rebel could not pay, being excluded from the Lands by the Donatars *Right*, and which were so in effect, rather lyable to be payed by the Donatars self, who either might recover Possession of the Lands by Law, or if the Rebel did Possess, might Comprise the Property therefore. And therefore the *Lords* Found, that the Donatar could not in Law seek any such Action of Nullitie, for *ubi datur & Competit ordinarium remedium ex Jure* as here, *non recurritur ad extraordinarium*. Actor. *Advocatus & Nicolson*. Alter. *Stuart* & *Craig*. *Gibson* Clerk. *Vid. July* 24. 1632. *Rule*, in the last Part of that Decision.

Gilhagie contra *Wairdrop*, *February* 7. 1634.

ONe *Gilhagie*, for Debt owing by umquhile *Wairdrop*, having obtained *Decreet* against *Wardrop's* Son, as lawfully Charged to enter Heir to him, and having Arrested the Maills and Duties of his Lands therefore, and having obtained Sentence to make the same furth-coming, and also having Comprised the saids Lands from the said Son, as Charged to Enter Heir to his said Father, who was Debitor, and thereupon being Infeft, the Tennents, who were Decerned to make the Maills forth-coming, Suspend; that they were distressed therefore by the Creditor, and also by the Son, who Compearing, claimed the Maills, as due to him, who was Infeft in the Lands by Hasp and Stapple, as Heir to his Good-sir, and not to his Father, likeas he Renounced to be Heir to his Father; and the Creditor opponing his Sentence, Comprising, and Infestment, which he Alledged could not be taken away this way without Reduction, seing his Renuncing to be Heir, might well hinder Personal Execution, but could not stay any Real Execution. The *Lords* Found the Sons Alledgance Relevant, that he Renounced to be Heir to his Father, and that he was Infeft as Heir to his Good-sir, and received the same in this Place, by way of Suspension, and Double Poynding, without necessity to Reduce, seing that Renunciation to be Heir, was Found sufficient to stay all Execution both Per-

sonal and Real, against the Son, for all things which he bruiked, and pertained to him otherways than as from his *Father*, seing it was never Alledged by the Creditor, that ever the *Father* was Infeft in the Lands Compriſed. *Scot* Clerk; *Vid. Decem.* 12. 1635. *Rowan*, and the Caſes there.

Caſſinbro contra *Irvin*, *February* 11. 1624.

ONe *Caſſinbro* a *Flaming* Purſues Captain *Irvin*, for payment of 500 pounds *Flamiſh*, conform to his Bond granted to him thereupon in *anno* 1624. and whereupon Purſuit was intented, in *anno* 1631. which ſenſyne lying over, was now again wakened, wherein the Defender Alledging the Bond was null, becauſe it wanted Witneſſes inſert therein; and the Purſuer Anſwering, that this Alledgance ought not to be received againſt a Bond made out of *Scotland*, and granted in favours of a Stranger, remaining in the Low-Countries, where ſuch Bonds are valid, albeit wanting Witneſſes; Likeas he offered and referred to the Captains Oath, the verity of the Subſcription, to be his proper hand-writ, and alſo that he was Debitor of the Sum, the time when he Subſcribed the Bond; and the Defender Duplyed, that that was not enough, unleſs he referred alſo to his Oath, that the Sum was yet reſtand owing unpayed. The *Lords* Found, that they would not ſupply this nullity, Alledged againſt the Bond, *viz.* of wanting Witneſſes, except that as the Purſuer referred the verity of the Subſcription, & Truth of the Debt, at the time of the making of the Bond to his Oath; ſo alſo, that he referred, and that the Defender ſhould alſo therewith Depone by the ſame Oath, if the Sum was yet reſtand unpayed or not, and Found that the Defender ought not to be Compelled, to depone upon the one, without conſideration of his Declaration, which he was Found he ought and might declare upon the other, *viz.* If it was yet reſting, owing, unpayed: In reſpect that the Lybel bears, that he was *Debitor* by his Bond in the Sum therein contained, and that it was yet reſting owing unpayed, ſo that he ought to ſwear upon the whole Lybel conjunctly, and not to divide the ſame, in reſpect of the *Alledged* Nullity of the Bond; and this was alſo Found, albeit the Bond was made in *Flanders*, and to a *Flaming*, and not betwixt *Scotsmen*. *Actor. Mowat*, Alter. *Nicolſon. Gibſon* Clerk. *Vid. Feb.* 14. 1633. *Rankin*, and the Caſes there cited. *Feb.* 9. 1631. *Barrens.*

Drummond contra Captain *Rollock*, *Eodem die.*

THe Lady *Athol* having borrowed 1000 merks from the Lady *Burgh*, ſhe granted to her a Bond thereupon, with a Blank for inſerting the name of the Creditor, to whom it ſhould have been payed. This Bond being Aſſigned by her, and delivered to one *Alexander Drummond*, who inſert his own name therein, and Charged the Lady *Athol*, and Captain *Rollock* her Husband for the ſame; who Suſpending, that the Bond was Blank the time of their Subſcription, and the Sum pertained to the Lady *Burgh*, from whom they borrowed it, at the which time ſhe was clad with a Husband, who yet lives, to whom the ſame muſt appertain, and in whoſe prejudice the Lady could not Aſſign the ſame, nor any other name could be inſert therein, to prejudge his Right thereof. And the Charger Alledging, that the Lady and her Husband, by a voluntar ſeparation made betwixt them, of their mutual conſent were Divorced. Likeas the Husband, in reſpect of that ſeparation, had given her a certain Sum of Money for her ſuſtentation; of the which Sum this Sum now Acclaimed is a part, and ſo the Husband can have no Intereſt to claim any part of this Sum, eſpecially ſeing this Charger had furniſhed her for her Aliment, as much as would exhauſt a great part of this Sum; and the Husband compearing by his Procurator, concurred with the Suſpender, and aſſiſted in the Reaſon with him. The *Lords* Suſpended the Charges raiſed by *Drummond* upon his Bond,

and

and Found the same, and Sum therein contained, to pertain to the said Husband, and that he had *Right* thereto, and that the Wife could not make any Right thereof, nor insert any name in the Bond to the Husbands prejudice, the Money being acknowledged to be hers; and Found, that this voluntar separation betwixt Man and Wife, not being lawfully authorized by a Legal and Judicial Sentence, ought not to be sustained, nor allowed; and therefore Found, that no Deed depending thereon, whereby any Moneys were provided to her by her Husband, ought to be effectual, but was altogether null, when-ever it was drawn in question: And whereas it was Alledged by the Charger, that a great part of the Money was applyed for the Wifes Aliment; They Found, that being condescended, and lawfully qualified, ought to be allowed *pro tanto*, to produce Execution to the Charger for the same. Actor. *Stuart*. Alter. *Gibson* Clerk. *Vid.* 14 *March* 1634. *Gib.*

La. *Barns* contra *Jean Guill*, *Eodem die.*

A Sentence obtained before the Commissar of *Aberdene*, holding the Defender as confest, was Found null, because it was given the time of the sitting of Parliament; in which time it was Found, that no Judge could proceed in any part of the Kingdom: For the Parliament sitting, which was the Supream Court and Convention of all the Estates, and Proclamation being made to all the Liedges thereof, all the Liedges were thereby freed from appearing in any other Judgment-place, and might in reason attend the Supream Court, and wait upon the Ordinances and Laws there to be made, the extent of that Court being universal, and reaching to all the Subjects; neither was it *Respected*, that both the Parties were Women, whereby it was Alledged by the Charger, that they had neither necessity to attend, nor was there probability that they should attend at Parliament; For it was Found, that no Judge ought then to sit, but that all Judgments and other Courts should be silent, during the time of Parliament; Therefore they Reponed the Defender, who was Suspender, to her Defences, as the Decreet were not given, to be proponed in the same place of Suspension, without necessity to put the Party to any other new Pursuit therefore. Actor. *Oliphant*. Alter. *Heriot*. *Hay* Clerk.

contra *Feb.* 13. 1634.

IN a Pursuit of Removing from a piece of Land, claimed by the Pursuer, as Part and Pertinent of the Land wherein he was Infeft; wherein the Defender Alledging, that it was Pertinent of these Lands wherein he was Infeft, within such particular bounds, specially Designed in his Infeftment, within the which Bounds and Marches the Land controverted lay, and was ever so bruiked by him. And the Pursuer Replying, that this piece of Land lay within his Land wherein he was Infeft, and was severally and distinctly known from the Excipients Lands: Likeas there was a *Dyke* which distinguished the Pursuers Lands from the Defenders; within which *Dyke* the Pursuers Land, and this piece controverted lay on the one side, and this Defenders Land on the other side: Likeas also the Tennents of the Defenders Lands, who possest the Lands controverted, payed to the Pursuers Predecessors Maill and Dutie for this Land now in question divers years together, at the direction and command of the Defenders Predecessor. This Reply being admitted to the Pursuers Probation, at the Term assigned, Witnesses being produced to prove the same; and it being questioned, if the direction and command ought to be proven by Witnesses, as this Defender Alledged it ought not to be, but only ought to be proven by Writ, or Oath. The *Lords* Found, that this direction or command was only probable by Writ, or Oath of Party, and that Witnesses ought not to be admitted, nor received, to prove the same, *Gibson* Clerk.

The Baillie of *Melros* contra *Darling*, *Eodem die*.

ONe *Darling* being conveened before the Baillie of the Regality of *Melros*, at the instance of *John Tait* and the Procurator-fiscal, for wounding of the said *John Tait*, to the effusion of his Blood; and the Fact of Blood and Blood-wyte being referred to the Defenders Oath, *Andrew Darling* being then present in Court, and refusing to give his Oath thereupon, Decreet was given against him, Convicting him, and therefore Unlawing him in a particular Sum, for Blood and Blood-wyte; which Decreet being Suspended on this Reason, that the same is a null Sentence, seing that the Party is not in Law holden to Swear upon a Criminal Fact, and the Judge ought not to put it to his Oath, but only ought to have tryed the same by an Assize, and neither by Oath, nor yet by Witnesses; for Witnesses might have been produced before the Inquest, to inform them, but the Judge could not try it by Witnesses; and the most that the Judge could do in such a case, was to Unlaw for Contumacy, and not for the Fact. The *Lords* sustained the Decreet, notwithstanding of this Reason, and Found, it might be tryed by the Parties Oath (or by Witnesses, as some thought) seing the Party was personally present, and for refusing to give his Oath, they Found the Sentence well given; for he was not pursued for Life or Member, to incur any Criminal Censure therefore, but only for a Pecunial Unlaw, which being to that end, might be tryed by his Oath, and in Facts Clandestinly done in the night, or where there are few or none to qualifie the same, tryal by the Parties Oath, with no reason ought to be refused, as is usually done before the *Lords* of Secret Council. Actor. *Trotter*. Alter: *Vid. Penult January* 1622. *Johnstoun*, & 24 *July* 1633. *Dickson*.

Orr contra *Watson*, *Feb.* 15. 1634.

BY Contract of Marriage betwixt *Peter Orr* and *Elizabeth Watson*, *John Watson* Father to the said *Elizabeth*, is obliged to pay a Sum in Tocher with her to the said *Peter Orr*; *Janet Orr* Daughter of this Marriage, being Executrix Confirmed to the said *Peter*, Pursues the said *Elizabeth* her own Mother, as Successor to the said *John Watson* her Father, *post contractum debitum*, to pay the said Sum to the Pursuer; for after the Contract of Marriage, the said *John Watson*, who was obliged in the Tocher, having no Bairns but this *Elizabeth Watson*, who was Defender, and other two Daughters who were begotten by him of a prior Marriage, whereof the one Compeared in this Process, and Renounced to be Heir to her Father, and the other Daughter was dead, leaving some Bairns behind her, who were not Conveened to pay, but were Beggers, and had nothing by their Father, the said *John Watson* having Disponed all his Means, Lands and Goods to this Daughter, begotten in the second Marriage; and she being conveened to pay solely, as Successor to her Father, as said is, *post Contractum debitum*; It being questioned if she could be craved to be Decerned *in solidum* for the whole Debt, seing there were other two Sisters, who might be *Co-hæredes*, and who ought to be Decerned for their parts, and therefore that this Defender could not be Decerned as lyable for the whole *in solidum*; for none could be conveened as Successor *post Contractum debitum*, but such a person as might totally represent the Defunct, and be Heir to him. And true it is, that the Defender Alledged, that she could not be Heir to him, but only one of three Heirs, there being three Daughters, as said is: therefore she could not be conveened as Successor to her Father, to whom she could not in Law totally succeed: And albeit it were true, that she were Infeft in all her Fathers Means, and that the other two Sisters had nothing by their Father, yet they ought to be Legally Conveened and Discussed, after which Discussing, the Pursuer might use any other Remedy of Law, to make this Defender lyable *actione in rem*, for Repeating of the umquhile Fathers Goods and Lands from her,

her, upon the Act of Dyvoury, or otherwise, as she best might, but not by this Pursuit to conveen her, as Successor to her Father *in totum*, to whom she could not succeed totally, but as one of three. This Alledgance was Repelled, for the *Lords* sustained the Action against her *in solidum* for the whole Debt, albeit the other two Sisters were not conveened as Heirs or Successors; (and yet they were also conveened as Heirs and Successors in the same Process), seing the one Sister Compeared by her Procurator, and Renounced to be Heir, and the other was poor, and had nothing; neither could the Defender qualifie, that the other two Sisters had succeeded, or might have succeeded to any thing by the Fathers decease: And this Defender was not conveened *hoc nomine* as Heir, but as she who had acquired all her Fathers Lands and Estate *post contractum debitum*, so that there would never be any other Heir-portioner, who might be conveened as Heir or Successor. Actor. *Gibson*. Alter. *Maxwell*. *Gibson* Clerk. *Vid.* 7 *February*, 1632. *Hume*, and what is marked to be done there betwixt L. *Lawers* and *Dumbar* upon the 9 of *March* 1637. whereto Mr *Alexander Gibson* Clerk. Pursuer there by the Kings Advocat, *Stuart* & *Nicolson* elder. *Reus per Lermonth*, *Burnet*, *Gilmor*, & *Nicolson* younger. *Vid.* 21 *March* 1634. betwixt the same Parties, *viz.* *Orr* contra *Watson*.

L. *Monckton* contra Lo. *Tester*, *Eodem die*.

THe Lands of being Disponed by the Lord *Tester* to umquhile *Hay* of *Monckton*, to be holden of him, who thereafter Setting them in Feu to a Sub-Vassal, to be holden of *Monckton*, for payment of a Feu-Duty, who is Infeft, and thereafter in Possession, by vertue of this Feu: Thereafter *Monckton* Dispones his Right of these Lands to another, from whom the same is Apprysed, or for his Debt Adjudged against the appearand Heir, being Charged to enter Heir, and Renouncing: The Creditor, to whom the same is Adjudged, and his Assigney Charging the Lo. *Tester* to enter him in *Monckttouns* place, who was his immediat Vassal, and who had Disponed his Right, which was Adjudged, as said is, which the Superior was content to do, he getting a years Duty of the Land. And the Charger Alledging, that he could give no more for his Entry, but one years Feu-Duty, which was payable by the Sub-Vassal to the Lo. *Testers* immediat Vassal, seing by his Adjudication he would get no more in time to come but only that Feu-Duty, and he ought to give no more than he would obtain himself. This Alledgance was found Relevant, and the *Lords* Ordained the Superior to Enter this Party in place of his Vassal, he paying the Feu-Duty, which he would obtain from the Sub-Vassal, and Found, he ought to pay no more for his Entry; neither was it respected, what the Superior Alledged, that he was not in Law holden to know that Sub-Feu, Set by his Vassal, being done without his consent, and so to his prejudice, especially whereas this Charger had obtained also the Sub-Vassals Liferent, he being at the Horn year and day, whereby he bruiked the whole profit of the Land, or might bruik it, and so had no prejudice to pay a years profit of the Land to the Superior; Which Alledgance was Repelled, seing the Casuality of the Sub-Vassals Liferent could fall to none but to the Sub-Vassals immediat Superior, and not to his Superiors Superior. Likeas the Principal Vassal Set the Feu to the Sub-Vassal, at that time when he might do it by the Laws of the Realm, and at which time the Superiors consent was not in Law requisite thereto. Actor. *Stuart*. Alter, *Nicolson*. *Hay* Clerk. *Vid.* 29 *March* 1636. Lo. *Elphingstoun*. 9 *March* 1639. L. *Almond*.

Davidson contra *Jack*, *February* 22. 1634.

ONe *Davidson* conveened one *Jack* in *Dundee*, as Heir to his Father another *Jack*, who was one of the Tutors to the said Pursuer, to make payment of 600 pounds, intromitted with by the said Tutor, with the Annualrent ever since,

since, conform to the said umquhile Tutors Discharge, upon the receipt of the said Sum from the Pursuers Debitor, *viz.* by the space of 25 years by-past, since the Date of the Discharge; Wherein the Defender Alledging, that he could not be Conveened *in solidum* for the whole, because the Pursuer had two Tutors given conjunctly, likeas the Acquittances were Subscribed by them both; And therefore he Alledged, he could only be lyable for his own part, and the other Tutor should be subject in the other half, specially seing he was the Pursuers own Uncle. The *Lords* Found, that the Pursuer might Pursue any of the Tutors as he pleased *in solidum* for the whole Debt received; For any of the Tutors omission would make the Tutor lyable for all, far more their Intromission, without necessity of Division; And in respect the Defender the time of his Father (who was Tutor) his Intromission, was only a Pupil of two years old, and that his Father died immediatly thereafter, and that his Father had not the exercise of the Office of Tutory, but one year only, and that he could not be acquaint that his Father was Tutor, nor what Deed he had done as Tutor, and that there was no Pursuit moved against him all this time these 25 years by-past, but only within these 2 or 3 years last by-past. Therefore the *Lords* Found, that he was not subject to the Pursuer in any Annualrent, for the Sum received by his Father as Tutor, as said is, except only for the Terms and space since he was Cited in this Action, *viz.* by the space of two or three years, but for no other Term or year preceeding; And therefore Assoilzied him from all preceeding Terms: And so this Priviledge of Minority, or *Privilegiatus*, was Found considerable against another Minor; Albeit this Cause has no Affinity with priviledged Causes, tending only (as is requisite in all Law) that Minors Moneys, received actually by their Tutors, should not be keeped from the Minors idly; And that the mischance of the Tutors Death ought not to prejudge him of the ordinary Benefit in Law of Tutor Compts; But the Cessation moved the *Lords* to Assoilzie from the bygone Annualrents. Actor. Alter. *Rollock. Gibson* Clerk. *Vid. February* 24. 1627. *Guthrie. July* 18. 1635. L. *Edmistoun. January* 29. 1631. *Hume* and the Cases there.

Hume contra *Humes*, *March* 4. 1634.

James Hume of *Coldingknows* Pursues Action of Reduction against the two Daughters, the only Bairns alive of umquhile *Alexander* Earl of *Hume*, and against Lo. *Doun* and Lo. *Maitland* their Husbands, for Reducing of a Sentence, obtained by umquhile *James* Earl of *Hume*, the Defenders Brother; by the which Sentence the Contract was Reduced, made betwixt the said umquhile *Alexander* E of *Hume* & umquhile L. *Coldingknows* Goodsir to this Pursuer, and also betwixt the Pursuers umquhile Father, whereby the Earldom of *Hume* was Tailzied to his said Father and Goodsir, and their Heirs-Male, failing of the Heirs-male gotten by the said umquhile *Alexander* Earl of *Hume* his own Body; And so the Living of *Coldingknows* was Tailzied to the said umquhile Earl of *Hume*, failing of Heirs-Male of their own Bodies: And both the Parties by this Contract were obliged to do nothing to prejudge that Tailzie, or whereby their saids Successors should not succeed to their saids Livings, except so far as concerned a certain special Sum agreed upon, with the which it was permitted to the Parties *hinc inde* to burden these Lands *respectivè*. This Contract being desired to be Reduced at the Instance of umquhile *Alexander* Earl of *Hume*, Party Contracter, and he dying after Intention of the Action, before *Litis contestation*, and thereafter the same Action being Transferred in umquhile *James* Earl of *Hume* his Son, and his Tutors and Curators *Activè*, and in this now Pursuer as Heir to his said umquhile Father, who was Deceast since the Intenting of the principal Action, and the same principal Cause being Wakned, and Insisted on betwixt the saids Parties, and also Wakned against old *Coldingknow's*, Goodsir

to

to this Pursuer, against which Goo'sir the said principal Cause was first Intented, and who was living the time of this Sentence Reductive, which is now craved to be Reduced: the Reason whereupon the said Contract was Reduced by that Sentence, was, because the Contract contained a mutual Tailzie, as said is, with the foresaid expres Clause, *That none of the Parties should do any thing*, as said is, *to others prejudice therein*; And so that being the final Cause thereof, the failzie of any of the Parties in fulfilling their part, and the Contraveening thereof ought to Repone the other Party against the Contract, and put him in his own place against the same; whereupon he Subsumed, that *Coldingknows* had fail'zied, and since the Contract, had Sold all his Lands Irredeemably, and had contracted Debts, by the which all his Lands might be Compryfed, and so had rendred himself altogether unable to fulfil his part, which was the final Cause of the Contract. This Reason in absence of the Party, was Found Relevant and proven, and the Contract Reduced, and the Earl of *Hume* Reponed against the same, which Decreet was now desired to be Reduced, after the Death of the said umquhile *James* Earl of *Hume*, the only Heir-Male of the said Earl *Alexander*, who was Contracter, as said is, and whereby the condition of the Contract began to take effect in the person of this Pursuer, the Heir of the other Party Contracter: The Reason of which Reduction was, that that first Reason of Reduction was not Relevant *in jure*, for the one Parties failzie in his part of the Contract, was not a Reason *in jure* Relevant to Repone the other Party, and so to Dissolve the Contract, there being no Irritant Clause therein, but only that the other Party had in Law Action Competent against the other Party breaker, and his Heirs, for Implement of the Contract, or for Dammage and Interest; specially seing that Mutual Tailzie made by *Coldingknows* (against which it was then first Lybelled, he had Contraveened by Burdening or Selling the Lands, as said is) was not the final Cause of the Contract, as the Reason buire, there being other Causes by the said Tailzie, *viz.* that the Earl of *Hume* made the said Tailzie for preservation of the Honour of the House of *Hume*, and the antient Dignity and Estate thereof, and that it might remain with the Name of *Hume*, and for great Gratitudes done to the Earl, by the Earl of *Dumbar*; And albeit he had subjoyned also these Words (for the Causes under-written) in the Words of the Contract, yet that ought to be understood but as a signification of his Thankful Mind, and not that the other Parties Tailzying of his Lands should have been the only final Cause of the Earls making of the Tailzie, as the Reason bears; Which Reason being Considered by the *Lords*, they Found the same Relevant, to Reduce the first Sentence Reductive, and Found, that the *Lords* themselves were Judges Competent to Consider of the first Reason Reductive, if it was then Relevant or not, and if it was proven or not, by that Contract, that the Mutual Tailzie was the final Cause of the making of the Tailzie by the Earl of *Hume* upon his part or not; And Found that they might Discuss that Reason now in this Process, if it was Relevant and Proven, (as the *Lords* by this first Process had Found the same Relevant & Proven) the finding whereof (seing it was so Found and done in absence of the Party Defender) The *Lords* Found to be no impediment in this second Instance but that it might be Found otherwayes, if they should find Reason so to do, albeit the same Reason did Consist *in jure*; and whereby it might be thought, that that Judge which Found once a Reason (being *in jure*,) Relevant, could not find it again to be Irrelevant, albeit that same Contract being considered then by the Judge, was Found to prove the Mutual Tailzie to be the final Cause, cannot now be used to prove the contrary, seing the said Sentence, and *Litiscontestation* so finding, cannot hinder to Examine and Try in the second Instance, if it was well done there; And which the *Lords* Found they might and ought

to do, without any Imputation to the Judge in the first Sentence, seing it was given, (*parte non comparente*,) in which Course of Proces in absence of Defenders, the Judges their Decreets are not so exactly Examined, as when both Parties Compears; And the *Lords* after mature Deliberation, having Considered of this Reason, and the foresaid first Reason in the first Instance, They Found that Reason no wayes to have been Relevant to have Reduced the foresaid Contract, and therefore they Reduced that Sentence Reductive; for they Found that the Contraveening of their part of the Contract, by this Pursuers Father and Goodsir, who were Contracters on the one side,(as the Reason bears) was no cause to Repone the other Party to the Contract; But the most that in Law might follow upon the doing of contrair Deeds to the Contract, was only to seek Implement thereof, or else Dammage and Interest for not Implement, and no further; and that a mutual Contract being once perfected, could not be Dissolved by a breach done by the one party, but only by consent of both: And also they Found, that the foresaid Contract, bearing, *To be made for the Causes within mentioned*, meaned not that the Tailzie made by *Coldingknow's* was the final Cause, for which the other Tailzie was made by the E. of *Hume*; Therefore they Reduced, as said is. This Decreet was given, the Defenders being absent; for after they had compeared & proponed some Defences *viz.* Dilators, that the Reason of the Summons was Eiked, Altered, and Mended in Substantial Points, in respect whereof the Procurators for the Defenders, *viz.* the Kings *Advocat* and *Stuart* Alledged, that they ought not to Answer, until they were of new Summoned, and which Alledgance was Repelled, and a short Day, *viz.* ten dayes thereafter was Assigned to them, to Answer to the Summons, and Reason as it was Mended; thereafter they past from their Compearance, and the Sentence was given, the Defenders not Compearing. Actor, *Nicolson* & *Craig*. Alter. *Gibson* Clerk. *Vid. January* 14 1631. *Sharp.*

Whitefoord contra L. *Crachlaw*, *March* 5. 1634.

IN a Double Poynding betwixt the Donatar of young *Crachlaws* Liferent-Escheat, and *Crachlaws* Creditors, which of them should be Answered of a yearly Duty adebted to the Rebel, wherein the Creditors claiming preference to the Donatar, because the Donatar had given Bond at the time of the Acquiring of the Gift to the Thesaurer, that the same should not be prejudicial to the Rebels Creditors: And the Donatar Answering, that that Bond cannot be extended in favours of any Creditors, but to such as were Creditors the time of the Gift, and not in favours of any Creditors, who had Acquired their Bonds since. The *Lords* Repelled the Alledgance proponed for these Creditors, seing these Bonds and Obligations were long after the date of the said Gift and general Declarator; for they Found that such Bonds, being, as said is, granted by Donatars to the King's Officers, should only extend to Debts owing to Creditors, before the purchasing of the Gift, and to no Debt contracted after the Gift. Actor, *Neilson*. Alter. *Gibson* Clerk.

Murray contra Lo. *Blantyre*, *Eodem die.*

BY a Minut of Contract Subscribed betwixt these Parties, the Lord *Blantyre* Sells the Lands of *Calderhal*, &c. to *Ronald Murray* for a Sum, and the Parties agree that a Contract be extended thereon, and if they fail, the Failzier to pay 2000 merks; Which Minut being desired to be Registrat, that Execution might pass thereon. The Defender Alledged, that seing the Minut was never perfected, and that the same resolved in a Failzie of 2000 Merks, and that the Party had no Interest by the not perfecting thereof; Therefore he Alledged, that it could not be Registrat, seing it was *factum impraestabile*, to give him Se-

Security of the Lands, which he had Sold since to another, being certified that this Pursuer had refused the Bargain, and he had neither deburſed Arles nor Money, so that *nihil illi deerat*, and he was instantly content to offer and satisfie all his dammage and Interest, and which now ought to be received, seing the Minut was desired to be Registrat, not for Extention, but for Execution, and this offer was competent against the Execution. The *Lords* Repelled the Alledgance, and Found that the Adjection of the Penalty in the Minut, resolved not the Contract, so that the same was appointed to come in place of the perfecting of the Minut; But notwithstanding of the said Penalty, the Parties might also seek Implement of the Minut, and whole Articles thereof, beside and attour the said Failzie; And they Repelled the offer of the Interest in this place against the Registration, without prejudice of the same to be received, and Discussed by way of Suspension. Actor. *Advocatus* & *Mowat*. Alter. *Stuart* & *Lermont*. *Hay* Clerk.

Black contra L. *Pitmedden*, *Eodem die*.

ONe *Black* having Compriſed some Lands, whereof *Pitmedden* was Heretor, and having Charged him as Superior, to receive him upon the Compriſing, after the Letters were found Orderly Proceeded, notwithstanding of *Pitmeddens* Alledgance that he was Heretor, because his Heretable Right was Acquired from the L. *Meldrum*, who was Heretor of the Lands, and was Debitor to *Black* in that Sum, for which the Compriſing was Deduced, and for which he had affected the Land with some Diligence, before *Pitmeddens* Right was Acquired, so that *Pitmedden* remained Superior to the Compriſer, but his Right of the Property was not sufficient against the Compriſer; and *Pitmedden* Claiming a years Duty for Entring of the Compriſer, The *Lords* allowed to him Retention of a years Rent of the Land therefore, during which he Poſſeſt the Land, by vertue of his Heretable Right, albeit that Heretable Right was not found sufficient to exclude the Compriſer; after which Sentence *Pitmedden* Suspending again *de novo*, upon the *Act*. 36. *Parliament* 5. *Ja*. 3. Whereby it is Provided, that the Superior may take the Lands Compriſed to himself, he satisfying the Compriſer of his Sum, and Expenses, which he offered presently to do, which he Alledged is the rather receivable from him, who had Acquired this Heretable Right, and was prejudged therein by this Compriſer, and which Compriſing being yet unexpired, as any other Creditor might Compriſe the Legal, & thereby Redeem the same, so with more equity ought he to be admitted to out-quite the Compriſing, that his own Right might convaleſce: And the Compriſer Answering, that it was not time now to make this Offer, because he had allowed by the *Lords* Ordinance, a years Rent to be retained by the Suspender, in his own hands, to which he had no Right, and which he had Poſſeſſed, for satisfaction of the years Duty acclaimed by him as Superior, for Entering of the Compriſer, which Allowance muſt be equivalent, as if he had payed, and really delivered a Liquid Sum for that years Entry, *quo caſu* if he had so payed, the Suspenders Offer could never have been thereafter received. And where it is said, that the Suspender, as Creditor, may do this, as if the Legal were Compriſed, and Redeemed from the Compriſer (the Compriſing being yet un-expired): he Answers, that this Offer cannot be reſpected upon that pretence, neither can it be admitted, except the Legal were Compriſed, and Redemption used by vertue thereof, which not being done, he cannot so summarly evacuat the effect and force of his Compriſing, by, and against all Form, and Order of Law, The *Lords* Repelled the Alledgance, and Found the Reason of Suspension Relevant, and Found that the Suspender paying the Principal Sum of the Compriſing, with the whole Annualrents thereof senſine, and the Expenses of the Compriſing, and the Charges thereof, That then the Compriſer ſhould Aſſign

his Right to the Suspender; and Found, that the allowing to the Suspender 2 years Duty of the Land, the same being Possest by him, was not alike, as if the Compriser had actually payed a years Rent to him, and that he had received Real Payment thereof, and therefore that that allowance was no cause why the Reason should not been Found Relevant. Actor. *Stuart*. Alter. *Baird*, *Hay* Clerk.

contra L. *Lag*, *March* 8. 1634.

THere being Four Executors conjunctly Nominat by the Defunct, and all the Four obtaining Licence from the Commissars, to pursue for the Debts, albeit the Testament was not Confirmed; one of the Four pursuing alone at his own Instance, without concourse of the Rest, and without inserting of their Names in the Pursuit, for Registration of a Bond of 100 pounds, made to the Defunct by the Defender; it was Found, that one Executor of Four Nominat, (the Licence being granted to all the Four) could not alone seek this Registration, except all the rest should either concur in the Pursuit, or else should refuse to Assist, and that they were excluded from their Office; even as mo Tutors being conjunctly Nominat, one of them could not Assist the Pupills Pursuit, without concourse of the rest, and such like in Curators, whereof Two or Three were necessary, and were given *sine quibus non*, &c. one of these could not Insist in a Pursuit, without concourse of the rest; for the satisfying of this Executor, would not be an exoneration to the Defender, at the hands of the rest of the Executors. *Scot* Clerk.

Charters contra *Myles*, *Eodem die*.

IN an Action moved before the Comissar of *Brechin*, where the Pursuit being referred to the Defenders Oath, and he Summoned to that effect, at the which day of Compearance, The Defender producing the *Lords* Letters of Advocation, discharging the Commissar, and the Pursuer instantly producing Horning against the Defender, whereby he debarred him to produce that Advocation, or to Compear in the Cause against the Defender; and whereupon the Commissar proceeded, and Decerned in the Cause against the Defender, as debarred with Horning: This Decreet being Suspended, as done and pronounced *spreto mandato Judicis*, and so is null, and the other maintaining the Decreet, as a Sentence standing, and also as lawfully given against the Defender, now Suspender, seing he was Debarred by Horning, and so could not use Advocation. The *Lords* Found the Decreet evil given, and that the same was Null, seing the Advocation was produced to the Judge, before the Horning was produced, and that the Judge ought not to have proceeded, the Advocation being produced to him before the Sentence, and the *Lords* Reponed the Suspender to all his Defences, and Ordained them to Disput presently in this place, upon the Principal Cause, as if no Sentence were given. Actor. *Mowat*. Alter. *Russel*.

Smith contra *Miller*, *Eodem die*.

IN an Advocation of a Pursuit moved before an Inferior Judge, for making of Arrested Goods furthcoming, because the Arrestment, which was the Ground of that Pursuit, was execute by vertue of a Precept, directed by Warrand of another Inferior Judge, and no Judge ought to proceed upon pursuit moved upon that Arrestment, but that Judge only, by the Warrand of whose Precept, the Arrestment was laid on and execut. This Reason was Found Relevant; for the *Lords* Found no other Inferior Judge ought to proceed upon such Precepts, and Actions, which were only Intented upon these Grounds, but that Judge alone, who directed the Warrand and Precept to Arrest; And it was thought by the *Lords*, That if the Arrestment had been execut by vertue of Letters of Arrestment directed by the *Lords* of Session, that no Inferior Judge could proceed in any Action, to make these Arrested Goods furth-coming,

ing, but only the *Lords* of Session, albeit some were of a contrair Opinion, anent this Case of Arrestment by Warrand of the *Lords* Letters, whereupon they thought any Judge might proceed, as a Good Ground to all Actions every where; but this Point was not Decided, seing it was but drawn in to be Reasoned upon, by way of Argument in this Case, where the Action was moved upon an Arrestment, directed by another Inferior Judge, and the Case appears not alike; for by the Arrestment made by the *Lords* Letters, all the Judges within the Realm may seem to proceed, seing the *Lords* Jurisdiction is Universal, over all the Kingdom; And if the Arrestment made by any Inferior Judge, may be a Warrand to that Judge himself to proceed thereon, far more may it Appear Reasonable, that he may proceed upon the Warrand of the more Supream Judge; for it is in effect a Power to him so to do, which is not alike among Inferior Judges themselves, where their Acts are distinct, and their Jurisdiction is not Universal, & where, *Par in parem non habet imperium*, neither may he usurp upon what pertains to his equal, even as an Inferior Judge may proceed upon an Obligation, although Registrat in the Books of Session. *Gibson* Clerk. *Vid. March* 22. 1637. *Finnie.*

Sheriff of *Galloway* contra E. of *Cassils*, *March* 11. 1634.

THe Sheriff of *Galloway* being Infeft by the Abbot of *Sawlset* in the Bailliary of certain Lands pertaining to the Abbot, with Services and Dependencies due thereto, Pursues the Earl of *Cassils* and the Tennents of his Lands, whereof the Earl was Heretor, and likewise Baillie, for payment of the saids Services, and doing of the same in all time coming: and the particulars craved by the Summons, were *furnishing of Shear Darges in Harvest, and Tilling in Sowing time, and Leading of Fuilzie, and such other Services*; and which the Pursuer craved by this Pursuit, the Defender to be Decerned to do, to the Pursuers other Lands, pertaining to him Heretably, not pertaining to these Baronies whereof he was Baillie, but being Lands of another nature, holden by the Pursuer of another Superior than the Abbot; and also he craved the payment yearly for his said Baillies Duty and Service of a certain quantity *of Oats and Straw*, particularly Lybelled *for each Pleugh of the Defenders Lands, together with some Hens yearly*; The ground of which Pursuit was founded upon his Infestment of the *Bailliary*, as said is, with the *Connexes* and *Services* belonging thereto, (for these were the words of his Right, and there was no special Duty insert therein) and in Fortification thereof, he offered to prove, that he had been in use, and his Forbears, Baillies, of receiving of all these particular Services and Duties from the Tennents of the saids Lands, these 50 years by-past: And the Defender Alledging, that there was no Ground nor Reason to compel him, who was Heretor, to do these Services to any Lands outwith the Baronies, whereof the Pursuer was Constitute Baillie, and to go to any other of the Pursuers Lands, not being of these Baronies, neither holden of that Abbot, but of other Superiors, and no use of the Tennents, how long soever of doing the same, and paying them to these Lands, whereto he was no ways astricted, either in Law or in Reason, or by any Constitution, either in Infestment or any other Writ, could oblige the Heretor, the same being done by & without his knowledge or consent, specially his Infestment, not astricting him to any such thing, and the Pursuers Right of Bailliary not proporting the same, and these Services and Duties being differing, and altogether disagreeing from Services due to Kirk-mens Baillies: And as to the Oats, Straw, and Hens acclaimed, it were out of all reason to allow this Pursuit for the same, as if Baillie Services could extend to such predial Duties, the same being a part of the Duty and Profit payed for the Ground, which can belong to none but the Master and Heretor of the Ground, or to such persons as has special Right *habili modo*, to such Duties out of the Lands, these Alledgances were Repelled, and the Action Sustained, both for these Duties of

Corns, Straw and Hens, to be payed yearly to the Baillie, as Duties and Services due for his Bailliary, and also for the special Darges acclaimed to be done to the Pursuer in his Lands, out of the Barony, in respect of the said 40 or 50 years Possession uninterrupted, albeit the Possession was only from the Tennents, and not from the Heretor, nor of his Knowledge, which the *Lords* Found not necessar, and admitted the said Summons and Reply of Possession, to the Pursuers Probation, but Declared that they would reserve to themselves, after Probation, to Determine upon the special Services, and quantity of Corns and others, which they would Decern to be payed in all time thereafter, for the saids Baillie Duties, as they should find reasonable. Actor. *Stuart* & *Heriot*. Alter. *Advocatus*, *Nicolson* & *Neilson*. *Hay* Clerk. *Vid. July* 10 and 15. 1623. *M'cay*. *July* 22. 1634. *Forrester*.

Gib contra *Miller*, *March* 14. 1634.

Andrew Gib having Married *Christian Hume*, the Relict of a prior Husband, after they were Married, they not living in concord together, and *stante matrimonio*, they make a Contract betwixt them, with consent of the Bairns of her prior Marriage and Friends, whereby it was conveened, that her Husband should Repone her to all the Goods and Moneys, which he had received by her Marriage, and pertaining to her, and that she should therefore Renunce all part and Portion of all Gear pertaining to him, which she might claim by his Decease; thereafter the Wife dying, and her Testament being Confirmed, whereby her Bairns got all the Gear pertaining to her, an other (by these Bairns motion) takes a Dative *ad omissa* to the half of the Goods, pertaining to the Husband, not Confirmed in the Wifes Testament, and Pursues the said Husband therefore, who Defending himself with the said Contract; and the Pursuer Answering, that it was a Writ against Law, done betwixt Husband and Wife, who cannot Contract *stante matrimonio*, and therefore is null; for otherwayes all Women might be prejudged heavily, who might be induced to prejudge themselves the time of their Marriage, if such Writs were permitted: The *Lords* not the less Sustained the Exception, and Found the Contract lawful, albeit done betwixt Man and Wife the time of their Marriage, because it was *Contractus mutuus*, containing therein a Donation Reciprocal and *vicissitudinarie*, which is not prohibit in Law, and none could quarrel the Contract, except they would restore that which was received by the Woman, and render it back again to the Husband, for it were Iniquity that the Wife should prejudge the Husband, by receiving from him, and not to render again what was received, if any would have her free of the Contract; for *jura subveniunt lasis & deceptis*, *& non ladentibus & decipientibus*: Likeas the Woman after the Contract compeared Judicially, and Ratified the same, and died never quarrelling, nor Revocking the same before her Decease; In respect whereof the *Lords* Found the Contract sufficient and lawful, as said is. Actor. *Hepburn*. Alter. *Nairn*. *Gibson* Clerk. *Vid. February* 11. 1634. *Drummond*. *June* 17. 1631. *Chapman*. *February* 2. 1632. *Bartilmo*.

Johnston contra *Irwin*, *Eodem die*.

One *Johnston* as Assigney made by *Irwin* of *Braes*, to an Obligation of 1400 Merks, adebted to him by another *Irwin*, Pursuing for Delivery of the same; the Maker of the Bond conform to his Ticket, granting the receipt thereof from the Cedent, and obliging him to redeliver the same; And the said Debitor Alledging the Assignation to be null, because albeit it was Subscribed by two Nottars, yet the same was not done *vince actu*, as is necessar, but only by one Nottar before two Witnesses to his Subscription, and by another Nottar before other two Witnesses to his Subscription, and so is not agreeable

to

to the Act of Parliament, being a Matter of Importance: And it being Answered, that the Act of Parliament requires not, that there shall be four Witnesses present to the Subscription of each one of the two Nottars, and that Writs Subscribed by two Nottars before two Witnesses, to each one of their Subscriptions are null; but *Negativè* Declares Writs which are not Subscribed by two Nottars before four Witnesses to be null, and which is done to eschew falshood: This Reply was not Discussed, but the Allegiance was Repelled, because the Cedent concurred with the Assigney, and assisted the Pursuit, Which the *Lords* Found Supplyed any defect Alledged in that Assignation. *Vid. March* 20. 1633. *Craig* contra *Cow.*

Brown contra *Thomson*, *March* 15. 1634.

MArgaret *Brown* being Married upon one *Thomson* her Husband, who died within the year after their Marriage, she Pursues the Heir of her said Husband for Repetition of her Tocher, *viz.* 2500 Merks, which by his Discharge he had granted was payed to him; And the Defender Alledging, that the Discharge could not burthen the Heir, because it was Subscribed by the Defunct on his Death-bed, and so could not prejudge the Heir; And the Pursuer Replying in fortification of the Discharge, that the Sum was really numerat and received by the Defunct. The Defender Duplyed, that the Enumeration was Elusory, for instantly after a form of Enumeration was made to the Defunct, he being then on his Death-bed, he immediatly rendred back again the Sum to the Payer of the same: And the Pursuer Replying, that albeit he had given it back again, yet the Discharge must bind his Heir, seing the Sum being once given to him, and so being beside him as a moveable Sum, if he had given the same to any other, it was lawful for him so to do, and the doing thereof could not have prejudged the Pursuer to have repeated the Tocher Discharged; even so the giving of the Sums to the Pursuer, Liberats not the Heir of the burden of the Discharge, which makes him lyable for the Defuncts receipt of the Tocher, in respect of the Law, which provides Repetition, where the Parties lives not year and day, there being no Bairn procreat betwixt them. The *Lords* Found, in respect of the Discharge and real Payment, albeit the Discharge was made on Death-bed, and also albeit the Money was instantly redelivered, that the Heir of the Defunct was lyable to pay again the half of the Sum Discharged and no more; for they Found that the Defunct by way of Testament or Legacy might leave his own part, which is Testable, to the Pursuer, and so by the like consequence, that the giving of the Tocher back again was effectual, in respect of the Discharge, granting receipt to make the Defender lyable for the half, as his Legacy, which struck upon his own part, and so did affect the half, and therefore Decerned the Defender to pay to the Pursuer the half of the Sum contained in the Discharge. Actor. Alter. *Gibson. Scot* Clerk. *Vid. July* 23. 1634. *Maxwel* and the Cases there.

Dowglass contra *Bothwel*, *March* 18. 1634.

THe deceast Lord *Whittinghame* having a Pension of 100 pound to be payed out of the Blench-duties of the Erection of *Holy-rood-house*, umquhile Mr. *Francis Bothwel* being Tutor to *John* now Lo. *Holy-rood-house*, gives a Bond to the said Lo. *Whittinghame*, for payment of that Duty of the Cropt 1624, at *Martinmass*, the said year, and dies before the Term of payment; which Obligation *Whittinghame* Assigns to *Dowglass* his Servant, who Pursues the Heirs and Executors of umquhile Mr. *Francis*, for payment; who Alledging, that the Lo. *Whittinghame* after this Bond, was in use diverse years thereafter, to receive payment from the said *John*, now Lord *Holy-rood-house*, of the said Pension; Likeas he had granted payment by three several Discharges, of three

years payment thereof, for three years together; and which of Law must presume payment of all preceeding Terms, and consequently must liberat from this Bond. The *Lords* Found the Exception Relevant, to liberat the Excipient from this Bond; albeit the Pursuer Replyed, that this presumption ought not to liberat from that year, whereof the Party Creditor had provided himself of a sufficient Security by the Bond, in which case the presumption ceases; and the payment made thereafter by another Party than by him, who was obliged by this Bond, cannot liberat him, who was obliged by the Bond, being a distinct Party. Which Reply was not respected, by reason that the Bond was granted by the Tutor to him, who thereafter had made the payment excepted on, and also that it was so long layen over, never craved till now. Actor. *Craig.* Alter. *Gibson* Clerk.. *Vid.* 17 *Feb.* 1631. *Williamson*, and the Cases there.

Watson contra *Orr*, *March* 21. 1634.

IN this Cause, whereof mention is made 15 *Feb.* 1634. It being there Alledged, that the one Sister Conveened as Successor, could not alone be Found lyable in the whole Debt Acclaimed, because the other two Sisters had every one of them received from the Father in Money, satisfaction of as much near equivalent to the Land, wherein the Defender was Infeft, so that of reason they ought proportionally to bear their part of the burden. This Alledgance was Repelled, seing the payment of Moneys by the Father to his Daughter, in his own lifetime, was no Relevant cause *in Jure*, whereupon any ground of Action might be moved by the Creditor against them, for thereby they could not be repute Successors, as this Defender, against whom, as succeeding to her Fathers Heretage *post contractum debitum*, she had in Law and Practick a competent *Action hoc nomine*, which was not competent against the others, and therefore the *Action* was sustained *in solidum* against her; but the *Lords* reserved to her *Action* of Relief against the other Sisters upon that Ground, for the satisfaction received by them from their Father proportionally, as accords of the Law. *Item*, It being thereafter *Alledged* by the Defender, that she could not be Conveened as Successor *titulo lucrativo* to her Father, because she was Infeft in the Lands Libelled, whereto she was *Alledged* to have succeeded *ex causa oneroſa*, for the time of the acquiring thereof she was Widow, and was twice Married before the same, whereby it was lawful and probable, that she did so acquire the Heretable *Right* of the Land from her Father, for Causes onerous; and thereby it appeared that she acquired not the same upon any favour flowing from her Father; Likeas the Disposition made to her, and whereupon the Infeftment proceeded, bears, *To be done for Causes onerous*, viz. *for Sums of Money really payed, and confeſt to be received from her.* And it being *Replyed*, that the Narration contained in the Disposition, cannot make the same to cease to be a meer Donation, except the Defender will otherways lawfully instruct the real payment of the Moneys therefore, especially where this Confession is emitted betwixt Father and Daughter, to the prejudice of an anterior Creditor, especially seing the same is done after the Pursuer had recovered Sentence against the *Defender*, and her Father also, for *Production* and Delivery of the said Contract to her, by the which Contract she was constitute the *Pursuers* Debitor, wherethrough it may appear, that the Disposition truly is but a Donation, what-ever the conception of the words, and Tenor thereof otherways proports. This Alledgance was Found *Relevant*, notwithstanding of the Answer, which was Repelled; for the Disposition of the foresaid Tenor, was Found sufficient to Eleid that Ground, whereby the Defender was Conveened as Successor *titulo lucrativo*, seing it bore to be done for Sums of Money received; And the *Lords* Found it not necessary to prove the payment of the Sums otherways than by the Writ it self, and by her own Oath upon the verity thereof; and

Found

Found it not neceſſary that ſhe ſhould prove it otherways: and yet nevertheleſs the *Lords* Found, that they would take the *Declaration* of the Nottars, Subſcribers of the Diſpoſition, and of the Witneſſes inſert therein (without ſwearing, and taking their Oaths thereon) anent the verity of the ſaid payment, and what they know therein; which Declaration un-ſworn, they would take in preſence of the Defender, and before that ſhe ſhould Depone thereon, and granted Letters to the Purſuer to ſummon them for that effect. Actor. *Nicolſon* & *Gibſon*. Alter. *Stuart* & *Mowat*. *Gibſon* Clerk. *Vid.* 15 *Feb.* 1634. betwixt theſe Parties. 20 *Decemb.* 1638. L. *Renton*. 23 *Feb.* 1637. L. *Kinnaber*. 12 *Feb.* 1622. *Young* contra *Denniſton*, and the Caſes there.

Maxwell contra *Murray* and *Wright*, *Eodem die.*

ONe *Ker* of *Redpeth* having Diſponed his Lands Heretably to his Son, and to his Wife in Conjunct-fee, reſerving an Annualrent of 500 merks yearly, to be payed forth of any part thereof, to himſelf during his lifetime; and the ſaids Lands, with all Right the ſaid *Ker* of *Redpeth* had thereof, being thereafter Compriſed by *Alexander Maxwell* for Debt, and he being conform thereto Infeft in the Lands, and another, *viz.* *Murray*, Son to the L. *Blackbaroney*, having Compriſed the ſaids Lands, and the ſaid Debitors Right, as the ſaid *Alexander Maxwell* had done, and before *Alexanders* Compriſing, but not being Infeft in the Lands, it was queſtioned betwixt theſe Compriſers, which of them had Right to be anſwered of the ſaid Annualrent, reſerved to the common Debitor, in the foreſaid Infeftment of Fee, whereto the Compriſer, who was Infeft, claimed to be preferred to the other not Infeft, albeit he had Compriſed before him, ſeing he Alledged, that the reſervation of the Annualrent to the Diſponer, could not be bruiked but by Infeftment; for the Diſponer therein behoved to be repute, as if he never had been Denuded of the Fee of the Land *pro tanto*, but remained, notwithſtanding of the Fee given to the Son, as if he had not been Denuded, but that he retained the Infeftment thereof, although it was Retrinſhed to a Liferent, and could not be bruiked but by vertue of his prior Infeftment, with which it was Conſolidat, as an uſufruct cauſal, and not formal, which is conſtitute by a naked Liferent, diſtinct and ſeparat from the Property. And the other Party contending on the contrair, that he needed no Seaſin: The *Lords* preferred the prior Compriſer, albeit not Infeft, to the poſterior, albeit Infeft, and albeit both the Compriſings were of the Lands, and of the Debitors Right, and not of the Liferent of the Annualrent *ſpecificè*, which was not ſpecially Compriſed by any of the Parties, but under the general Clauſe, as ſaid is; for they Found the ſame might have been *ſpecificè* Compriſed, and the Right thereof good to the Compriſer, without neceſſity of a Seaſin; even as the Debitor might have Diſponed the ſame validly, without Seaſin, to the Receiver; For the ſaid Liferent was diſtinct from the Property, and was not inherent in the Property, he being Denuded of the Property, by giving of the Fee, and retaining nothing but a Liferent of the Annualrent, during his lifetime, which never made the Fee thereof to revive to him, conform to his prior Right; for then it could not have expired with his death, but he might have Diſponed it to another, to be effectual to the Receiver after his death, which could not be done; therefore the Alledgance was Diſcuſſed, as ſaid is. Actor. *Advocatus*. Alter. *Nicolſon*. *Gibſon* Clerk. *Vid. diem ſequentem*, *Wright*.

Wright contra *Lawder*, *March* 22. 1634.

James Wright being Infeft Heretably in ſome Tenements in *Lawder*, by Diſpoſition of *Ker* of *Redpeth*, Purſues a Removing; and the Defenders Alledging a prior Diſpoſition of his Liferent made by him, albeit without Seaſin, by vertue whereof one of the Defenders was in Poſſeſſion. The *Lords*

Preferred the prior Disposition without Seasin, where it was clothed with Possession, albeit there was not a Liferent in the Disponers person, distinct from the Property, but that he was then Fiar; neither was it respected, what the Pursuer Alledged, that the Defenders Disposition of the Liferent made to him, was not clothed with Possession, before the Pursuers acquiring of the Heretable Right, as he Replyed it ought to be, seing both the Parties Rights were made within thir two or three years last bypast, and the prior Right acquired, and being now clothed with Possession the time of this Pursuit, was sustained without Seasin, as said is; But the Disposition of the Liferent not clothed with Possession, albeit prior, was Repelled, because the Seasin and this Pursuit gave preference to the same, even as if there had been two Dispositions made, the prior last intimat, or not intimat at all, would have been postponed to the second Disposition first intimat. Actor. *Stuart.* Alter. *Vid. diem precedentem, Maxwell.*

Rynd contra E: *Dumfermling, Eodem die.*

JOhn *Rynd* Pursuing the E. of *Dumfermling* for Sums, as the price of Merchant Wares furnished to him and his Lady, conform to his Subscribed Compt; and sundry of the particulars of the Compt wanting the consent and direction of the Defenders Curators, being then and yet Minor, and so Alledged to be null. The Alledgance was Repelled, and the Action sustained, in respect the whole Compt was Subscribed by the Minor, and the greatest part of the Articles had the approbation of his Curators: Likeas the Pursuer was his ordinar Merchant, who was in use to furnish him in all times preceeding. *Scot* Clerk.

L. *Hart-wood-myres* contra *Turnbul, Eodem die.*

A Submission being made betwit thir Parties to Arbitrators, anent either of their Rights to the Lands of *Philiphaugh* and *Hadden.* The Judges Decerned *Turnbul* to Dispone to *Hart-wood-myres,* with consent of *Turnbul* his Son, his Right of the said Lands Heretably, and *Hart-wood-myres* to pay therefore to *Turnbul* 7000 merks; whereupon *Turnbul* being Charged, he Suspends, that the Decreet is Null, being *ultra vires compromissi,* seing he had submitted all his Right, that he had to the Lands, and took no Burthen for his Son, so that the Judges had no Power to Decern him to Dispone, with consent of his Son, but his own Right only. The *Lords* Found this Reason no ways sufficient, but sustained the Decreet, seing it was a base *Fee,* which the Son had Acquired from the *Father,* which Right coming to the Arbitrators Knowledge, after the Submission, they shew'd to the Suspender, that they behoved to Decern him to obtain his Sons consent, to that Disposition of the Land, without which he could not have a perfect Right, whereunto the Suspender acquiesced, and was content therewith; and which the Charger offered to prove by the Declaration of the *Arbitrators,* the *Lords* sustained the same to be so proven: For they *Found* it unjust, that the Heretable Right of the Lands should subsist in the Sons Person, and that the *Father* should receive from the Charger, as the Decreet *Arbitral* appointed, 7000 Merks, which was reput to be a competent price for the full *Right* of the Lands. It being thereafter *Alledged,* that the Charger had past from the said Decreet, in so far as since the date thereof, he had of new again, submitted his *Right* of these Lands to the Arbitrators, whereby he could never cloth himself with that Sentence, nor return thereto. This *Alledgance* was *Repelled,* seing nothing had followed upon the New Submission, nor no Sentence given thereon; for the *Lords* Found, that the Submission being expired, and nothing done thereon, and the Charger never expressly Renouncing his former Decreet in the Submission, he was not thereby prejudged in the said Sentence

Sentence, but the same stood in its own force, and so the Decreet was sustained, and Found not *ultra vires*. Actor. *Stuart*. Alter. *Gibson* Clerk.

Ochiltrie contra *Miller*, *Eodem die*.

A Donatar to a Bastards Gift of Single Escheat, Pursuing for payment of a Sum owing to the Bastard, by Heretable Bond. The *Lords* Found this Heretable Bond fell under the Gift of Single-Escheat, and that it needed not to be conferred by Presentation, there being no Seasin, nor by no other manner of Gift. *Item*, a Bond of 100 pounds, Subscribed by one Nottar only, was sustained, because it exceeded not that Sum; and the *Lords* Interpreted Matters of Importance, which requires two Nottars, to exceed that Sum, and not these which extends thereto, and no more. *Scot* Clerk.

Glasford contra *Dawling*, *Eodem die*.

ONe *Glasford* Clerk of *Leith*, married upon one *Dawling*, gives out 1000 Merks upon an Heretable obligation, *To Himself and to his Wife, and to the longest liver of them two in Liferent, and to the Heirs of the Wife after her decease*: The Wife being deceast, and the Debitor Suspending upon Double Poynding, against the Husband, on the one Part, and *Robert Dawling* Brother Son, and Heir to the Wife, on the other Part, and they being both heard anent their Right to the said Sum; The *Lords* Found, that the Husband had the only Right to the said Sum, and that the same pertained to him Heretably, and not to the Heir of the Wife, because the *Lords* respected the Bond of the Tenor foresaid, as *Donatio facta à viro uxori*, and so that it was Revockable, likeas he had Revocked the same; and therefore the Destination of payment appointed to the Wifes Heirs by the Bond, could not take effect against the Husbands will, Revocking the same: neither was it respected, what the Heir of the Wife Alledged, that the Revocation was made after the Wifes decease, and so was not done *Debito tempore post jus acquisitum Haredi*, who could not be prejudged of that Benefit of the Obligation, by that Revocation done after the Wifes decease, and after the Heir became clothed with the Right, whereof he could not be prejudged, but by a Deed done by himself; for the Wife & the Husband once agreeing upon the choise of an Heir, to whom they had provided by Consent the Fee of that Money; neither could they, far less one of them alone without the other, alter that choise which they had made, and much less could the alteration be made against the Will of the Heir, after the decease of the Wife, who died in that Will, which Alledgance was Repelled. Actor. Alter. *Nielson*. *Scot* Clerk.

Dumbar contra Provost of *Elgin*, *March* 26. 1634.

ONe *Dumbar* Pursuing the Provost of *Elgin*, for payment of a Debt owing to him by his Debitor, who was Rebel, and for not taking of which Rebel, he had Charged the Defender, as is usual in such Cases, and for not doing whereof he had Pursued the Magistrats, who Alledging, that seing the Rebel, who was Debitor, was dead before the Intenting of this Action, Therefore, that no Process can be granted against them, while the Decreet were first Transferred in some to represent him: This Alledgance was Repelled, and the Action sustained, without necessity of Transferring in the Person of any to represent the Principal Debitor, seing the Heirs and Executors to Represent him, were called in this Pursuit, for their Interests, which the *Lords* Found enough, and so sustained the Action. *Gibson* Clerk.

La. *Dumfermling* contra E. *Dumfermling*, *March* 27. 1634.

THe Lady *Dumfermling* Pursuing the Earl her Son, and his Curators, for payment of her Terce Duties of his Lands, whereto she was Kenned, in Consideration of certain Defalcations, which the Defenders Curators desired to be taken off the Terce. The *Lords* having heard the Parties upon the saids Defalcations,

falcations, there being a *Defalcation* Alledged, that the umquhile Earl, Husband to the Lady, had burdened the Land, whereof the Lady was Conjunct-fiar, with a Pension of pounds yearly to be taken out thereof: And albeit by the Warrandice contained in the Ladies Infeftment of Conjunct-fie, her umquhile Spouse had obliged him, and his Heirs, to Warrand the Lands to her, from all Rights, *&c.* whereby the Heir stands obliged to Warrand the Conjunct-fie Lands, that they could not be Burdened with the said Pension, yet seing the same was a Real Right, affecting these Lands to the Pensioner, the said Pensioner has recourse to other Lands pertaining to the Earl, whereof the Lady has no Conjunct-fie Right, which other Lands being so affected with the said Real Right of Pension, and so a Burden thereupon, behoved in Law to Defalk so much of the Terce of the Lands acclaimed by the Pursuer. This Alledgance was *Repelled*, and the said Pension found to be no Burden, so to affect the Lands, as that thereby the Ladies Terce should be Defalked, in any part for the same; *Item*, the Lady being provided by her umquhile Husband, to the *Right* of some Teinds, with Warrandice also, and there being an Imposition of a Burden for the Ministers Stipend, laid on upon these Teinds yearly, more then she was Subject to, by the *Right* made to her by her Husband, and according to the Law, and procedure by the General Commission, now superveening since the making of her *Right*, and she craving the Heir to Warrand the saids Teinds, from that Burden. The *Lords* Found, notwithstanding of the Clause obligator of Warrandice, contained in her *Right*, that she had no Action of Warrandice therefore, and that the Heir was not holden to Warrand from any supervenient Law, which was a publick Law, which could not strike against *Parties*, to draw them to Warrand from *Facts* Impresstable: Also Defalcation being craved for the Third Part of the *Fee*, payed by the Defender to the Chamberlain, who intromett with the Third, and the Earls two Part promiscuously, there being no *Separation*, nor Distinction, whereby the one was known from the other; for she receiving payment of the Third, the Earl Alledged, that she ought to allow to him, who in-gathered the same, seing she could not have received the same, if she had had the managing thereof her self, without expenses, Charges, and furnishing to her Servants, who should Collect the same. This Alledgance and Defalcation was refused, and no Allowance given to the *Chamberlain* for his *Fie*, which might diminish any *Part* of the Ladies full Third. *Actor. Stuart, Advocatus & Nicolson. Hay* Clerk. *Vid. July* 28. 1635. La. *Cardros. March* 10. 1636. La. *Dunipace.*

Richardson contra *Maxwell, June* 18. 1634.

AGnes *Richardson* having obtained Decreet against *Maxwell* of *Frier-corse*, before the Commissar of *Dumfries*, Decerning him to relieve the said *Agnes Richardson* of the Sum of 80 pounds, which she had payed as Cautioner for *Maxwells* Son, of the which Cautionry, and Sum, he had promised to Relieve her; and also *Decerning* him to pay to her the Sum of Fourty pound for Meat and Drink, Furnished by her to the Defenders self: and the verity of both which Articles was referred to the Defenders Oath, and *in panam contumaciæ & in supplementum*, the Pursuers Oath was taken upon the Libel, whereupon Sentence was Pronounced, which being Suspended, because it was given, *a non suo Judice*, the matter being Civil, and albeit referred to Oath, whereby the Commissar might appear to be competent Judge, yet seing the Subject exceeded 40 pound, and so is above the Injunctions given to Commissars, whereby they have only Power in Civil Matters, where the same are referred to the Parties Oath, if the Sum exceeded not 40 pound, and above that Sum they cannot proceed, albeit referred to Oath. The *Lords* Found not this *Reason* Relevant, to Suspend the Decreet, but Sustained the same; tho it was

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in a Matter of 80 pounds; for Ordinarily the *Lords* Found, That the Ecclesiastical Judge may proceed in Civil Matters, referred to Oath, extending to 100 Merks, and this being but for 20 Merks more, the same was not thought of such Importance, at to anull the Sentence; for as concerning the other Article of Fourty pound, albeit it was in the same Lybel and Sentence, yet it was considered, as if it had been Pursued in a distinct Lybel, and as a several Sentence, seing it was for another Subject, and cause of a different nature from the other, the one being for Relief, and the other for Furnishing of Vivers to himself; neither was the offer of the Suspender, to give his Oath, received now *post Sententiam*, there being no cause Alledged to excuse his Absence, and not Compearance at the day whereto he was cited, and that the Pursuers Oath was also taken upon the Truth of the Lybel, whereby there might be fear of Perjury, if the other Parties Oath should now be taken, if he should deny the Lybel. Actor. *Cunningham*. Alter. *Gibson* Clerk. *Vid. July* 19. 1625. *Ker*.

Supplicant; *June* 21. 1634.

THis Day a Supplication was given in to the *Lords*, by Proporting, that he was Prebendar of of the which Prebandry the Lands of were Holden, and of which Lands he was Heretor, so that he could not grant a Precept by himself to himself, to take Seasin of these Lands, and therefore craved a Warrand to the Director of the Chancellary, to give out Precept and Charges to the Sherif of the Shire, to give him Seasin of these Lands, This Supplication was granted: for it was considered by the *Lords*, that no Person could have Prejudice thereby, and that it was also needlesly craved by the Supplicant; for he being Heretor of that Land, which held of a Prebendar, of a Kirk Benefice, *viz.* The Priory of *Creill*, and he being also Prebendar himself, during his Lifetime of that Prebendry, whereby he became for his Lifetime Superior to himself of these Lands, he might as Prebendar Infeft himself as Heretor, by his Precept Direct as Prebendar, for he had two Relations: and this was of old done by the Earl of *Bothwell*, who being Prior of *Coldingham*, and Heretor of Lands holden of the said Priory, Directed Precepts, as Prior, to Infeft himself as Heretor, and the same was Found lawful, and Sustained; But I like the Form desired by this Supplication rather, whereby there was no such Confusion as is in Properties and Superiorities, where the Superiorities are also Heretable, *quo casu* the Property accresing to any who is Heretable Superior, there is no necessity of a new Seasin, seing the Seasin of the Superiority, will carry with it the Property, where there is no other Proprietor; but it is not so in these Benefices conferred upon Persons, Temporally provided for their Lifetime, where their Provisions may give them Right to the Fruits of all belonging to their Benefices during their Lifetime, but will give them no longer Right to any Lands, or other things holden of that Benefice, without a new Right lawfully Acquired and Established in their Person.

contra *Hamilton*, *Eodem die*.

CErtain Furnishers pursuing Sir *James Hamilton* for the Price of certain Furnishing, really and necessarily made by them to his Lady, Bairns and Family in his absence, by the space of two years, or thereby, *viz.* a Baxter for Bread, and a Flesher for Flesh, and a Cordiner for Shoes and Pantons; Likeas they all offered to prove, that before thir years pursued for, they were all in use to Furnish in that same manner, to his Lady, Bairns and Family, divers preceeding years, for which they were well satisfied; as also a part of this same Furnishing, now acclaimed, was made by them since Sir *James* his coming to *Scotland*, and the said Sir *James* was Partner, and eated of the said Bread, and

Fleshes in his House, with his Lady, for the space of Three or Four Moneths, of the space acclaimed, ay and while he Diverted from his Lady, and pursued Divorcement (since which time they pursued not for furnishing sensine made) And the said Sir *James* Excepting, that he was not in Law obliged to pay the said furnishing to them, albeit it had never been so necessar; because before his going out of the Countrey, he appointed a yearly Provision to be given to his Lady, for furnishing her self, her Bairns, Servants, and whole Family, Answerable to his Estate and hers, in all Necessar and useful things, and which was accordingly payed to her by his Servants, who had direction to pay the same, and whereupon Acquittances were yearly received from her; so that the Pursuers having no Direction, or Warrand from him, or any by his Power, to make the furnishing, he ought not to be Lyable therefore. The *Lords* Found the Exception Relevant, for the *Lords* Found, that the Defender having given to his Lady als sufficient a quantity of Money yearly, during each year Lybelled, as might conveniently suffice for maintenance of his Lady, Bairns and Family, he was not Lyable to pay these Furnishers, except he had given Direction to them, or Command to do it, or that he had known that they had Furnished her, and also had known that they were not payed therefore by her; for they having no Warrand from the Husband, what they did without the same, they did it *suo periculo*; Neither was it needful to have been intimat to them, that the Husband had appointed Maintenance yearly to his Wife, whereby they might have looked and provided for their own Security (as it was Replyed by them) nor were they ever Discharged to furnish, which the *Lords* did not respect, seing they had no Warrand to furnish from him, and it was not necessar to them to furnish; for nothing could have compelled them thereto, albeit the Husband might have been Compelled to Aliment his Family, which being done by him, he was no further bound in Law; and so the Action for the Danger of the Preparative was not sustained, for otherwise Wifes, or Servants might bring on many bygone years furnishings upon their Husbands and Masters, to their overthrow, if they should thereby Intervert the Moneys allowed by the Husband, for Sustentation of his House, applying the same to any other unlawful use, and bring the necessar furnishing of his House back again upon him; so that furnishers ought only to Rely upon the Security of payment to be made by these, by whose Warrand they do the same, and with whom they make their Bargains, or else to take payment in hand. Actor. *Cunningham*. Alter. *Nicolson* & *Stuart*. *Hay* Clerk. *Vid. November* 27. 1624. a Baxter in *Leith* contra *Mckeson*.

L. *Renton* contra La. *Aiton* and L. of *Blackader her Spouse*, *June* 25. 1634.

IN a Spuilzie of Teinds founded upon a Right made by *John Stuart* of *Coldingham*, and *Francis Stuart* L. *Morisloun*, and *Robert Douglas* to the Pursuer of the same Teinds, at the time of the making of which Right the Pursuer gave a Bond to the saids Persons Authors of his Right, that he should never exact more for these Teinds, now acclaimed from the Lady *Aiton*, but only 100 pound yearly, which Bond is Registrat in the Books of Council, and made publick; and upon which Bond the Lady *Aiton* Defender propones this Exception, that she could not be found to have committed Spuilzie, which Exception the *Lords* Found Relevant, and sustained it to Elide the Spuilzie; notwithstanding that the Pursuer Replyed, that this Bond containing the foresaid Clause could not Defend her, the said Clause being conceived in favours of a Third Party, who was neither present the time of the Parties Transacting thereon, she not being a Party, nor knowing any thing of the Bargain, and doing nothing upon it, nor being accepted by her, nor by none in her Name, and so behoved to be Improfitable to her, being *stipulatio alteri facta*, which is not Profitable in Law; Likeas thereafter all the Parties Authors of the said Disposition

sition, and Receivers of the Bond, containing the said Clause, had Discharged the same, and all the whole Heads thereof, to the Pursuer, except the L. *Morison*, whereby the same became extinct, as if it had never been made, seing she was not Contracter, which Reply was Repelled, for the *Lords* Found; that seing the said Bond was Registrat, and so made publict, the same could not thereafter validly be Discharged without the Consent, and expreis Deed of that Person, in whose favours the Clause was conceived; likeas the whole Persons to whom the same was made, and who Disponed the Teinds to the Pursuer had not all Discharged the same; For if it might have been validly Discharged without consent of the Third Person, (as it was not Found) yet all their consents behoved to have been given thereto; and seing *Morisons* consent was not adhibited, who survived long after the Discharge, and which is now Impossible to be had, he being now deceased, therefore the Discharge was not respected, to derogat to the said Third Person. Actor. *Stuart* & *Nicolson*, Alter. *Advocatus* & *Belshes*. *Gibson* Clerk. *Vid. January* 15. 1633. *Shanks*, and the Cases there cited.

Bruce contra *Durie*, *June* 26. 1634.

ONe *Durie* of *Craigluskart* having Infeft his second Wife, called *Margaret Bruce*, in some Lands in Liferent after his decease, by a publick Right confirmed, in the which Lands he had long before Infeft his Son, begotten of a prior Marriage in Fee, by a base Right, reserving his own Liferent: After the Husbands decease at the next Term, the Relict pursues the Tennents for the Mails and Duties of the Land, the Son Compearing, and by vertue of his Prior Right claiming preference; The *Lords* Repelled this Alledgance, and preferred the Relict, whose Right being publick, and the Sons Right being but base, albeit prior, yet not being clothed with Possession, nor no Deed done, nor no Diligence to apprehend Possession, it was not Found to be of Force, to hinder the effect of the posterior publick Right, granted by the Husband to the Wife, for her Liferent and sustentation; albeit the Son Alledged, That he could not have done Diligence to get Possession, before his Fathers decease, who was Liferenter, who died but at the Term Immediatly before this Pursuit, in which Pursuit, he now timously Compeared, to claime the benefit of his Right, which was not Respected, but Repelled. Actor, *Bruce*. Alter. *Hay* Clerk. *Vid. July* 1. 1634. betwixt the same Parties.

Keith contra *Innes*, *Eodem die*.

THe Debitor being obliged to pay a Sum to his Creditor, at the Term contained in the Bond, and in case of Failzie, to his Son named in the Bond, and the Father, who was Principal Creditor, living diverse years after the Term of payment, and receiving the Annualrent of the Sum, and thereafter dying, never making any Alteration by Testament, or any otherwise, concerning that Sum, to give or provide the Right thereof otherwise to any other, after whose decease the Son substitut charges the Debitor to pay the Sum, who Suspending, that seing the Principal Creditor lived diverse years after the Term of payment, therefore the Clause of Substitution, whereby payment was obliged to be made to the Son, in case of the Fathers decease, had not taken effect; And consequently the Sum pertained to the Defuncts Heirs or Executors, and ought to be Confirmed in Testament, and the Son could not charge therefore. This Reason was not sustained, specially seing the same was proponed by the Debitor, and there was neither any Heir or Executor of the Defuncts, or any of the Defuncts Creditors, who Compeared to claime that Sum, and Propone the same, so that it was not Competent to the Debitor to excuse him from payment; and seing the Defunct, albeit he lived after the Term, ne-

ver changed his Will, therefore the substitute Person was Found to have Right, as said is, *Hay* Clerk. *Vid.* 15. *June* 1630. *Thomson.*

Lo. *Johnstoun* contra E. of *Queensberry*, *Eodem die.*

IN a Double Poynding betwixt these Parties, wherein the Earl producing a Seasin for his Right: The Lord *Johnstoun* Alledged the same to be null, because it bore in the Nottars Subscription, to be Written *aliena manu*, and it Designed not by whom it was Written, conform to the Act of Parliament 1593. at least the User thereof should yet Design the same, seing he wanted the Means of Improbation, all the Parties therein, and all the Witnesses being dead and the Nottar. 2°. He Alledged it was null, because the foresaid Nottar was never Admitted Nottar, conform to the Act of Parliament 1563. anent Admissions of Nottars, which provides Instruments, given out by Nottars not Admitted, to be null; and this Instrument is so, except the Party will qualifie that he was Admitted conform to that Act: Both these Alledgances were Repelled, for it was Found unnecessary to Design a Writer of a Seasin, and that Seasins came not under the Act of Parliament 1593, for these Writs are not Writs made by Parties, as that Act of Parliament means, but it is the Act of the Nottar, and not of the Party: And as to the second, The *Lords* Found, that the Party needed not in this Judgment to offer to prove, that the Nottar was Admitted conform to the Act of Parliament, but reserved to the Proponer to Pursue that Nullity by way of Action thereupon, as accords of the Law; So these two Alledgances were Found Novelties to be proponed, and if they were received, might produce in all Causes great delay, and trouble to Parties, which were against reason to Sustain. Actor. *Advocatus* Regis & *Nicolson*. Alter. *Stuart* & *Cunninghame*. *Scot* Clerk.

Durie contra *Bruce*, *July* 1. 1634.

IN this Pursuit mentioned before upon the 26 of *June* 1634. for Mails and Duties of the Lands of *Badrig*, at the Instance of *Margaret Bruce*, Relict of umquhile *George Durie*, who was Infeft therein in Liferent by her said umquhile Husband, holden of the Superior, and *James Durie* Son to the said umquhile *George* of a prior Marriage, Compearing and Alledging, that she had no Right thereto, but he ought to be answered of the Duties of the saids Lands, because the said umquhile *George* his Father, long before the Pursuers Right, had Infeft his umquhile Mother in Liferent, and umquhile *John Durie*, eldest Son procreat betwixt them in Fee in these Lands, to which *John* he is Heir, reserving also the Fathers Liferent, whereby he has the better Right; and albeit it was but a base Infeftment, yet seing the Fathers Possession and the Mothers was continued, so long as they lived together, whose Liferent is also Constitute by that same Infeftment of Fee, their Possession must be repute his: Likeas, this Pursuers Right is but a poor and naked Donation by the Husband to the second Wife, having no preceeding necessary Cause, which might have produced that effect; and albeit publick, yet being posterior to his, *& sine causa*, and never clad with Possession year and day, as is required by the Act of Parliament, *Ja.* 5. *anno* 1540. Therefore he ought to be preferred. This Alledgance was Repelled, and the Pursuers Right, albeit posterior, was preferred, seing the Husband had provided her to no other Means whereby to live, he being obliged by her Contract of Marriage, to as great Provision as the Avail of these Lands yearly extended to, which not being done, the *Lords* Sustained this Infeftment, seing she had nothing for her Provision but the same; And it was not respected that her Infeftment had no relation of being made for Implement of her Contract of Marriage, nor made no mention thereof. Actor. *Bruce*. Alter. *Nicolson*. *Hay* Clerk. *Vid. June* 26. 1634. betwixt the same parties. *July* 12. 1634. Sir

James

James Oliphants Creditors. *February* 14. 1633. *Charters*. *July* 17. 1635. L. *Craighal*.

Mr. *Rob: Glendinning* contra L. *Barnbarroch*, *Eodem die*.

Barnbarroch having sold some Lands to *Glendinning*, which were holden Ward of the Laird of *Lauchop*, which *Alienation* bore *simple Warrandice*, and particularly from all *Wards*, and to obtain *Lauchops* consent: And the said *Glendinning* having obtained the Gift of Recognition from *Lauchop*, and thereupon Declarator, thereafter Pursues Warrandice against *Barnbarroch*, who *Alledged*, that seing he was secured by the *Acquiring* of the Recognition to himself, all cause of Warrandice ceased, seing he ought also to have Intimat to the Defender, and Required him to have Purchased the Superiors Consent, before he took the *Recognition*, which he would have done: And the Pursuer Answering, that it was as favourable to him to have taken the Gift of Recognition, as to a Stranger; Likeas the Defender was obliged, to purchase the Superiors consent betwixt and a day, which has expyred many years before he Acquired this Right. The *Lords Repelled* the Exception, and Sustained the Warrandice, but they retrinched the same to the Sums payed to the Superior by the Pursuer, for Acquiring of the said *Recognition*, with the Expenses made by him since in Pley, and prosecuting the same, and no further. Actor. Alter. *Gilmor*. *Gibson* Clerk. *Vid. March* 8. 1632. *Logan* of *Balvy*.

Hume contra *Hume*, *July* 3. 1634.

ONe *Hume* Brother to *Polwart* being Charged to pay a Sum, contained in his Bond Subscribed with his hand, who Suspending and Alledging, the Bond to be null, because there were no Witnesses insert in the body of the Bond; and albeit the same was Subscribed by two Witnesses, yet seing their Names were not insert in the Bond, nor no other Witnesses Names; therefore the same ought not to make Faith, in respect of the Act of Parliament 1579, which requires that the Witnesses be insert in the Bond. The *Lords* Repelled this Reason, and Sustained the Bond, seing there were two Witnesses Subscribers of the Bond, which they Found alse good as if their Names had been insert: And where this Decision may appear to differ from that of the Sheriff of *Cavers*, Noted here under, the same may be reconciled thus, that that of the Sheriff of *Cavers* was in a Writ not Subscribed by the Party, but by Nottars for him, in which case the Act of Parliament requires four Witnesses Names to be specially Designed, and Insert in the Writ, and this Writ is Subscribed by the Parties own Hand, and the Act stricks not so directly on it. Actor. *Gray*. Alter. *Craig*. *Gibson* Clerk; *Vid. July* 8. 1623. Sheriff of *Cavers*.

Melvill contra *Drummond*, *Eodem die*.

Esther Taillor and *George Melvill* her second Spouse, Pursues *Archibald Drummond*, Executor to umquhile *Drummond* her first Husband, for payment to her of a Sum of Money, left in Legacy to her by her Husband, wherein the *Lords* Found, that albeit by the Law of *England*, where the Infestment was made, which bore that Legacy, the Testator might leave Legacies of Heretable Sums, and that the Heir could not quarrel the same, but that such Legacies are effectual; and albeit the Heir was born in *England*, and so was Alledged behoved to be subject to the *English* Laws, yet seing the Money left, was adebted in *Scotland*, and was a Sum which could not be Disponed upon by way of Testament, and so came not under Legacy, according to the *Scottish* Laws, therefore that the Relict had no Action to Pursue for the same, by the Practick and Laws of this Realm; for *bona tam mobilia quam immobilia regulantur juxta Leges Regni & loci in quo bona ea jacent, & sita sunt*; for this Legacy was *in corpore individuo*, of another nature than what was Testable in *Scotland*, being of a particular Heretable Bond. Actor. *Stuart* & *Gray* Alter. *Nicolson* & *Gilmor*:

Gilmor. Gibson Clerk. *Vid.* 9 *Decemb.* 1623. Col. *Henderson*, and the other Cases there noted. 27 *July* 1633. *Worlie.*

L. *Lanchop* contra *July* 8. 1634.

L. *Lanchop* having Right from the Donatar of umquhile *Gavin* B. of *Galloway's* Liferent, after general Declarator, Pursues by special Declarator, the Intromettors with the Duties of his Benefice, pertaining to him, of certain years, addebted to the said umquhile Bishop; wherein the Horning being produced, whereon the Gift and Declarator proceeded, the Defender Alledged the Horning to be null, because there interveened three years betwixt the Execution of the Charge and the Denounciation; which Alledgance was Repelled, and notwithstanding thereof the Horning found sufficient, and well Execute; because before the Denounciation, there preceeded an Intimation, made to the umquhile Rebel, two days before he was Denounced; which Intimation proported, that the Party, at whose instance the Horning was Execute, had obtained a Protestation before the *Lords* of Session, against a Suspension of these Charges, purchast by the said umquhile Bishop, by the which Protestation Letters were ordered to be put to Execution, which being so intimat to the said umquhile Bishop by the Officer, the *Lords* Found the Officer might thereafter *D*enounce; and the *D*enounciation being made within two days after the said Intimation, it was Found sufficient, and that there needed no new Charge to have been given by the Messenger: for the Alledged length of time that interveened since the said first Charge, as the Defender Alledged, ought to have been given before he could have been Denounced, and that the Intimation was not enough to warrand the Denounciation, without a new Charge, especially such an Intimation upon two dayes allanerly before the Denounciation. Likeas they Alledged, that if any Intimation might be sustained, to supply the Charge, and sustain the Horning; yet the same ought not to be upon so short a space as two days, but that there was requisite as many days to have interveened after the making of the Intimation, before the Party could be Denounced, as was requisite to the Charge, after the expiring whereof, Denounciation might be made by the Letters of Horning, and Warrand thereof; so that if the Charge was requisite to be given upon six days, or moe or fewer, as the Warrand appointed, so the Intimation ought to have been made upon no fewer, before the Officer could lawfully Denounce: which Alledgance was Repelled, and the Horning with the Intimation made, as said is, and the *D*enounciation following thereon were sustained. Actor. *Hamilton* & Alter. *Neilson*. *Scot* Clerk.

Dam *Margaret Preston* contra the Executors of her Son, *Eodem die.*

DAm *Margaret Preston*, Pursuing the Executors of umquhile *John Hepburn* her Son, to warrand her from a Debt Decerned against her as Executrix to her umquhile Husband Sir *Robert Hepburn*, and whereof the said umquhile *John Hepburn* should have relieved her said Husband his Father. The Defenders Alledging, that the whole Goods of the Testament of the said umquhile *John* was exhausted, by Sentences obtained by other Creditors of the Defunct, against them. This Alledgance was Repelled, and it was not Found sufficient to liberat the Executors, that Sentences were obtained by other Creditors against them, for as much as would exhaust the Inventar of the Testament, except also that payment had been made by the saids Executors to the Creditors, conform to their Decreets; for before payment the Executors could not be exonered, and when this Pursuer had recovered Sentence, as the other Creditors have done, the Executors might Conveen them, or Suspend all their Sentences: In which Process the Creditors might Dispute upon their preference, if there was

was not enough to pay them all, and then the Executors could not be further obliged, but *secundum vires Inventarii*. Actor. *Stuart*. Alter. *Hay* Clerk.

Bruce contra *Forbes*, *July* 11. 1634.

AFter an Interdiction and Publication thereof, the person Interdicted being *specificè* bound therein to Contract no Debt, nor do no Deed, *&c.* as the Style is usual in these Writs, *&c.* whereby he might be hurt in his Goods and Gear, or other Moveables, and so the Tenor thereof expressly extending to his Moveables, as well as to his Heretables; the said person Interdicted having given a Bond of Money, and being Charged by the Creditor to pay it, which being Suspended upon a Reason founded upon the said Interdiction; It was Found, that the Creditor might seek personal Execution by Horning or Caption against the Debitor, and also might Poynd and Arrest, and use all ordinar Execution against his Moveable Goods, but no Execution against his Lands, nor Heretage; notwithstanding that the Interdiction was of the foresaid Tenor *per expressum*, extending to Moveables, which the *Lords* did not respect; for they Found, that Interdictions could not be of larger extent, nor have any other force nor effect than Inhibitions hath, which extends not to Moveables, but only to Heritage; albeit it might appear that the like reason is to sustain Interdictions, so long as they stand, as well for preservation of Moveables, as Heritage; for if there be reason for the one, the same may be for the other, especially where it may be, that the Interdicted persons Estate consists most part in Moveables, or that he hath no Heritage at all. Actor. Alter. *Hope*. *Gibson* Clerk. *Vid.* 22 *January* 1631. *Hardie*. 11 *December* 1622. *Seaton*. 15 *March* 1637. *Brown*. 7 *July* 1625. L. of *Innerweick*.

Hay contra *Gicht*, *Eodem die*.

IN a Reduction of a Decreet obtained by the L. *Gicht*, against one *Hay* his Tennent, in his own Court, for payment of Farms conset resting owing by *Hay*, upon this Reason, because the Tennent was never Cited, and there was no Citation nor Execution extant to qualifie the same: In this Process the Baillie, Pronouncer of the Decreet, and the Clerk thereto, and the Officer Executor of the Poynding Execute thereupon, being called, and being all deceased now *lite pendente* before this Process was Discust, whereby the Defenders Alledged, that the Process should cease, while the same were transferred in some person, to represent them. This Alledgance was Repelled, and the *Lords* Found no necessity of Transferring, especially seing nothing was concluded against the Judge, for wrong done, nor no Reason Libelled thereon, and that the Party ought to be answerable for the Warrand of his own Sentence; especially the Baron's self being the obtainer thereof, in his own Court, before his own Baillie, the Members of the Court being of his own Creation. *Item*, The Defender offering to prove against the Reason of Reduction, that the Defender in that Decreet, *viz.* the Tennent, was Summoned to the giving thereof, and that he offered to prove it by Witnesses. The *Lords* Found this Alledgance Relevant to sustain the Decreet, and that it was Relevant to be proven by Witnesses, and that there was no necessity to prove the same by Writ; for in such Acts and Procedures before Baron Baillies, in Baron Courts, The *Lords* Found no necessity that there should be any Citation extant in Writ, seing the Citations in such Courts are frequently done by Verbal Direction, and if it can be proven that the Tennents be truly Cited, albeit not in Writ, it is sufficient. Actor. *Advocates* & *Monat*. Alter. *Nicolson* & *Baird*. *Hay* Clerk, *Vid.* 17 *June* 1624. *Crawfurd*, and the Cases there.

Lo. *Balmerinoch* contra Lo. *Jedburgh* and *Eliot*, *July* 12. 1634.

THE Lo. *Balmerinoch* having Compriſed certain Lands from the Lo. *Jedburgh*, and using the Order of Redemption, and seeking Declarator thereon:

againſt *Gilbert Eliot*, who had a preceeding Wodſet of theſe Lands; and the Defender quarrelling the Order, becauſe at the Term, to which the Redemption was uſed, he was ready, and Compeared with his Procurator, and offered a Renounciation, and was content to receive the Money, ſo that the Purſuer was in default himſelf, who would not deliver the Money, and receive the Renounciation; And where the Purſuer Replyed, that the Renounciation offered by the Defender was not ſufficient, ſo that he could not accept the ſame. He Duplyed, that the Purſuer ought to have preſented another Renounciation to the Defender, ſuch as he deſired to have been perfected to the Purſuer, which the Defender was ready to have Subſcribed, and to have then received his Money; which the Purſuer not doing, *per ipſum ſtetit* that the Redemption took not effect, and conſequently the Order cannot be found lawful; for he ought to have formed his own Security, which if the Defender had refuſed to Subſcribe (being lawful) then the Defender might juſtly have been Found to be *in mora*, but this not being ſo done, this Order cannot be ſuſtained. This Alledgance was Repelled, and the Order ſuſtained; for the Defenders Renounciation offered by him was not ſufficient, neither was it Found neceſſar, that the Purſuer ſhould have at the time of the Order, and at the Term of Redemption, offered ſuch a Renunciation to the Defender, as he would have had to be Subſcribed by him. *Item*, in this ſame Proceſs, the Defender having alſo an Infeftment of Annualrent out of the ſame Lands, by and attour the ſaid Wodſet; which Annualrent was Redeemable by Payment of the Principal Sum, Eight days after any Term of *Whitſunday*, or *Martinmas*, upon the premonition of Fourty Days preceeding; And the Purſuer having uſed the Order for Redemption of the ſame againſt that Term, whereto the Wodſet was craved to be Redeemed, and not to the Eight Day after the Term, as the Reverſion bore: This Order concerning the Annualrent, was not ſuſtained, ſeing the Defender was not Warned to come and receive his Money at the Eight Day after the Term; albeit the Purſuer Replyed, that that Clauſe was conceived in the Redeemers favours, and ſeing he had done more than he needed, by Warning him, and making his Money preciſly ready at the Term, that that Clauſe, which was conceived in his favours, ſhould not be converted to his prejudice; ſpecially where thereby the Defender has no prejudice, ſeing alſo he Compeared at the Term, to which he was Warned, and thereby cannot be excuſed by Ignorance, which Reply was Repelled, and therefore the Order was not ſuſtained for Redemption of the Annualrent. *Actor. Stuart* & *Lermonth. Alter. Nicolſon* & *Scot. Hay* Clerk.

Sir *James Oliphants Creditors*, *Eodem die.*

IN a Double Poynding, which of Sir *James*'s Creditors ſhould be anſwered of the Duties of theſe Lands, which were Appryſed by ſome, and who being publickly Infeft therein, craved therefore to be anſwered of the ſaids Duties of the Crop 1632, which was then controverted; And on the other part *Patrick Oliphant*, who craved to be preferred to *John Fairholm* the Compryſer, becauſe long before his Compryſing and Denunciation, he was Infeft in an Annualrent out of the ſaids Lands, for a principal Sum adebted to him by the ſaid common Debitor, which Infeftment proceeded upon a procuratory granted by the Debitor, for taking Infeftment, either to be holden of the Granter, or of the King, the Debitors Superior; and albeit he was Seized to be holden, only of the Granter, yet his Infeftment was Regiſtrat in the Secretaries Regiſter, and ſo made publick before *Fairholm's* Denunciation; As alſo the ſame was Confirmed by the King, before *Fairholm's* Compryſing was compleat, In the which Confirmation, the King Declared the ſaid Seaſin to be als ſufficient as if he had

had been Infeft to be holden of the King: And it being Answered for the Compryser, that the Annualrenters Right was base, and was not clad with Possession, neither could be clad with Possession, seing the payment of the Annualrent was not conferred till the year of God 1633, to be the first Term of Payment of the Annualrent; and the Confirmation nor Registration made not the same publick, so that still the Infestment remained a base Right, and could not be respected against the publick, which instantly was to take effect, and to receive present Possession: And the Annualrenter Answering, that albeit his Infestment could not take present Possession, seing the Term of payment was not before *Whitsunday* 1633. yet that was not a ground of Law to annul his Right thereby, seing it was a true and lawful Debt, and lawfully Constitute, *Ubi cedebat dies, licet non venit. & licet non peti posſit*; Neither could it be repute base thereby to extinguish his Right, being Registrat and Confirmed, which took away all suspition of Fraud or Clandestine dealing; for the publick Registration took away all these suspitions, which gave the cause of any Acts of Parliament, made against privat Rights; and he has beside done all lawful Diligence to make his Infestment notour, by intenting Action thereupon, and Executing of Arrestment before this Compryser, which must have force, as if he had obtained Possession, seing both the Parties are but yet contending *de adipiscenda possessione*; and if his Infestment had been publick, and had the term of payment conferred to a subsequent Term, as this Infestment quarrelled does, yet being prior to the Comprysers Right, albeit thereby he might be secluded from the Term controverted, which preceeds the Term of his payment, yet thereby his Infestment could never fall for any years subsequent, when the Term of his Right should come, but then in Reason it ought to have Effect, and be preferred to the Compryser: Notwithstanding of this Alledgance for the Annualtenter, the Compryser was preferred, and the Annualrenters Right was Found base; But here the question, as said is, was for a Term, whereto the Annualrenter could not claim Right, being before his Terms of payment, and so for that Term he was excluded, and the Dispute was not for Terms, whereto his Infestment might give him Right, Although the *Lords* by their Interlocutor Found his Right base, and so did exclude him for ever. Actor. *Oliphant*. Alter. *Cunninghame*, *Hay* Clerk. *Vid. November* 22. 1633 *Warnock*, and the cases there. *January* 22. 1633. *Gordon. July* 1. 1634. *Bruce. February* 14. 1633. *Charters. July* 17. 1635. L. *Craighal.*

Lo. *Johnston* contra E. *Queensberry* & *Johnston* of *Corhead*, *July* 17. 1634.

IN a Double Poynding for the Mails and Duties of the Lands of *Lochouse*, claimed by the Lo. *Johnston*, as having Right from the appearand Heir of umquhile Captain *Johnston* of *Lochouse*, Heretor of these Lands, and who was in Possession thereof at his Decease, on the one part; & by the Earl of *Queensberry*, as being Heir to the Lord *Drumlanrig* his Father, who was Heretably Infeft therein by Disposition of the said umquhile Captain by two Infestments, one base, and another holding of the Superior; Which Infestment to be holden of the Superior, was Confirmed by this Lord *Queensberry*, who had Acquired the Heretable Right of the said Superiority from the L. *Calderwood*, of whom the said Lands were holden; Which Confirmation was granted after Decease of Captain *Johnston*, granter of the Infestment, and after the Decease of the Lord *Drumlanrig* also, to whom the Infestment was granted. In this Process the *Lords* appointed that there should be a Sequestration of the Duties of these Lands in an indifferent responsal Gentlemans hands, who during the dependence of this Action, should uplift the same from the Tennents, and make payment thereof to the Party, who should be Found to have Right thereto, at the end of the Process: Which Sequestration was so appointed, albeit it was only

Verbally sought at the Bar by the Lord *Johnston*, the time of the Disputing of this Cause, and that the Summons craved no such Sequestration, neither was there any Summons or Action Intented, or Depending, craving Sequestration; And albeit also the Earl and *Johnston* of *Corehead* Alledged, there was no reason to grant the same, seing they were in Possession of the Land by a great part thereof in Mansing, and the rest by uplifting the Duties thereof from the Tennents: Likeas the Lord *Johnston* nor the appearand Heir had no real Right, which might be the ground of the Sequestration; notwithstanding whereof the Sequestration was ordained for such Duties as was not uplifted already, and in time coming ay and while the Process ended, so far as concern'd the Lands Set to Tennents, but not for the Mains possest in Mansing by *Corehead*: Also the *Lords* Sustained the Confirmation foresaid of the said publick Infestment, although done after the Granters Decease, which Infestment and Confirmation thereof were Found valid, done at any time whatsoever the Superior pleased, either before or after the Disponers Decease, at any time where there was no Interveening Impediment of any other more lawful Right, made by the Disponer before the Confirmation, really of the saids Lands, in which case, if any such real Right had been lawfully perfected before the Confirmation, there might have been Argument, that the Confirmation might have been controverted, as not valid, after the Decease of the Disponer, as that thereby *Confirmatio & confirmatum non possent conjungi post mortem, propter illud medium impedimentum*. Actor. *Stuart* & *Cunninghame*. Alter. *Advocatus* & *Nicolson*. *Scot* Clerk. *Vid. December* 5. 1623. *Patoun*.

Hendersons contra *Sanders* Minister, *July* 18. 1634.

ONe *Hendersons* Bairns Pursuing their Mother's second Husband, which Mother was Executrix to her first Husband their Father, likeas her second Husband was Executor to his Wife their Mother, for payment to them of their Bairns Part of Gear, and of their Part of the Money pertaining to them, falling by there Fathers decease; Together with the Annualrent of the said Money continually, since the Fathers decease, & since the time of their Mothers Intromission therewith; and also for payment of the equal half of the Goods and Gear contained in their Mothers Testament, whereto they had Right as Bairns, and nearest of Kin to their Mother. This Pursuit being moved before the Commissar of *Murray*, and Sentence given thereupon, against the Defender, *viz.* the Bairns Good-Father, the second Husband of their Mother, as Executor to her, he Compearing, which Decreet being Suspended by him, upon this Reason, *viz.* That he, nor yet his umquhile Spouse could be subject to no Annualrents, they being only Executors, who by the Law are not subject to pay Annualrents, specially before Sentence, for any Terms before they were Decerned; and there being nine or ten years betwixt the first Husbands decease, and the time of the Sentence, and also two or three years betwixt their Mothers decease, and the said Decreet, no Reason can make either her, if she were living, or him lyable in Annualrent, seing Executors cannot be subject, but at most from the time of the Sentence: And the Chargers opponing, that they having meddled with the Moneys, and Imployed the same to their use, and they being but Minors all this time, they are excusable, not to have Pursued more timely for their Moneys; and the Suspenders, and their Mothers Intromission therewith, ought not to be Profitable to them, to their Prejudice, and they opponed the Decreet given against them *in foro contradictorio*. The *Lords*, in respect of the Sentence given *parte comparente*, Found the Letters Orderly Proceeded, albeit most of the *Lords* were of different Judgments, some thinking that Executors are not subject to pay Annualrent, specially before Sentence; and others were of a contrair Judgement in this Case, where the Bairns were Minors, and the Mother and Father

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in Law had intromitted with the Money; but because of the Sentence standing *parte comparente*, Decreet was given as said is. *Item*, where the Decreet Decerned the *Father* in Law to pay the half of the Gear to the Bairns, as having Right to that half, by their Mothers decease, The *Lords Found*, that the Bairns could not claim the half, because the Mothers Testament, by whose decease they sought the same, could give them only Right to a Third of the Goods and Gear, which belonged to her Husband conveened; For although there were no Bairns procreat betwixt the said second Husband and her, yet the said Husband had Bairns living of a prior Marriage, who behoved to be reput to have their own Interests, and a Third Part of their *Fathers* Goods, and consequently they Found the Wifes Testament should not been Confirmed as it was, by a two-fold Division, giving the Wife the one half, and the Husband the other, but that there ought to have been a Division in Three Parts, *viz.* the Wife one Third, the Husband another Third, and the Third Third to the Husbands Bairns; so by this *Decision*, the Wife and the Husband, albeit having no Bairns betwixt them, yet where the Husband has Bairns of another Marriage, the Wife dying, transmits Right only to her nearest of Kin, to the Third Part of their Gear allenarly; and the Bairns of the Husband, although not gotten of that Marriage, has Right to a Third *fictione Juris*. For their Father living, they cannot have Right to any Bairns-Part of Gear, so long as he lives; but it was reput as a Right in their Person, to exclude the Wife from any Right further than a Third, seing the whole Gear being *de Jure in bonis mariti*, and he *Dominus*, It was not thought Reasonable, to give the Wife the half, thereby to exclude the Bairns, and to give them no Right to their Fathers Gear: & albeit this was considered by the *Lords*, yet it could not be effectual, to give the Bairns any Right thereto, so long as the Father lived: And albeit also the Chargers Alledged, that seing the Father is living, the Bairns could not have Right, and that the Husband is truly Reput in Law, to be *Dominus omnium bonorum*, as the Party Alledged, Therefore with the more Reason, and in Law, should his Wife have the half of all which he had, the time of his decease, which Alledgance was Repelled, and the Wifes Part Restricted to a Third, as said is. *Actor. Ja. Gibson.* Alter. *Gibson* Clerk. *Vid. June* 17. 1631. *Chapman.* 27 *Feb.* 1627. *Ross.*

Hart contra Tennents, *Eodem die.*

MR. *John Hart* Pursuing a Removing from a House in the *Cannongate*, Conform to a Warning, as use is, made within Burgh; It being Alledged, that the Warning was null, because it was not execut upon 40 days, at the Paroch Kirk, within which the House lyes, The *Lords* Repelled the Alledgance, and sustained the Warning, because they Found, that Warnings from Houses within Burgh, needed not to be made, nor execute at the Paroch Kirk, seing that is only required by *Act* of *Parliament* to be done in Field-Land, and not for Houses in Towns, from which Warnings to Remove are made by the Town-Officers, at the Verbal desires of Parties, without necessity of Precepts in Writ from the Party, or any other Direction from the Magistrat, and by Chalking of the Doors, Testified to be done by the Officer Executor, and Witnesses, without any Record of the Execution in Writ. *Scot* Clerk.

Good-man of *Humbie* contra *Hume*, *July* 19. 1634.

HUmbie being Charged to pay to *Helen Cockburn* sometime Good-Wife of *Humbie*, and to *Laurence Hume* her Spouse, the Sum of 2000 Merks contained in a Bond granted by him to them thereupon, at a certain Term mentioned in the Bond, and to pay Annualrent therefore, so long as he retained the Sum, after the Term of payment; And there being one Clause subjoyned in the end of the Bond, whereby it was Provided,

that it should not be Leisum to *Laurence Hume* the Husband, to seek the Principal Sum, nor up-lift the same, during his Wifes Lifetime, but only the Annualrent thereof; in respect of the which Provision, the said Debitor Suspended the said Charges execute at the Husbands instance, for the said Principal Sum: whereto the Husband Answered, that that Clause was conceived in his Wifes favours, and not in favours of the *Debitor*; Likeas his Wife consented to the Charge, and up-lifting of the Money, and offered to Compear Judicially, and consent most Solemnly thereto. The *Lords* nevertheless Suspended the Charge, for the said Principal Sum, in respect of the said Clause; for they Found, that the Debitor could not be Compelled to pay the same, albeit the Wife consented, except that he pleased himself to pay it, so long as the Wife lived; for it was Found, that the Clause was in the Debitors favours, if he liked to make use of it. *Hay* Clerk.

Hay contra Baillies of *Aberdene*, *July* 22. 1634.

HAy of *Crimonmogat* having Charged the Baillies of *Aberdene*, upon a Procuratory of *Resignation*, made of some Tenements of Land in *Aberdene*, Holding Burgage in his favours, to Infeft him therein; and they Suspending, that they were not holden to receive the Resignation, being done in favours of one, who is not Burges of their Burgh; and if in Law, they could be obliged to Infeft him, as they Alledged they were not, [no more than other Superiors can be Compelled to Receive and *Change* their Vassals, upon a *Prior* Vassals Resignation, or Disposition, which no Superior is Bound in Law, to acknowledge] yet if they might be Compelled in Law, they ought to have a years Duty, as the Land payed, and be otherwise satisfied in a Composition, for *Receiving* and Infefting him. The *Lords* Found not this Reason Relevant; But Found that the Magistrats ought to Receive, and Infeft this Person, albeit he was not a Burges, upon the foresaid *Procuratory of Resignation* made in his favours, and that without payment of a years Rent of the Land, or any other Composition therefore, albeit other Superiors of other Lands, not Burgage, are not Compelled to receive such Resignations, and to *Change* their Vassals against their will: for they ought to Claim no Satisfaction therefore, seing the Land is not holden of them as Superiors, but in Burgage of the King, and the Magistrats are but the Kings Baillies, and so should have nothing done therefore, but the Services of Burgh; yet the Scruple abides, *viz.* That Lands of Burgh, granted in Burgage Holding, ought not to be transmitted to any other, not being Burges: for it appears to change the Tenor of the Concession, given to the Incorporation of the Burgh by the Prince, which none can bruik, not being Burgesses, and of that Corporation; And which the Magistrat, although he be not Superior, but the King's Baillie, cannot, nor ought not to alter; but the Receiving of one not Burges changes not the Holding. Actor. *Mowat. Vid.* 18. *Decem.* 1630. *Stark* and the Cases there, *Decem.* 15. 1629. *Young* *.

Forrester contra Feuars, *Eodem die.*

MArgaret *Forrester*, as having Right from her Father, who, and his Predecessors were Infeft in the Office of the Forrestrie of *Torwood*, and for the Fees of the said Office, had Disponed to them certain quantities of Victual, to be payed by the Feuars, and Possessors of the Lands of *Bothkenner*, which were the King's Property; for payment of the which Duty, she pursues the said Feuars, for diverse years by-past; And they Compearing, and Alledging, that the Summons was not Relevant, seing it was never Lybelled therein, that the Pursuer, or her Predecessors were ever in Possession of these Duties Acclaimed. The *Lords* Repelled the Exception, and Found the Summons Relevant, albeit no Possession was Lybelled therein, of the Duties Acclaimed at any time, in the

the Pursuers Predecessors Person; for if the *Defender* should propone a peremptory to Elide the Pursuit, whereby the Pursuer might be urged to Reply upon Possession, the *Lords* Found, they would consider it by way of *Reply*, as if it had been Lybelled; And the *Defenders* Alledging, that they were Infeft in the Lands Lybelled by the King, and by vertue of their Infeftments, has been 40 years, and past Memory of Man in Possession of these Lands, for payment of a Feu-duty of Victual to the King's *Majesty*, there being no other Duty contained in their saids Rights, either for Fee, or for other Services to be done for the saids Lands; So that they Possessing so long without Interruption, they ought to be free of this Pursuit, seing the Pursuers Right is Prescribed, and the *Act* of *Parliament* anent Prescription, *anno* 1617. makes the same become Extinct: And the Pursuer Replying, that the Prescription militats not in this Case, for the Pursuers Right is not of the *Defenders* Land, but of a Fee, and certain Duty forth thereof, so that they are *disparata & non circa idem*; for he quarrels not the Defenders Right of the Land, seing he may bruik his Lands, and the Pursuer his Right of Office, and the Fees due thereto, and they may subsist together. The *Lords* Found the Exception of Prescription Relevant, and to Militat in this same Case, against the Pursuers Right to elide the same; The Defender Alledging, that he bruiked these Lands thir 40 years by-past, free of any payment except his Feu-Duty, and so that he had prescribed *liberum tenementum*, free of this Burden Lybelled, even as if the Pursuer had Acclaimed an Annualrent out of the saids Lands, which the like Exception of Prescription would in Law and Reason have excluded; And because thereafter the Pursuer Replyed upon an Interruption lawfully done *debito tempore*, therefore the Reply was admitted. Actor. *Nicolson* & *M^cgil.* Alter. *Stuart* & *Mowat.* *Hay* Clerk. *Via. March* 11. 1634. Sherif of *Galloway*.

Ladly contra Commissar of *Dunkell*, *Eodem die*.

THe Commissar of *Dunkell* being pursued by Mr *James Ladly*, for payment of an Annualrent of 28 Bolls Victual, wherein Mr. *Thomas Abercrombie* died Infeft, and that of diverse years by-past, which the Pursuer Acclaimed as Donatar to the Escheat of *Robert Abercromby*, Son and Executor to the said umquhile Mr. *Thomas*, and which were Intrometted with by the Commissar, who Alledging, that he had lawfully Redeemed the said Annualrent by Payment of the Principal Sum, whereupon the Annualrent was Redeemable to the Daughter of the said Mr. *Thomas*, who had Right thereto by her Father, and whereupon she was Infeft; and the most that can be craved for by-gones, is only Ten *per Cent* of the Principal Sum, and not the Victual Annualrent, and Prices thereof Acclaimed, in respect of the 134. *Act* of *Parliament*, 1592, Which provides, that Annualrents be Redeemable after that manner, and that the Party can be subject in no higher Annualrent than Ten *per Cent*. This Exception was Found Relevant, albeit the Infeftment of the Annualrent was before the *Act* of *Parliament*: And the *Lords* Found the Defender only subject, for all by-gone years Acclaimed, at Ten for ilk Hundred; And albeit the Pursuer Replyed, that the Defender might Redeem by payment, and consigning of the Principal Sum, and Ten *per Cent*; and that the Order is sufficient, although no more were Consigned, yet that will never hinder the Wodsetter to pursue, by way of Action, the Defender, for payment of the greater Quantity, whereto his Annualrent extended more than his Annualrent of Ten *per cent*, as he now does, and has been usually done in the like Cases before; this Reply was Repelled, & the Action only sustained, for Ten *per Cent*. But because this was neither Offered, nor Consigned, at the time of the Redemption, and that the Pursuer had obtained diverse Decreets against the Defender for these by-gones, The *Lords* modified 300 Merks of expenses to be payed by this Defender, to the Pursuer,

by and beside the Sum, whereto the Annualrent now restricted to Ten *per Cent.* did extend to. *Hay* Clerk. *Vid. July* 6. 1630. *Nisbet* contra E. *Cassils.*

Campbel contra *Mccharty, July* 23. 1634.

MAtthew *Campbel* having obtained Decreet of Removing, against *Ronald Mccharty*, this *Mccharty* intents Reduction upon a Reason, bearing, That the Reducers Brother, to whom he was Appearand Heir, had received a Charter of the Lands Lybelled from umquhile *Campbels*, to whom the obtainer of the Sentence was Heir, or has behaved himself as Heir, by vertue whereof the Reducer, and his Brother before him, has been in continual Possession of the saids Lands, since the date of the said Charter, which is in *anno* 1597. And which contains absolute Warrandice. The *Lords* Found this Reason Relevant to Reduce the Decreet, albeit the Obtainer thereof Alledged, that the Charter without Seasin taken thereon could not be sustained as a Right, to maintain the Reducer in the Right and Possession of the Lands; for he contended that it was not obligator, being but the beginning of an Imperfected Act, which cannot be sustained, while it be Compleat, specially where the Compleating thereof depends upon the Parties own Will, who never seeking Seasin, nor doing Diligence therefore, as he ought, his own Fault ought not to be Profitable to him: which Alledgance was Repelled, and the Charter Sustained, albeit wanting Seasin, in respect the Partie now Defender in the Reduction, was offered to be proven to be Heir, or behaving him as Heir to the Granter of the Charter, whereby he could not quarrel it, being that Person who is holden to Warrand and Perfect the same; and it was not respected, where the Defender Alledged, that it was the Parties own Fault, who did no Diligence to obtain Seasin, for thereby the Defender might seek Non-entry against the Land, and make his best Advantage thereof; but it was sustained, being clad with Possession, to exclude Removing, pursued by this Party, and it was not Found *nudum pactum*, but sustained as a Contract, which would have Defended against the Contracter, and his Heirs. *Scot* Clerk.

Maxwel contra *Hairstaines, Eodem die.*

THomas *Maxwel* having Married the Relict of umquhile *Matthew Hairstaines*, in their Contract of Marriage she Assigns to him and his Heirs, the Sum of 3000 Merks of that 6000 Merks, which was adebted to her by *John Hairstaines* after which Marriage she dies within the year, there being no Bairns procreat betwixt them; the said *Thomas* thereafter Pursues the said *John Hairstaines* for payment of the 3000 Merks, conform to the said Contract, who Excepting, that the Pursuer had no right by vertue thereof to the said Sum, in respect the Wife, whose Money this was, died within the year, there being no Bairns born of that Marriage: This Exception was Found Relevant, albeit the Pursuer Replyed, that this Party had no Interest to propone this Alledgance, he being only Debitor, who could be put *in tuto* by this Sentence; And also Replyed, that this Alledgance holds not where the Wife so deceasing within the year was a Widow, as this Pursuers Wife was: For albeit when a Virgin Married dies within the year, *omnia hinc inde restituuntur*, yet it is not so where the Wife was Married before: which Reply was Repelled, for the Defender was Found to have sufficient Interest to exclude the Pursuers Right: And also it was Found alike to infer Restitution, whether the Wife dying was a Maid the time of her Marriage, or not; and sicklike in the Husband, whether he had been Married before, or that he had never been Married before; But because the Pursuer Replyed, that the only Bairn of the Defunct Woman, and who would be Executrix to her in Law, and so have only Interest to the Sum acclaimed, concurred and assisted this Pursuit, Therefore the Defender was ordained

dained to Alledge further. Actor. *Gibson.* Alter. *Cunninghame. Gibson* Clerk. *Vid. November* 16. 1633. *Grant. March* 15. 1634. *Brown. July* 20. 1632. *Irwin.* February 4. 1642. *Lowfoot.*

Glendinning of *Drumrash* contra *Willie*, *July* 24. 1634.

Drumrash & some Cautioners with him, being obliged in payment of Moneys to the Bairns of umquhile *Alexander Willie*, to whom Sir *John Scot* was Tutor; thereafter the said *Drumrash*, and some other Cautioners subscribed a new Bond to Sir *John Scot*'s self, of the said Sum, which new Bond the said *Drumrash* the principal Debitor, sends to *Edinburgh* to *William Buchannan*, Servitor to *John Belshes* Advocat, to be delivered to the said Sir *John*, upon condition that he should receive back his prior Bond, with a Discharge thereof; conform whereto *William Buchannan* having past to the said Sir *John*, and offered the said new Bond to him, he desired the prior Bond, and a Discharge thereof, and the said Sir *John* desired, that he might have a borrowing of the said last Bond, to conferr it with the other Bond and Sums thereof, and he should give an answer what he should do, which being given to the said Sir *John*, the same day in the afternoon, Sir *John* renders back the new Bond to the said *William*, because he alledged the same wanted a Terms Annualrent of the Money, and desired him to advertise *Drumrash* thereof; which being done by the said *William Buchannan*, *Drumrash* writ back to the said Sir *John*, and also to the said *William*; after which time *William* went to Sir *John*, and offered the Bond upon the said condition, who refused to receive and accept the same, affirming his Tutory to be expyred, and willed him to deliver the Bond to the Curators. And now Pursuit being moved by *Wyllies* Bairns, as Assigneys to this new Bond, made by Sir *John*, against the Cautioners, and havers of the Bond for delivery thereof; *Drumrash* the Principal Debitor being dead before any Pursuit therefore, it was Found that the said Principal being dead before delivery of the Bond, the condition never being perfected to him, upon doing whereof it was sent to be delivered, and no Pursuit moved before his Decease, albeit the condition was now offered to be fulfilled, that therefore the said Bond now after his Decease, could not be delivered in prejudice of the Cautioners; for by his death the Bond became extinct as to the Principal, and so consequently also to the Cautioners, *quia mortuo Mandatore expirat Mandatum*, and so the Cautioners were freed, and it was not respected that it was Answered, that the Cautioners had followed the Faith of the Principal. Actor. *Stuart* & *Mowat*. Alter. *Nicolson* & *Gilmore*. *Hay* Clerk.

Bruntfield contra *Trotters*, *Eodem die.*

Upham Bruntfield Pursues *Trotters* for Contravention, the deed whereof was the taking away of her Oxen out of her Wains in Harvest 1633, casting down the Corns, and taking away her Kine; against which the Defenders Excepting, that they Poynded the same lawfully, conform to a Decreet for Poynding of the Ground, for an Annualrent of 100 pounds, owing by the space of six or seven years by-past, preceeding the year 1633. The Pursuer Replyed, that that Decreet was Suspended before the Poynding: To which it was Duplyed, that the Suspension was only in a Double Poynding, raised by the Tennents of the Lands, out of which the Annualrents should have been payed, complaining that they were Distrest in the saids Lands by the Annualrenter on the one part, and by the Pursuer, claiming Right by Wodset to the Duties of the Lands, on the other part, for the Cropt 1633. Which Double Poynding being only Raised for that year, and no other year, and they Suspending both the Parties Rights, and Charges and Decreet only for that one year, the same could not extend to any of the preceeding years, contained in the Sentence, which were not que-

stioned by that Suspension, and Double Poynding. The *Lords* Repelled the Exception and Duply on the Poynding, in respect of the said preceeding Double Poynding, and Suspension, which albeit it extended only *specificè* to the Cropt 1633. for the which no Poynding was Execute, Yet the *Lords* Found that during the Dependence, and before the discussing thereof, the Party could not misknow by Poynding for any year whatsoever contained in that Decreet, seing both the Parties were Summoned in the Double Poynding, to bring with them their Rights and Decreets, as also this Decreet for the Annualrent, and to hear and see the same Suspended; and so the Decreet being called for to be Suspended, he could execute the same for no year: Neither was it respected, that the Defender Alledged, that the same was Suspended for the year 1633. and none other preceeding, for it was Elusory to think that the Tennents would crave to have their Goods & Gear safe from Poynding that year, and not to think that they desired to have the like for all years preceeding, which the *Lords* Found to be the just effect of the Suspension, but the *Lords* Reserved Consideration and Modification of the Contravention to themselves, at the Advising of the Cause, after probation was Concluded. Actor. *Craig*. Alter. *Trotter*. *Gibson* Clerk.

Craufurd contra *Matheson*, *July* 25. 1634.

James Matheson being Charged and Decerned, as Executor Confirmed to his Father, to pay 3000 Merks to *Lillias Craufurd*, which his Father was Adebted to her, who Suspending, and Reducing this Decreet, upon this Reason, that he could not be obliged *ultra vires Inventarii*, and that the Free Gear in the Testament, would not extend to so much as would satisfie her; and in special, he craved to be Defalked an Article of 1000 pounds given up in the Testament, owing to him by the E. of *Roxburgh*, because that Sum was owing by an Heretable Bond, and so pertained to the Heir, and was not Testable; so that the up-giving thereof by the Defunct in his Testament, nor the Confirmation of the Testament, which was done by this Suspenders Mother, in his Pupillarity, cannot prejudge him, to make it fall under Testament. It being Answered by the Charger, that the up-giving thereof by the Defunct, and the Confirmation thereof by the Mother, who was Tutrix to this Partie, who was Executrix Nominat by the Father, in the said Confirmed Testament, and the Mother Contracting since with the same Reducer, wherein he has received Satisfaction from her, for all the Goods contained in the Testament, which he might claim from her, and his Intromission with the Profites of the same Money continually from the E. of *Roxburgh*, should make the Sum forthcoming to the Creditors, so that he cannot object the same to be Heretable, and tho it were, yet the same would be subject to the Creditors Debt, whether it be Heretable, or Moveable; Likeas he is Heir to the Defunct, in the second Marriage, and so must pay his Debt; and there being no Persons extant of the Defunct, by his first Marriage, who are *solvendo*, but by the Contrary this Party bruiking his Fathers Heretage, and being Infeft therein *post contractum debitum*, therefore he must be counted universal Successor to him. The *Lords* Found this Article of Defalcation Relevant, and seing the Sum was Heretable, the up-giving thereof by the Defunct in his Testament, nor the Confirming thereof sensyne made not the Sum change the nature thereof, & to become Moveable, but that it pertained to the Heir; and seing there was an Heir of a prior Marriage extant, this Suspender being but a Son of the second Marriage, they Found, that he could not be repute as universal Successor to the Defunct in his Lands, and so *hoc nomine* that he was not Lyable to the Creditor. *Item*, The Suspender craving Deduction of a Debt of 3000 Merks payed to another Sister of this same Charger, and contained in the Defuncts Testament foresaid, given up by himself, being a Testament Testamentar, because she hath obtained Sentence against

gainſt him, and he has payed her; Likeas he craved Deduction of 500 *Merks*, left in Legacy to the Defuncts Oy, and which the Oy's Aſſigney had recovered by Sentence againſt him, and he had alſo payed to the Aſſigney. *Item*, A Legacy of 100 Merks left to the Kirk of *Edinburgh*, and which being left *ad pios uſus*, ought to be allowed, ſeing he had alſo payed it, and craved Defalcation alſo for the Funerals; Theſe Defalcations the Suſpender Alledged ought to be allowed, ſeing he had payed them all *bona fide*, and this Charger her Ceſſation by the ſpace of ſixteen years, doing nothing all this time, ought not to make him Lyable to her. The Charger Anſwered, that Legacies cannot be allowed, ſo long as there is any Debt, and as to the Debt payed to the Siſter, that cannot make Defalcation, nor be allowed, ſeing that ſame Writ, whereupon the Siſter recovered Sentence, contained expreſſly, that the like Sum was owing to this Charger, ſo that he could not have mis-known both the Debts to be alike, and to have payed fully the one Siſter, to the prejudice of the other; but he ought to have taken *Cautionem Mutianam* for his own Security, to re-pay the Sums payed by him, in caſe he ſhould thereafter be diſtreſſed, by other Emergent Creditors, albeit this acclaimed cannot be called Emergent, being known to him, as ſaid is, when the other Siſter purſued him; ſo that he ought not to repeat what he has payed to others, that the ſame may be made forth-coming by him to this Charger, according to the Proportion of her Juſt Debt, with the other Creditors, without reſpect to the Legatars, as long as there is not enough to pay the Defuncts Debts. And the Suſpender Anſwering, that her Ceſſation by the ſpace of 16 years, and his payment *bona fide* after Sentence, ought to free the Executor, neither was there neceſſity of Caution, ſeing the whole Perſons, to whom he has payed, are *ſolvendo*, which ſupplies the Caution; and albeit her Debt was contained in the ſame Writ, whereupon the other Siſter obtained Decreet, yet that ought not to put him *in mala fide*, for he was not obliged to know more than in Law he was holden to know, and the rather ſince ſhe took no notice thereof her ſelf, never purſuing therefore, ſo that he ought not to be put to repeat the ſame from the Creditors, or Legatars, whom he has payed, and whoſe Decreets he could never have ſtayed; for the proponing, that there was other Creditors, would never have been admitted by the Judge, there being no other Creditor purſuing him, to have ſtayed Sentence, ſo that the moſt that this Charger can claim, is, to purſue the Creditors and Legatars, whom the Executor has payed, and the Executor ought not to be put to that Purſuit, as is expreſly Statute, *L. ſcimus* 22. § *etſi præfatam*: 4. *& deinde per totum Paragraphum*: *C. de Jure deliberandi*; This was Contraverted, if the Executor ſhould repeat, or if the other Creditors ſhould Repeat from the Creditor ſatisfied, or if they ſhould both concur to Repeat, to the end that the Gear in the Teſtament ſhould be proportionably Divided; but it was not Decided. Actor. *Nicolſon* & *Gibſon*. Alter. *Stuart* & *Hope*. *Gibſon* Clerk. *Vid. Decem.* 3. 1634. *Mure. July* 8. 1637. *Dickſon. Feb.* 3. 1631. *Henderſon.*

L. *Lugton* contra Creditors of *Diſhington*, *July* 29. 1634.

L. *Lugton* being Debitor to *William Diſhington*, in a Sum to be payed at a Term, and to pay Annualrent therefore yearly after the Term, while it were repayed; which Sum being Arreſted by a Creditor of the ſaid *William Diſhingtons*, who Purſuing to make the ſame forth-coming, conform to the Arreſtment. It was Found that the ſaid Sum owing by the Bond, of the Tenor foreſaid, was Heretable, and conſequently not being made Moveable by a Charge, preceeding the Arreſtment, it was not Arreſtable. *Vid. Jan.* 29. 1635. *Ker* contra *Knows.*

Hunter contra *William Dick*, *Eodem die.*

ONe *Hunter* Arreſting in *William Dicks* hands, ſome Wares pertaining to *James Spence* his Debitor, and Purſuing to make the ſame forth-coming,

and referring the Summons to the said *William Dicks* Oath, who granting the having of the Wares, and the being thereof in one of his Sellers in *Leith*, the time of the Arrestment, but declared that one *Thomson* another Creditor of the said *Spence*, had Poynded the same out of his Seller, by vertue of a Sentence, and Intrometted with the same; And the Pursuer Answering, that after his Arrestment, he ought not to have suffered any other to have Intrometted with the saids Goods Arrested, to his prejudice, but should have Suspended against both Parties, that they might have Disputed their Rights, which of them should be preferred. The *Lords* Found, that a prior Arrestment was no Impediment to any other Creditor, to Execut his Sentence, by Poynding the same Goods Arrested before, and that the Person in whose hands the Goods were Arrested, had neither Reason, nor any necessity to have stayed the Poynding, nor to have Suspended upon double Poynding; for no Deed was done by him, to give any Advantage to the one Party before the other, for if any Sums of Money, or other thing had been in his hand, which he had given out of his hands, without Order of Law, that would have been done upon his own Hazard and Perril; but here where there was no accession of any Fact done by him, in whose hands the Arrestment was made to further the Poynder, which Poynding he could not stay, therefore the Arrestment was Found, could not make him Lyable to the Arrester, but reserved to the Arrester his Action to Pursue him, who had Poynded, for Rendering, or Repeating of the Goods, *pro ut de Jure*. Actor. *M'gill* & *Sibbald* Alter. *Nicolson* & *Stuart*, *Scot* Clerk. *Vid. March* 11. 1635. betwixt these Parties.

L. *Innerweik* contra *Hamilton*, *Eodem die*.

A Decreet being Recovered by the L. *Innerweik*, declaring the Corns growing upon the Defenders Lands to be Thirled to the Pursuers Miln of *Bancrief*, which Decreet being Suspended, and craved to be Reduced by the Defender, the Reasons thereof were not Found Relevant, Therefore the Decreet and Letters were Found Orderly proceeded; And the Defender thereafter Alledging, that seing this Decreet was only a Declarator of the Thirlage, whereupon no Execution was presently to follow, that therefore no Letters of Horning ought to be granted thereupon, against the Party, but that thereupon the Pursuer, when occasion should so fall out, might Pursue his Action, for abstracted Multures, and not to have liberty ever when he pleased to Charge him, under the Pain of Horning, to come and Grind his Corns, which he might do at unseasonable times, and put the Party always to un-necessary Toyl, and Charges of Suspensions. The *Lords* Found, that upon this Declarator the Pursuer might Charge the Party to Grind his Corns, and pay the Multures thereof, conform to the Thirlage, at convenient times; and if the Pursuer should Execut these Charges in Malice, or Unjustly, they would consider thereof, and grant the Party Suspension, and have regard to modifie Expenses to him; But they Found that he might Charge him to come and Grind, *&c.* The same being done in due time, and that he ought not to be debarred from the like Charges, as if the same could not be permitted in Law to proceed so Summarily, and as it were meerly necessar, and only competent in thir Cases, to Intent Action, for *Abstracting* Multures; which albeit it was competent, yet was not Found so necessar, as if the foresaids Charges could not be Direct; for if the Contract betwixt the Parties, which bears, *Thirlage* were Registrat, Charges of Horning would pass thereon, so here in the Declarator upon the Contract, Charges may be Suspended, by Obedience and Caution to Obey. Actor. *Nicolson* & *M'gil*. Alter. *Stuart* & *Lermonth*. *Scot* Clerk.

Brown contra Town of *Innerness*, *November* 11. 1634.

Alexander Brown Pursues the Provost and Baillies of *Innerness* for payment of a Debt of 90 pounds, owing to him by his Debitor, because his

his Debitor being Incarcerat by them in their Ward (they suffered him to escape) And it being Alledged, that the Debitor by applying Quick-silver to the Lock of the Prison Door, under silence of night, thereby made the Door open, and escaped out of the Ward, albeit the Prison was sufficient, and the Lock and Door sufficient, if the Rebel had not adhibited these unlawful means, whereby he escaped; which being in effect *vis major*, the Magistrats ought not therefore to be punished, who are not obliged, nor cannot keep a Guard about the Tolbooth, to attend such accidents. This Alledgance was Repelled, in respect the Magistrats did no Diligence to search and make inquiry for the Rebel, whereby it might appear that they were, and are excusable from the said escaping, seing they ought to have sought, and followed, and speired for him, where-ever he might have been apprehended again. And sicklike, it being Alledged for one of the Baillies conveened, that he ought to be Assoilzied, because another of the Baillies of the Town being in Office for the time Libelled, when the Rebel escaped, whose name he condescended upon, received payment of the Debt, for which the Rebel was Incarcerat, from the Rebel, and thereafter put him to liberty; which Baillie at that time, and by the space of two years thereafter, was responsal to have payed that Debt to the Creditor; and after that space, the said Baillie becoming irresponsal *& lapsus bonis*, and the Creditor all that time when he was answerable, doing nothing to recover payment, nor Pursuing the Magistrat, who would have gotten relief off the Baillie, who dimitted the Debitor, if the Pursuer had moved his *Action* in due time; therefore after so long time this other Baillie, who committed no fault, ought not to be punished for the wrong done by another; especially where the cause flows most from the Creditors own negligence and Cessation, especially also seing the Baillie, who faulted, was in equal Authority and Power with the *Excipient*, and he could not stay him to put the Debitor to liberty, albeit he had known it before he dimitted him, as indeed he knew it not; for if he had known it, they might have provided for the Indemnity of the Town, and for the Parties satisfaction. It was Answered for the Pursuer, that ilk one of the Baillies are obliged to him *in solidum*, and one of their faults burdens all and every one of them, and the rest may either have their relief against the Delinquent, or against the Town, and whole Body thereof. The *Lords* Repelled this Alledgance, and Found the Baillie, for whom the Exception was proponed, lyable to the *Debt*, notwithstanding that the other Baillie put him out of Ward; and albeit that Baillie was so long responsal, and now is *lapsus bonis*; for Magistrats who are chosen to serve the King and his Liedges, hath this Incumbent to them, that Parties suffer not by any of their over-sights, and any of them failzieing in duty, is alike, as if all had failzied; neither was the Creditors negligence imputed to him, to liberat them, because there is no Law tying the Party in these cases, within two years after the Fact, to Pursue the Magistrats; and the *Lords* reserved Action to the Baillies, compearing for their relief, against the Baillie who failzied, and also against the Town, if he be found irresponsal, for refounding again of this Debt, *quia propter nexum culpæ omnes tenentur* in thir cases, albeit otherways *regulariter, delicta sequuntur suos authores*; but here in a case of such circumstances, it deserves consideration, that the Debt may be divided amongst the Baillies, and not one to pay all, and to suffer *in solidum propter alterius culpam*; as also it might be considered (as is also consonant in Law) that he who failzied ought first to have been Discussed, as in Tutors, *qui gessit, primo est conveniendus, qui si non sufficiat, tum demum Collega teneatur*; but this here needed not, seing the Baillie Proponer of the Alledgance contest the other, *qui deliquit*, to be irresponsal; and also it might been considered, that the Baillie being so long responsal *tempore officii, & post depositum officium*, and the

Creditor doing no Diligence, that *hoc casu* his negligence (whereby the other Magistrats & the Town are frustrat of their relief against the Baillie who failzied, and which they would have sought, if the Creditor had Pursued, or intimate to them *debito tempore*) that therethrough the Creditor should take himself to his direct Party, *viz.* the Baillie who received his Prisoners Money, with whom possibly the Creditor might have Transacted, or received Satisfaction, or otherwise may collude with him, to the prejudice of the other Baillies, and not to have this Action sustained against them, who are free of all fault; for it is of hard consequence, to insnare Magistrats after so long time, for anothers fault, never made known to them, and which if the Party had signified then, when both he and they might have been safe from the prejudice, they might better have discovered how matters were carried betwixt the Baillie and the Party; but it was Decided *ut supra.* Actor. *M'gill.* Alter. *Gibson. Hay* Clerk *Vid. 6 July* 1631. Town of *Perth*, 24 *January* 1642. *Wilson.*

Muddie contra *Lightoun* and the Town of *Montross, Novemb.* 13. 1634.

IN an Action at *Will. Muddies* Instance, as Infeft upon a Compryfing, for payment of the Mails and Duties of the Land, which *Lighton* the Defender Alledged, that he possessed by a Right flowing from *Graham*, who was Heretably Infeft in that Land, which *Graham* being once called in this Process, and dying *pendente lite*, the Process ought to sist until it were Transferred in some to represent him, that they might defend their own Right, which he could not be compelled to do, nor to Dispute upon his Authors Right, albeit he was Possessor. The *Lords* Repelled this Alledgance, and Found no necessity of Transferring, seing the *Lords* Found it not necessary *ab initio*, to have Summoned the Defenders Authors; but if the Defender had any Defence, which might Defend him, that he should not pay the Mails of the Lands Lybelled to the Pursuer, as was desired, he ought and might propone the same as he pleased; But in this Action, which was for Mails and Duties of Land, the Pursuer needed to Conveen none but the Possessors, against which Pursuit it was not a competent Defence, to Alledge that their Author or Master was not Summoned; Which Defence, although it be proponed and received in Actions of Removing, at some times, yet it is not alike receivable in Causes for Mails and Duties, wherein either the Possessor ought to maintain his Possession, by excluding of the Pursuers, or else if he cannot do that, as not being acquaint with the Ground of his Master and Authors Right, who is not called, he must after Sentence Suspend upon Double Poynding. Actor. *Stuart* & *Craig.* Alter. *Nicolson* & *Mowat. Gibson* Clerk.

Lindsay contra *Scot, December* 3. 1634.

MR. *James Lindsay*, Servitor to the Bishop of *Glasgow*, having obtained the Gift of Liferent of *Scot* of *Well*, and general Declarator thereupon, Pursues special Declarator against one *Scot*, for the Mails and Duties of the Lands of whereof the Defenders Alledging, that they had a Contract of Alienation of the saids Lands, under Reversion, made to them by the Rebels Father, and by vertue thereof they had been 38 years in Possession: And the Donatar Answering, that it was not a good Right, which could militat against the Donatar, not being real, nor any Infeftment taken thereon, no more than it would meet a singular Successor: The *Lords* Repelled the Alledgance, and Found, that the Contract of Wodset granted by the Rebels Father, could not Defend now after the Decease of the Father, his Son being Rebel, who was his appearand Heir, seing the Defender had no real Right, without which it would not meet the singular Successor, nor the Donatar, who now was as favourable

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as a singular Successor, and more favourable than any other, in respect he had the Superiors Right, in whose person there was an Heretable Right of the Land, which carried with it the effect of the Property, so long as there was not a Legal Vassal, and this cannot exclude the Superiors self, and no more his Donatar. *Gibson* Clerk.

Lo. *Johnston* contra *Johnston*, *Eodem die*.

THe Lord *Johnston* having Charged one *Johnston* of *Neis* to enter Heir to *James Johnston* of *Lochouse*, who was his Debitor, and who had right to the Lands of and having so Compryssed from him, as lawfully Charged to enter Heir, all the said *James Johnston* of *Lochouse* his Right, and also as having Right made to him by the said *Johnston* of *Neis*, as appearand Heir to the said *James Johnston* of *Lochouse*, Pursues the Earl of *Queensberry*, and certain others, for Improbation of all Writs made to them of the said Lands, by the said *James Johnston*; in which Action of Improbation, The *Lords* Found no Process at the Pursuers Instance, *super hoc titulo*, as having Right from the appearand Heir; for the appearand Heir himself without Infeftment, or Retour, could not be heard to pursue an Improbation, *super hoc titulo*, as appearand Heir, albeit an appearand Heir may call for Exhibition and production of Writs, which Pursuit is only Sustained for Exhibition, that he may advise whether he will enter Heir or not, but not for Delivery, which the appearand Heir cannot crave; and as the appearand Heir cannot Pursue to produce to be Improven [for if the Defender compear not, no Certification Decerning to make no Faith can be granted to the appearand Heir] no more therefore at the instance of one having Right from the appearand Heir, but Process was Sustained at the Lord *Johnston's* instance, as having Compriſed from the appearand Heir, who was Charged to enter Heir, for that Charge and Compryſing, so long as they stood, were als sufficient as if he had been Retoured Heir. Actor. *Stuart* & *Cunninghame*. Alter. *Nicolson*. *Scot* Clerk. *Vid. Feb.* 11. 1635 *Muré*.

Muire contra *Fleming*, *Eodem die*

ELizabeth *Fleming* as Executrix Confirmed to Unquhile *Matthew Muire* is Pursued by one *Muire*, to pay to him 100 Franks adebted by the said umquhile *Matthew*; And the Defender Alledging, that the whole free Gear was exhausted by Sentences, recovered against her, partly at the instance of Creditors, and partly at the Instance of Legatars contained in the Testament, and whereof she has made payment, this Pursuer never craving nor doing Diligence for his Debt, and she never knowing the same: And the Pursuer contending, that the Legatars could not be payed, as long as there was any Creditors lawful Debt unpayed, but that he ought to be payed of his just Debt, which could not be Exhausted by the Legacies, and that the Executrix should be put to repeat the same from the Legatars: And she Duplying, that she ought not to be put to seek the Legatars again, and to be vexed with pleas, seing she could not eschew the payment, which was made for obedience of a Sentence, which she could not have stayed, there never being any Intimation of this Pursuers Debt before these Sentences, and before her payment; And seing other Creditors and Legatars has been more diligent, and this Pursuer has been negligent, his negligence ought not to be prejudicial to her, but to himself; so that he ought to pursue and repeat from the Legatars, and not she: Likeas she took Caution from the Legatars to make the Sums payed to them forthcoming, in case any other Debts should break out, for which she might be distressed, to which Caution she is content to Assign this Creditor, and which ought to be Found enough to exoner her, and to impose a necessity upon this Pursuer, to conveen the saids Legatars. The *Lords* Found that part of the Alledgance not

Relevant to exoner the Executrix, anent her payment to the Legatars, albeit done by vertue of Sentences; but Found that this Pursuer should be payed as a Creditor, and that the Executrix ought to repeat that which she had payed to the Legatars from them, and that the Creditor should not be astricted, nor urged to that Repetition, because the Executrix was his direct Party; for the Testament could not be exhausted but by the Debts, and that Legacies are not to be payed, but if there be superplus of the free Gear *deductis debitis*; But because this appeared to be hard to the Executrix, who walked *bona fide*, and payed nothing but by vertue of Sentences, which she could not stay, this Debt not being known, which might be imputed to this Pursuers own negligence; Therefore the *Lords* Ordained this to be delayed, until the Parties and their Procurators should be inquired, if they had any Practiques to Alledge either *pro* or *contra* to this Decision, but the Civil Law is *in terminis* opposite to the same, for in *L. Scimus* §. *Et si præfatam: C. de jure deliberandi*, it is clearly determined, that the Heir (that is, to us the Executor) who payes to the Creditors, who first conveens him, or to the Legatars, is exonered of all other Creditors, who thereafter comes to trouble him, where the Inventary is exhausted by the first payment of these, whether they be Creditors or Legatars, who first comes, and the Heir can never be further troubled by any of them, albeit the Creditor last coming was anterior to the other who is payed, and these other Creditors has only Action of Repetition from the Creditors payed, or from the Legatars payed, to compell them to refound to him, as in Law they best may; but no ways to impeach or molest the Heir, who has once payed the whole Inventar to the Creditors, or Legatars, who first came; neither can the Buyer from the Heir be Conveened, for that which the Heir sold to Him, and the price whereof he converted to these Creditors or Legatars use, so payed by him: How this expres Law agrees with our Practique, it is well to be considered, and the equity and reason thereof. *Scot* Clerk. *Vid. July* 25. 1634. *Matheson.*

L. *Lesmore* contra *Hutcheson*, *Decemb.* 11. 1634.

L. *Lesmore* younger being Constitute Assigney by the L. *Caprington*, Donatar to old L. *Lesmore*'s Liferent-Escheat, after general Declarator, in an Action of special Declarator, he Pursues one called *Hutcheson*, for payment of the Mails and Duties of the Lands of pertaining to the Rebel: And the Defender Defending himself with a Tack of the Lands, Set to him by the Rebel, before his Rebellion. The Pursuer Replyed, that he had passed from that Tack, in so far as since the date thereof he had accepted an Heretable Infeftment of these Lands from the Rebel, he then being Rebel unrelaxed, where, by the Tack became extinct, so that he cannot have Recourse thereto, and therefore the Heretable Right being acquired thereafter, at the which time he being Rebel, and not Relaxed within the year, he could not Dispone the Lands within the year, the Rebellion being *in cursu*; so that when ever the year of his Authors Rebellion expyred, his Liferent of the Lands must belong to the Superior, and the same cannot be excluded by returning to the Tack, which was absorbed by the Heretable posterior Wodset. And the Defender Duplying, that seing the Wodset is not a valid Right to him, whereby to bruik, he may lawfully return to that Right, whereby he did bruik; For if his Heretable Infeftment were Reduced, or that another had Acquired a better Right, which would give him preference to the Lands before the Excipients Right, *hisce casibus* his Heretable Right falling, he might return to his Tack, and could not be prejudged therein: Even so in this Case, the *Lords* Sustained the Exception notwithstanding of the Reply, and Found that the Excipient might return, and Clothe himself with the foresaid Tack, notwithstanding of the acceptation of the said Heretable Right; Albeit the Rebel, who was the Defenders

ſenders Author of his Heretable *Right*, was at the Horn, the time of the Acquiring of the ſaid Heretable *Right*, and that he was never *Relaxed* within the year: For ſeing he could not bruik by vertue of that Heretable *Right*, in reſpect of the ſaid Rebellion, it was Found that it could not extinguiſh the prior Tack, but that he might return and Clothe himſelf therewith. This Deciſion wants not its own doubt, for it appears, that it is hard to make the Tack Convaleſce, for that *Reaſon*, that he could not bruik by vertue of the Wodſet: for if the Heretable *Right* be good and valid in Law, there is no reaſon wherefore he ſhould return to the Tack again; and albeit the Author thereof was then *Rebel*, yet that makes not the Heretable Right to fall, but Suſpends the ſame during his Lifetime, by reaſon of the *Rebellion*, which in effect is a Confirmation of the Heretable Right to this Excipient, and not an Everting of that Heretable *Right*; for they might ſubſiſt together, *viz.* That the Liferent ſhould pertain to the Donatar, and the Fee to the Excipient; whereas the Tack and the Heretable *Right* cannot both ſubſiſt in one perſon: and if the Defender ſhould take him to the Tack, now after he had Purchaſt an Heretable *Right*, it may appear that thereby he paſſes from the Heretable *Right*, by uſing a more baſe and Ignoble *Right*, and ſo cannot return to a more noble *Right* thereafter, having made choice to bruik by a definit Temporal *Right*: Likeas it is his own fault, that he obtained not his Author *Relaxed*, whereby he might validly have obtained from him that Heretable *Right*, *& ſic non debet lucrari ex ſua culpa*, and to the prejudice of the King, who by his Vaſſals Annual *Rebellion*, cannot be prejudged of the Caſuality of the Liferent-Eſcheat, thereby accreſcing to him, *& ſic reus ſibi Imputet*, who provided not better for his own Security; and it may be, and is very probable that it was ſo, that when the Defender Acquired the Heretable Right, the Parties agreed that upon conſideration of the Tack, the Wodſet was granted upon more eaſie Conditions, and that there was allowance given to the Excipient in the ſaid Wodſet, in regard of the Tack, whereby it is in effect Extinguiſhed; and as the Tack could not be obtruded to the Setters ſelf, after the Heretable Right, albeit the Heretable Right had not given him a valid Title to the Land, far leſs can it be obtruded to the King & his Donatars; And as if either the Tack had been directly *& ſpecifice Renounced* by the Tackſ-man, or that there never had been a Tack Set, the Liferent would have fallen, even ſo in this Caſe as it now ſtands, where in effect by the poſterior Wodſet, the Tack, if not *per expreſſum*, yet *tacite* is *Renounced*, and paſſed from: but it was Decided *ut ſupra*, and theſe Arguments were not Proponed. *Vid. March* 4. 1635. *Borthwick.*

Roſs contra *William Dick* & *Hume* of *Heugh*, *December* 12. 1634.

IN a Reduction of a Contract, and ſome other ſpecial Writs called for, following upon that Contract, of the Lands of *Heugh*, made to the ſaid *William Dick* by the ſaid *Hume* of *Heugh*, as done ſince an Inhibition, Execute by the ſaid *Roſs* Purſuer, who was Creditor to the ſaid Good-man of *Heugh*, where in the ſaid Summons of Reduction, the Defenders were called by a general Clauſe, to produce, not only the ſaid ſpecial Writs particularly called for, but alſo all and whatſoever other Writs concerning the ſaids Lands, made by the ſaid Debitor to the Defender, ſince the ſaid Inhibition, which Clauſe being quarrelled by the Defender, that it could not be ſuſtained, ſeing by Action of Reduction, nothing can be called to be *Produced*, or *Reduced*, but only ſpecial Writs, expreſly and particularly condeſcended upon; for theſe general Clauſes, albeit they be ſuſtained in Improbations, yet has never been ſuſtained, nor ever can be in Reductions, to Reduce Writs for not Production, not ſpecially called for. This Exception was Repelled, and the Certificati-

on of the general Clause sustained and Granted; for the *Lords* Reduced all Writs not produced, which were made since the Inhibition of the Lands Lybelled to the Defender, by the Debitor, so that the time was special in the date of the Writs, *viz.* Since the Inhibition, which was Produced, and the Subject was special, *viz.* The Lands Lybelled; and the Persons were special, *viz.* by the Debitor to this Defender, therefore the general Clause being so qualified, was sustained. Actor. *Advocatus*, Alter. *Stuart*, *Scot* Clerk. *Vid.* 18. *January* 1637. E. *Hume*.

Campbel contra *Chalmbers*, *December* 19. 1634.

A Tutor pursuing the Mother of his Pupil, for delivery of the Pupil her Son to him, in whose keeping the Pupil was ever since his Fathers decease; The said Pupil now at the time of this Pursuit, being diverse years beyond the years of Infancy; and the Mother Compearing, and Alledging, that he had chosen Curators, and producing the *Act* of Curatory, to which Defence the Curators adhered, and Alledging, that in respect thereof, the said Act of Curatory being standing, that the Tutors Office ceased, and was expired, and so had no Interest to Pursue for delivery of the Bairn; and the Tutor *Answering*, that that Act was fraudfully done, seing he offered to prove, that his Office was not expired, and that the Bairn was still within the years of Pupillarity, so that his Tutory yet lasts, and that he was still under the danger of *Administration*. And the Defender Duplying, that the Act of Curatory standing, the Curators had the Charge ay and while the Act of Curatory were Reduced. The *Lords* Repelled that Alledgance, and Found the Tutors Reply Relevant, *viz.* that the Bairn was yet within 14 years of Age, and so within the years of Pupillarity, so that his Tutory (that being proven) yet continued, and that he had reason to Pursue for delivery of the Pupil, and that he had no reason to Reduce the *Act* of Curatory, the Defender never Alledging; that the Bairn was past the years of Tutory: For the Bairn being proven to be yet within the years of Tutory, he needed never to Reduce the *Act* of Curatory, the length of which Process might indure while his Office were expired, and the Danger of the not Administration of his Office, in the mean time might tend to his Prejudice. Actor. *Gibson*. Alter. *Miller*. *Scot* Clerk.

Shanks contra *Eistons*, *January* 15. 1635.

IN a Suspension of Charges raised by one *Eistons*, upon a Contract of Marriage, betwixt the Suspender *James Shank* on the one Part, and umquhile *Marion Wilson*, on the other Part; by the which Contract he was obliged to Infeft his Spouse in her Liferent, of all Lands and Moneys to be Conquest by him, and to provide her lawfully thereto, and after her decease, the one half thereof should pertain to his Heirs, and the other half to *Janet* and *Marion Eistons*, Daughters to the Wife of a prior Marriage; whereupon the saids Daughters after their Mothers decease, having caused Registrat the said Contract by the Compearance of a Procurator for the Husband surviving, and they having thereupon Charged him to fulfil the Contract, in the special heads condescended upon by them, anent the Infefting of them in the half of a Tenement of Land, Conquest by him, the time of the said Marriage. The *Lords* Found, that this Contract could not be Registrat after the Wifes decease, in this manner, *viz.* by a Procurators Consent for the Husband, & consequently that such summar Charges could not be raised thereupon, at the Instance of these, in whose favours the said Clause of the Contract was conceived, they being neither Contracters, nor Subscribers of the Contract, and the Contract not being Registrat betwixt the Parties, who were direct Contracters in their own life-time, but only Registrat by

by this Third Party, after the decease of the Wife, which was sustained, and the Reason of Suspension thereupon Found Relevant, notwithstanding that the Contract was Registrat, as said is. Actor. *Nairn.* Alter. *Gibson* Clerk. *Vid. Jan.* 29. 1628. L. *Whittingham. Feb.* 12. 1635. *Brown. June* 25. 1634. L. *Rentoun.*

Bell contra L. *Mow*, *January* 22. 1635.

THe L. *Mow* having Wodset his Lands to one *Bell*, who Setting the Lands in Back-Tack, for payment of a Back-Tack Duty, and after the decease of the L. *Mow*, Arresting the Duties of the Lands in the Tennents hands, and Pursuing them thereupon, to make them forth-coming; *Nisbet* Relict of the Laird *Mow*, who was Liferenter of the Lands, before the Wodset, Compearing, and Defending with her said Right, the Pursuer Replying, that she had consented to the Contract of Wodset, and producing the Contract, with her Subscription at the same, with an Act Extracted out of the Sherif Registers of *Tividale*, Subscribed by the Clerk thereof, bearing, *That she compeared Judicially in Judgment before the Sheriff, and Subscribed the said Contract out with the presence of her Husband, and made Faith, that she consented thereto Voluntarly, and Ratified the same.* And she Duplying, that that Act, nor the Warrand of the same, was not Subscribed by her, and was but the Assertion of a Nottar, and her Alledged Subscription at the Contract, not being done before Witnesses, and no Witnesses being Insert thereto, it was null, & so could not prejudge her. And the Pursuer Replying, that although there were no Witnesses Insert to her Subscription, yet seing the Judicial Act produced bore *her to have subscribed the same in Judgment, and that she had Judicially Ratified the same*, it is enough to sustain the Contract, and is more than if there were Witnesses Insert. The *Lords* Found not this Act sufficient to denude the Woman, and to verifie her Consent, nor yet her Subscription of the Contract, seing it bore, *not to be done, and Subscribed by her before Witnesses*; seing the same Contract Subscribed (as it bore) by her, ought to have made mention, that she Subscribed the same before Witnesses, who ought to have been insert in the Contract, and to have proported, that she should have Subscribed the same before them; but Found, that the Party might condescend upon the Witnesses, their Names, who saw her Subscribe the same, and that yet they might declare the same; But that it was not enough, that the Act declared that she Subscribed the same Judicially, but that he should condescend upon the Witnesses present, before whom she Subscribed it, and abide at the same in that manner. Actor. Alter. *Gilmor. Scot* Clerk. *Vid. Jan.* 30. 1635. *Mitchelson.*

Menzies contra *Mckay*, *Eodem die.*

ONe *Mckay* Pursuing a Spuilzie of a Horse, the Defender Alledged, that (conform to the Law of *Regiam Majestatem*) he being Infeft in the Miln of to the which Miln the Lands occupied by the Pursuer were expresly Thirled, against which Thirlage the Pursuer having carried his Corns growing upon these Lands, and grinding the same at another Miln, the Pursuer apprehended the Horses bringing back the Meal, made and grinded at the said other Miln, which by the said Law of the *Majesty*, he might lawfully do; Likeas it is the custom of the Countrey, not only in this Miln, but in the other Milns about, *viz.* In *Athole*, where the Miln Lybelled, and the Lands Lybelled, so Thirled lyes, to do the same. The *Lords* sustained this Exception, to liberat the Defender from Spuilzie, but not from Restitution of the Horses again; and the Reason the Exception was sustained, was, because the Defender Alledged, that he sent back the Horses again that same night, to the Pursuers House, and re-delivered the Meal to the Pursuers Wife, albeit the Pursuer received not the Horses. *Vid. March* 14. 1635. betwixt these Parties.

Mug contra *Campbell*, *January* 23, 1635.

Patrick Mug, for the Sum of 500 merks, having Compriſed his Debitors Lands, and being thereupon Inſeſt, obtains Decreet of Removing before the Sheriff of *Perth*, againſt one *Campbell*, he not Compearing, who Suſpends, that he was Inſeſt before the Compriſing; and the other opponing his Decreet ſtanding, and notwithſtanding thereof, Anſwering alſo, that he would be content to receive that Reaſon, and the verification thereof in this ſame place, to be tryed *hoc ordine*, if his Reply thereto ſhall be alſo received in this place, *viz.* that the common Debitor was Inhibited by the Compriſer long before any Right made to this Suſpender; and which he Alledged, was as great reaſon ſhould be received *hoc ordine*, againſt that Inſeſtment, as the ſaid Inſeſtment might be received againſt the Decreet ſtanding againſt this ſame Party, and againſt this Compriſing alſo, and Inſeſtment ſtanding, obtained by him upon his great Charges, being a poor man, and for a ſmall Sum, which required ſummar Proceſs; and if not, that they both alike ſhould be either put to Reduce, or elſe both ſhould be ſummarly diſcuſt; notwithſtanding whereof, the Reaſon of Suſpenſion was inſtantly received, the Inſeſtment being inſtantly produced to verifie the ſame, albeit the Suſpenders Poſſeſſion was not inſtantly verified, and the Compriſer was put to Reduce upon his Inhibition.

L. *Caddell* contra *Boyd*, *Eodem die.*

THe young L. *Caddell* being Heretor of the place and Lands of *Caddell*, and having acquired his Fathers Liferent thereof from him; and Setting Back-Tack again thereof to him during his lifetime, which contained no Duty to be payed therefore; and the old Laird being year and day at the Horn, and his liferent Eſcheat thereby Diſponed to *Stevin Boyd*; the young Laird Purſues the old Laird and the Donatar, upon the Act of Parliament, to pay the Expences that would repair the Houſe of *Caddell*, wherein it was in worſe caſe than it was the time of the Acquiring of the ſaid Liferent, and to keep it in time coming in the like eſtate, when it ſhall be repaired. And it being Alledged, that this Action could not be ſuſtained, while there were a Precognition firſt taken, for tryal in what ſtate it was, the time of the Acquiring of the Defenders Liferent-Tack, and what would repair the ſame. And alſo it being Alledged, that this Action could not be ſuſtained againſt the Liferent Tacksman, ſeing the Act of Parliament, which is the ground of the Purſuit, extends not to ſuch Rights, but only to Conjunct-fies, or ſuch Inſeſtments of Liferent, and cannot be extended to Tacks, for it is not proper againſt them; and any who conduces with an Heretor, to take a Tack of Lands or Houſes, ought not to be burdened with theſe burdens, the like whereof was never ſuſtained; for a Conductor can never be holden to this, but on the contrair, a Conductor more properly may have ſuch Action againſt the Setter, eſpecially this Purſuer himſelf being full Proprietar, and his Property no ways affected with a Liferent-Inſeſtment. Attour he Alledged, that ſuch an Action was never heard, neither Purſued nor Suſtained againſt the Donatar to a Tacks-mans Liferent; for the King could not be in Law holden to this Reparation, and conſequently not his Donatar, no more than the King or his Donatar are holden to pay the Rebels Debts. Theſe Alledganees were all Repelled, and it was Found, there needed no Precognition; and alſo it was Found, that a Liferent-Tacks-man was as well ſubject to this Reparation, as one Inſeſt in Liferent, ſeing it was a Tack granted by a Contract, by the which the whole Property was granted by the Father to the Son, and the Son again grants a Liferent-Tack to the Father, without payment of any Duty therefore: and it was not as a Tack Set *inter Locatorem & Conductorem*, which had a competent Duty to be payed therefore by the Tacks-man, in which caſe the Argument had been more conſiderable; and alſo

also it was Found, that the Donatar to the Liferent was subject as well as the Tacks-mans self, to pay the Charges which should be tryed necessar to this Reparation, in so far as it was worse now than it was at the time of the Acquiring of his Liferent-Escheat, and Declarator thereupon; and that the said Donatar should keep the same thereafter, as it should have been when it was Repaired; which the *Lords* Found, either he should be holden to do, or else to quite his Right of either of which he had his option. Actor. *Advocatus, Nicolson* & *Gibson.* Alter. *Stuart* & *Cunninghame. Hay* Clerk.

Ker contra *Knows, January* 29. 1635.

ONe *Ker*, Donatar to *Robert Mudie*'s Escheat, after general Declarator thereon, and also after special obtained against one *Craw*, Debitor of a Sum to the said *Robert Mudie*; he Arrests in Mr. *Christopher Knows* hands the like Sum, owing by him to the said *Craw*, and Pursues to make it forth-coming. And the Defender Alledging, that the Sum was not Arrestable, because the same was owing by a Bond, the Term of payment whereof was *Whitsunday*, and in case of failzie then of payment, he was obliged to pay Annualrent therefore; whereby the same became Heretable, and so not Arrestable. This Exception was Repelled, because the Arrestment was laid upon this Sum before the Term of payment, at which time the Heretable Clause could not take effect: Likeas after the Term how soon it was payable, he Pursued for the same, and as if the Creditor had died before the Term, the Sum would have pertained to his Executors, and not to his Heirs, notwithstanding of that Heretable Clause; so the Arrestment before the Term, was Found to affect the Sum, notwithstanding of the Tenor of the Bond: It is ever doubted by me, if these preceeding Decisions be good, whereby Sums owing by such Bonds, after the Terms of payment, are found not Arrestable; for I think the Clause to pay Annualrent therefore, nor no Surety, nor other Right following thereon, ought to exeem the same from Arrestments. Actor. *Craig.* Alter. *Gibson* Clerk. *Vid.* 29 *July* 1634. L. *Lugtoun*, 5 *Feb.* 1635. Betwixt thir same Parties.

Hamilton contra *Wilson, Eodem die.*

IN a double Poynding betwixt Sir *James Hamilton* of *Broomhill*, and one *Wilson*, against whom the Tennents of *Lauder* had Suspended upon double Poynding; *Wilson* claimed the Maills of the Lands from the Tennents, by vertue of his Compriſing: And the other Alledging, that in the first end of the Farms he ought to be answered of his Annualrent *primo loco*, seing he was Infeft therein long before the Compriſing. And the Compriſer Answering, that he had only Right to claim the Duties of the Lands as Heretor, and the Annualrenter could not go therein betwixt him and the Possessors; and for his Annualrent, he had his Action safe to him, to Poynd or Compriſe the Ground therefore. The *Lords* preferred the Annualrenter to the Compriſer, for answering of the Annualrent in the first end of the Farms adebted by the Tennents, and Found, that the Compriſer had no Right but to the Superplus. And it being further Alledged, that the Annualrenter, before this years Term of payment of thir Duties controverted, had made Requisition to his Debitor, for payment of his Principal Sum, whereupon the Annualrent foresaid was redeemable, whereby he could not come back again to seek his Annualrent out of the Land, having made the Sum Moveable. This Alledgance was Repelled, for it was Found, that notwithstanding of the Requisition, he might cloth himself with his Infeftment, and might pass from the Requisition, so long as the Sum was neither payed by the Debitor, nor yet prepared and consigned, or offered to this Party, conform to the Requisition. Alter. *Gilmor. Vid.* 15 *July* 1629. Sir *John Hamilton.* 24 *March* 1626. *Fairniflat* for the last part, and 15 *March* 1637. *Guthrie* for the first part.

Moncreiff contra L. *Balnagowne*, *Eodem die.*

MR. *Archibald Moncreiff* having a Pension granted by the King, out of the Blensh or Feu-duties payable to the King by the L. of *Balnagowne*, out of the Lands of which were erected to *Balnagowne* in a Barony, the Lands of old being of the Abbacy of *Ferne*, and diverse of these Lands so Erected, pertaining to others, who had the Property thereof Feued to them; And others of the Lands pertaining in property to *Balnagowne* self, who by the Erection of the whole, became Superior to the other Feuars; And the said Mr. *Archibald Moncreiff* having obtained Decreet against the L. of *Balnagowne*, as appearand Heir to his Father, who was adebted in that Duty to the King, out of which his Pension was gifted to be payed, Decerning the Ground to be Poynded therefore; the said Decreet being given against him, only as appearand Heir to his umquhile Father, and not as Heir, nor Infeft, nor as Charged to enter Heir; and upon the said Decreet, having Compriſed all the Lands, as well pertaining to the Laird, as to the other Feuars, for not payment of the Pension which he had, as said is, out of the Feu-duties, and which were owing to him of diverse years, for which he had Deduced the Compriſing, and obtained the said Sentence; he Purſues the L. *Balnagowne*, and the Poſſeſſors of the Lands Compriſed, for the Maills and Duties thereof. And the Defender Alledging the Compriſing to be null, becauſe it was Deduced againſt him, as appearand Heir only, he neither being Decerned as Heir, nor as lawfully Charged to enter Heir, nor as Infeft. The *Lords* Repelled this Alledgance, & ſuſtained the Decreet & Compriſing, eſpecially in reſpect of the ſamine ſtanding unreduced, which the *Lords* Found they could not annul in this Proceſs ſo ſummarly, by way of Exception, albeit the Alledged Nullity had been in it ſelf Relevant: As alſo the *Lords* thought it not Relevant, even albeit it were in a Reduction, for they thought, & Found, that a Decreet to Poynd the Ground, might well be Decerned againſt one called to repreſent the Party Debitor deceaſed, only as naked appearand Heir, and that the Compriſing might ſo be Deduced thereupon, for a *Defuncts* Debt, againſt him, albeit neither Infeft, nor being Heir, nor charged to enter Heir: Yet this would appear to have ſome difficulties, that a Decreet can either be given, or an *Appryſing* deduced thereon, for a *Defuncts Debt*, againſt any perſon, who repreſents not the *Defunct*, by Charge to enter Heir to him, or ſome otherways; for perſonal execution, could not be granted otherways againſt him. And where it may appear that this *Decreet* and Execution is more againſt the Ground than againſt the *Perſon*, and for a *Debt* wherewith the Ground is affected, and ſo *tranſit contra quemcunque quoad fundum*. It may be Anſwered, that the Feu-*Duty*, and the Poynding therefore, may well affect the Ground, , but for the not payment thereof, it would ſeem that the *Property* cannot be Compriſed, but from the Party that may be Conveened, and is ſubject in the *Debt*, as the appearand Heir cannot be. It may be Anſwered, why may not here the Ground be Compriſed, as well as in Non-entries after General *Declarator*, which proceeds againſt the appearand Heir to the *Defunct*, and the Lands will be Compriſed againſt the appearand Heir, after the profits of the Lands are Liquidat and *Decerned*. Whereto it is Replyed, that this is not alike; for in Non-entries the Sentence is tryed againſt him, who only ſhould and may enter, finding that the Lands are in Non-entry, and that the Superior wants a Vaſſal, wherein no other can pretend Intereſt, and that is inherent in the nature of the Holding, that the Property may be ſo challenged by the Superior, for the Vaſſals contempt, in depriving the Superior of a Vaſſal, which juſtly in place of a Vaſſal to ſerve him, gives the Lands to ſupply that want, which cannot be declared againſt any other, but him who is appearand Heir, and he the cauſe of the failzie; for it is for his own fault, that is for his Non-entry

try, he wants that Land; but in the other case, the not payment of the Feu-duty, may give the Superior Right to Poynd the Ground therefore *contra omnes*, but not to Comprise the Property, but against one clothed with a Right, or called as representing *in Jure* the Right of the Defunct: For when Lands are Decerned in Non-entry, and thereafter Profits specially Proven and Decerned, of necessity the Superior must Comprise therefore, because there is no other person as pretending Right thereto, who could by any possibility in Law be Decerned to pay the same; therefore Sentence and Comprising of necessity must be Execute against the Ground, to the which no other can have Claim, and for which no other can be Conveened; but in the other case it is not so, for there is possibility of personal payment, if any were Cited Legally therefore as Heir, or Charged to enter Heir, *quo casu* for not Entering or Renouncing, Adjudication or Comprising may go on orderly; but in Non-entry this is needless, because of the nature of the Holding, and special Priviledge of the Superior granted in Law. Actor. *Nicolson*. Alter. *Advocatus*, *Stuart* & *Gibson*, *Gibson* Clerk. *Vid.* 14 *November* 1635. *Dickson*. 1 *March* 1637. Betwixt thir same Parties. *Item*, 15 *Feb.* 1627. *Andrew Cowper*.

Mitchelson contra *Mowbray*, *January* 30. 1635.

THe deceast *Gavin Mitchelson* and *Elizabeth Mowbray* his Spouse, being adebted by their Bond in certain Sums borrowed from the deceast *Mitchelson* their Creditor, for not payment whereof the said Creditor Comprises from the said Debitor, some Dwelling Houses in *Leith*, and thereupon is Infeft in the same; Likeas thereafter the said *Elizabeth Mowbray* (who was Infeft in Conjunct-fie in the same Lands before the Comprising) Compeared Judicially before the Baillies of *Edinburgh*, and Ratified the said Appraysing, and the *Lords* allowance thereof, together with the Bonds foresaid, whereupon the Comprising was Deduced, with the Infeftments to follow thereupon, and Renounced all Right which she had to the said Lands, either by Conjunctfie, Liferent, or Terce, or any way whatsoever, and made Faith, that she was not compelled thereto, but that she did it voluntarly, and of her own free will, and obliged her never to come in the contrair thereof, as the said Act under the Hand of Mr. *Alexander Guthrie* Town Clerk of *Edinburgh* bears; And *George Mitchelson* Chirurgeon in *Edinburgh* being Infeft in these Lands, as Heir to his umquhile Father a Compriser, he Pursues Removing therefrom against the said *Elizabeth Mowbray*; who defending her self with the said Infeftment of Conjunct-fie, granted to her before the Compraysing, and the Pursuer opponing her Judicial Renounciation and Ratification: The Defender Duplyed, that that Ratification could not prejudge her, because it was not Subscribed by her, but was only the assertion of a Clerk to an Inferior Court, which ought not to be of force to take away her Liferent-Infeftment; and the other opponing the Solemnity thereof, and the preceeding Bonds and Comprisings, which being so Ratified by her, adds strength to the Bonds, albeit they in Law had not been of force to have produced personal Execution against her, seing they are *Actus geminati*, and all conjoyned together, are of that same strength, as if her Husband and she had Disponed the Lands, and that she had Judicially Ratified the Disposition. The *Lords* Found the Exception Relevant, notwithstanding of the Ratification produced; for the *Lords* Found, that the Bonds, albeit Subscribed also by the Woman, yet being of borrowed Money, and done by her with her Husband *stante Matrimonio*, could not be obligator against her, nor produce Execution against her; and also Found, that a Ratification being done by an Act Extracted out of the Town Books, as said is, under the Clerks Subscription, did not derogat to the Defenders Right of Conjunct-fie, seing it was done by her in the time of the Marriage standing, her Husband then being

on Life, and that the same was not Warranted by her Subscription, nor was there any other Writ made before this Judicial Act, whereby she had given her Consent, and Subscribed the like Ratification, without which her Subscription of some preceeding Writ of this Tenor, the said Ratification Judicially made of the Comprising, and Renounciation of her foresaid Right, under the Clerks hands only, and not Subscribed by her self, with her own hand, or by Nottar for her, if she could not Writ, could not prejudge her Right. *Actor. Cunninghame* & *Johnston.* Alter. *Mowat* & *Deans. Scot* Clerk. *Vid. January* 22, 1635. *Bell.*

L. *Renton* contra L. *Wedderburn*, *Ult. January* 1635.

THe L. *Renton* being Donatar to Sir *George Hume* of *Manderston's* Life-rent-Escheat, and sicklike the L. *Wedderburn* being Donatar to the same, and both the Donatars Pursuing Declarator thereupon, and both Compearing, and claiming preference. The *Lords* preferred *Renton*, and Declared the Life-rent in his favours; because albeit the Laird of *Wedderburn's* Gift was a quarter of a year dated, and exped before *Rentons* Gift, yet the Summons of Declarator at *Rentons* instance was execut three days, and the day of Compearance was three days also before the Execution, and day of Compearance of the Summons of Declarator pursued by *Wedderburn*, and so for such little Odds as Three Days, albeit there was the space of a quarter of a year betwixt their Gifts, the first Diligence of the Citation was totally preferred, albeit also L. *Wedderburn* had raised upon his Gift a Summons of Declarator, long before *Renton*, and had Execut the same long before *Rentons* Summons, and called the same; but because it was Execute upon six days Citation, whereas it should have been Execut upon 21 days, therefore he stood not at that Citation, which could not have been lawful, but Coppied the Summons again off the Signet, and Execut the same again *de novo* upon 21 days, which Execution so made, and day of Compearance was three days behind *Rentons*, and so *Renton* was Preferred, as said is; and for no other defect, was *Wedderburn* Rejected, but because his last Execution was Three days behind the other, and the day of Compearance sicklike; For the *Lords* thought that *Wedderburn* might double his Summons at the Signet, and of New again Summon the Party thereby, albeit the other Party contended, that he could not Summon *de novo*, by vertue of that Summons, which was once Execut to another day of before, and which was Insert therein, and called, and accepted in Judgment by the Party; but if he should use any other Execution, it behoved to be by another new raised Summons, and not by the same Summons, or the double thereof, being Execut, as said is, which was not respected, for the double was sustained; but for the Priority of the other, the other was preferred, they being both Creditors to the Rebel, albeit *Wedderburn* offered instantly to satisfie all the Debt, owing by the Rebel to *Renton*. *Actor. Advocatus* & *Nicolson.* Alter. *Stuart. Gibson* Clerk.

Ross contra *Dick*, *February* 3. 1635.

ONe *Robert Ross*, Son to the Lo. *Ross*, pursues *William Dick*, for Reduction of a Contract, made betwixt the said *William Dick*, and Sir *John Hume* of *Northberwick*, anent the Alienation of the said's Lands to the said *William*, *super capite Inhibitionis*, as done after the said *Robert Ross* his Inhibition, Execut against the said Sir *John*, upon his Bond of 12000 Merks, debtful to him by the said Sir *John*. And the said *William Dick* Alledging, that albeit the said Contract was Posterior to the Inhibition, yet it depended upon Causes preceeding the same; for the said Sir *John* being Debitor to the said *William* in diverse Sums, and also to diverse others his Creditors, which other Creditors had Security of the said's Lands, for their Debts before this Contract, now quarrelled:

It

It was very lawful to the said *William Dick*, to the effect he might get Security, for payment of his own Debt, To take the said Security of the said Sir *John* his Lands, wherein he has obliged himself to pay the saids other Creditors, who had Security of the Land, by Infeftment, before the Contract quarrelled; so that these Rights being perfected to the Creditors before this Inhibition, the subsequent Contract, albeit after the Inhibition, yet depending upon the saids other Rights preceeding the same, cannot be Reduced; seing this Pursuer may yet Comprise the Reversion of the said Contract, and take the Lands, by payment of the other preceeding Sums. This Alledgance was Repelled, for the *Lords* Found, that this Contract now quarrelled, could not be sustained, being done after the Inhibition, as if it had depended upon the prior Securities, in respect it was a new Security, not made in favours of the Creditors, who had Securities Exped before this Contract; but was made in favours of *William Dick*, another Party, who had no Right made to him of these Debts, by these Creditors, whose Real Securities preceeded the Inhibition, and whose Securities did subsist un-prejudged, by the falling of this Contract, which was made as said is, betwixt Sir *John Hume* and *William Dick*, who was a Stranger to the other Creditors Rights; and therefore this Contract was Reduced, as done after Inhibition, and not having any dependence upon a Right preceeding the same, whereto the said *William Dick* had good Right. Actor. *Advocatus*. Alter. *Gilmore*. *Vid. March* 8. 1631. *Broun* contra *Murray*. *Feb.* 6. 1635. betwixt thir same Parties.

Innes contra *Leslie*, *Eodem die*.

ONe *Innes* being Donatar to the Escheat of one *Douglas*, after general Declarator Pursues one *Lesly*, for payment of 400 Merks, adebted by his Bond, to the said *Douglas* the Rebel; and the said *Lesly* Alledging, that he was Cautioner for the said Rebel to one of his Creditors, before the said Rebels Rebellion, for payment whereof, he was Distressed, and would be forced to pay the same, and therefore that Bond ought to Compense the said Cautionry, and he has Just Cause of Retention of the same, for his relief, of a Part of this greater Sum, which he was Distressed for; and so this relief *pro tanto*, being in his own hands, it ought not to be taken from him. The Donatar Replyed, that the Fisk payes no Debt of the rebels, therefore the Defender cannot obtrude this Compensation against the Fisk, albeit it might have met the Rebels self, if he had been seeking this Debt from the Defender. The *Lords* Found the Exception Relevant, and Found that the Defender might allow in his own hands this Debt of 400 Merks, adebted by him to the Rebel, in satisfaction for so much of the other Debt of 1100 Merks *pro tanto*, wherein he was Cautioner for the Rebel, to the Rebels Creditors, he being distressed therefore; and the *Lords* admitted this against the Fisk, and his Donatar, albeit *Regulariter* in our Practique, the Fisk payes none of the Rebels Debts. Actor. *Gibson*. Alter. *Gibson* Clerk. *Vid. July* 26. 622. L. *Essilmont*. *Feb.* 15. 1635. *Lockhart*. *Feb.* 24. 1635. *Raith*. *Feb.* 24 1637. *Pilmuir*.

Dog contra *Musket*, *February* 5. 1635.

ONe *Dog* Pursuing *Musket*, for abstracting of his Corns, growing upon his Lands of which Lands are of the Lordship of *Cessintullie*, in the Miln of the which Lordship, the Pursuer is Infeft, with the Astricted and Thirled Multures of the said whole Lordship; and the Defender Alledging, that the Pursuers Seasin of the Miln foresaid, and Thirled Multures therein contained, cannot furnish this Action, except that the Pursuer could qualifie, and prove, that either the Defender were Thirled to the said Miln, by some Clause of his Infeftment, which astricted his Lands thereto, or else by some other Act and Constitution of Thirlage, or other lawful Writ, which might astrict him

to the said Miln. This Exception was Repelled, in respect of this Reply, which the *Lords* sustained, and admitted to the Pursuers Probation, *viz.* That the Miln Lybelled is the sole and only Miln of this Barrony, belonging to the Kings *Majesty*, and that the Defenders Lands lybelled, are a Part of the said Lordship, and that the Heretors thereof has been in use past memory of Man, to come and grind their Corns of the saids Lands, at the said Miln, as Thirled thereto, and to pay therefore the quantities of the Multures acclaimed, and to cast the Miln-dames, and to lead the Miln-stones, and to repair the Miln; which use and consuetude in the King's Miln is sufficient, albeit more is required in Milns pertaining to privat Persons, which *Reply* being Proven, the *Lords* Found als sufficient to constitut a perpetual Thirlage, as any Writ, or Constitution, being in the Miln of the Kings Barrony. Actor. Alter. *Dunlop*, *Gibson* Clerk. *Vid. March* 14. 1635. *Mackay.*

Ker contra *Knows*, *Eodem die.*

IN this Cause which is mentioned *Jan.* 29. 1635 It was Alledged by *Knows*, that he could not pay to the Pursuer the Sums acclaimed. as being Arrested in his hands, and as Adebted by him to *Craw*, because by the Bond produced, whereby he is Constitut Debitor to the said *Craw*, It is provided that the said *Craw* his Creditor, should pay, and Imploy the same for *Relief* of two Sums adebted by the said *Craw*, to two of his Creditors, who had served Inhibition against the said *Craw* their Debitor, before the Alienation of the Land, made by the said *Craw* to this Defender (and for the which Alienation, the Sum acclaimed, is a part of the Price) and for purging of all other Inhibitions Execut against him, according whereto the Defender has given Bond to the saids two Creditors, specially expreſt, for payment of their Sums; and which Bonds, albeit given after the Arrestment made by the Pursuer, must liberat the Defender, at this Arresters hands, in respect the Writ, whereby the Pursuer conſtituts him *Debitor*, is affected with this Condition, and which he may yet awfully do, in respect of the Provision foresaid, specially expressed therein; And albeit the Pursuer Replyed, that the Provision of the Bond is not tyed only to these two special Creditors, but also has joyned there with others, in that same Clause, in a connexed Phrase, *viz. And for satisfying of all other Inhibitions:* seing therefore he had Arrested, before he gave Bond to these two special Creditors, and that he had not only Arrested, but also had served Inhibitions, long before any Inhibition Execute by any of these two Creditors, therefore in respect of his Diligence, and that the others had done none, The Defenders voluntar binding himself to the two Creditors, ought not to postpone the Pursuer, but he ought to be preferred in the Sum acclaimed. The *Lords*, notwithstanding of the *Pursuers* first Inhibition, before the other two Creditors to *Craw*, and notwithstanding of his Arrestment before *Knows* gave Bond to these two special Creditors, *Found* the Exception Relevant, and that the payment appointed by the Bond, and to be made to the other Two Creditors, specially mentioned therein, ought to take effect, before payment could be craved by this Arrester; albeit the Bond *unico contextu*, provided payment to be made to them two, and also to all other Creditors, who had served Inhibition; which generality, The *Lords* Found, could not take effect, but after the two Creditors *specificè* named were first payed, seing the *Defender* was content to run the hazard of this Pursuers first Inhibition; and so the special Persons named were preferred, albeit there was no Note of Priority, appointing them to be payed in the first place, by that Bond, but only *in ordine Scripturæ*, their names were expreſt first therein; And therewith the said general Clause immediately thereafter, without any directing of Preference, or Posteriority,

ority, and albeit there was no Diligence done by any other but this Pursuer. Actor. *Craig.* Alter. *Belshis* & *Mowat.* *Gibson* Clerk.

Ker contra *Forsyth* of *Dyks*, *Eodem die.*

MR. *William Ker* pursues one *Forsyth*, and *Forsyth* of *Dyks*, for Improving of a Disposition of his Wifes Liferent, Alledged made by him to the said *Forsyth*, and which being produced by *Dyks*, to whom *Forsyth* had Assigned the same, for Relief of some Money, wherein *Dyks* was Bound as Cautioner to *Forsyths* Creditors for him; And the Pursuer offering to Improve the same, and therefore desiring that *Dyks*, who produced the same, should abide by the same, upon Peril of the pain of Falshood; seing the Principal Party, to whom it was made, has left the Countrey, and was not present to abide thereat, And *Dyks* Answering, that he could not abide thereat, but as given to him by the principal Party, as a true Writ, wherein he could know nothing whether it were true or false, he not being a Direct Partie therein, and no wayes accessor thereto, but is a Third Person, who is heavily prejudged by the Party, and with no Reason ought to be drawn under this danger; And the Kings *Advocat* contending, that the Writ being now produced, the Producer ought to advise, if he will abide by it or not, so as that he will stand to the perril of it, seing there is no other Person to abide at it; and if the Producer were not urged to this by the *Lords*, it would open a door to all Falsets, the Forger flying himself, and putting over the Writ to a Third Person, whereby all Punishment might be evited. The *Lords* would give no Answer at this time, whether a Third Person should be holden absolutely to abide at this Writ, or not, seing he produced the same in Judgment, where he might yet deliberat with himself, if he would abide at it, and use it or not, seing it was yet entire to him, either to use it, or pass from it; but superceeded to give answer thereto, while the tryal of the Truth of the Writ were deduced, according whereto, as they Found by the consideration of the Course of the Process, and tryal taken therein, and as any thing should reflect upon this Party, they would give answer either to ty him thereto *simpliciter*, or not: And it being further Alledged by the Defender, that the Pursuer could never be heard, to Improve the Disposition called for, and now produced, but Absolvitor *simpliciter* ought to be granted from this Improbation, because the Pursuer has sensine ratified the said Disposition, which being of consent admitted to Probation, the Defender produced the said Ratification, for proving thereof; and the Pursuer offering to Improve the same as False, And so Alledging the Exception could not be Found proven; wherein it being Contested betwixt the Parties, if the Pursuer should be holden also to Improve the Principal Disposition called for, or if it should suffice in Law, and that he had no necessity to Improve any more, but the Ratification produced, to verifie the Exception, as the Pursuer Alledged; who Replyed, that seing the Exception elided the whole Cause *in totum*, and that the Probation thereof, as it would produce Absolvitor *simpliciter & in totum* from the Pursuit, so the succumbing therein, should produce Condemnator, without any further Probation of the Lybel; for *Exceptio affirmat Libellum*, at least *praesumptive*, and it is absurd, that there can be any Probation of a Libel totally elided by the Exception; For the Exception and the Lybel cannot admit Probation to go upon both. The *Lords* nevertheless Found, that it was Incumbent to the Pursuer to Improve both the Disposition, and the Ratification; and that albeit he should Improve the Ratification, yet he would not be freed from Improving the Disposition called for, so that albeit the Exception elided the whole Pursuit, yet being in an Improbation, where the Exception was proponed against the Party, not materially *in causa*, but why he could not Improve the Writ, it was Found that the proponing thereof, did not exeem the Pursuer,

from the Burden, to Improve the Writ Lybelled; Therefore they Assigned a Term for to Improve both, but declared that they would consider by the tryal Deduced, if the Improving of the Ratification should suffice to take away the Writ Ratified, or not; and because the Pursuer desired a short day to be assigned to him to Improve, against which day *Forsyth*, who was the Party principally called, and to whom the Disposition Lybelled was Alledged to be made, was Alledged to be out of the Countrey, and so could not be conveniently Summoned to that day; Therefore he desired that the *Lords* should find no necessity to Cite him to that Dyet, as use is in other Dyets, where Defenders are absent, and which in this Process, he Alledged he needed not to do, seing he being twice Cited before, and not Compearing to abide at the Writ, nor to sustain the Tryal, *quoad eum*, the Writ ought to be Decerned to make no Faith, which ought to liberat the Pursuer, of any further warning of him, to any subsequent Dyet of the Process; for these Dyets are not Deduced, nor the Tryal taken against him, but against this Third Party Compearing, and who uses and produces the Writ; notwithstanding whereof the *Lords* Found, that they would not find the Writ to make no Faith against the Principal Partie absent, seing it was produced by another, and that Tryal was to be taken upon the verity of the Writ; Therefore they Ordained him to be Warned to all the Dyets, but upon Citation of 15 days only, and not as against one out of the Countrey upon 60 days. *Actor. Advocatus. Alter. Nicolson* & *Gilmor. Scot* Clerk.

Ross contra *Dick*, *February* 6. 1635.

THis Cause which is mentioned, *Feb.* 3. 1635. being again this day called, and the Parties heard in presence of the *Lords*; It was Found, that the Contract of Alienation of the Lands of *Northberwick*, made to *William Dick* by Sir *John Hume*, after the date of the Pursuers Inhibition, ought not to be Reduced upon that Reason, as done after his Inhibition, where the said Contract depended, and was made for fulfilling of Bonds, preceeding that Inhibition; in the which Bond the Debitor was obliged to give Infeftment, either in Wodset, or of Annualrent, or where the said Contract was made, according to prior Infeftments, granted to other Creditors, before the said Inhibition; which Contract the *Lords* Found not to fall, for the Reason of the said preceeding Inhibition, where the same contained no other head, nor no more than was granted in the saids Infeftments, perfected to the Creditors, who were Infeft before the Contract, and where the same Contract contained nothing but the Obligation, and perfecting of the Infeftment, whereto the Debitor had Obliged himself, by his Bond to his Creditors, before the said Inhibition; and respected not the Reply, whereby the Pursuer answered, that the Contract being made with *William Dick*, who had not Acquired the Right of the preceeding Creditors their Infeftments, but being a new Security, done after his Inhibition, however it might have been sustained to the Creditors themselves, or to their Assigneys, yet cannot be sustained to this Party, who had contraveened the Inhibition, which was Repelled; seing the Party Pursuer received no prejudice thereby; for that which in the Person of other Creditors, would have excluded the Pursuers Inhibition, might alike have the same effect in *William Dicks* Person, who had payed the Creditors, and who had resigned their Rights of Infeftments in his Hands, he being Infeft upon this Contract in the Lands Lybelled; but whereas the said Contract contained any other head, which had no Dependence upon a Cause preceeding the Inhibition, and which the Debitor might have been compelled to fulfill, upon the ground of a preceeding Obligator Clause, The *Lords* Found the Contract, in these Points, as done *post Inhibitionem*, ought to be Reduced; and because the Defender also Alledged, that the Contract was in some Points perfected, for Satisfaction of preceeding Bond

Bonds of Money, adebted to the Creditors, and whereupon they had ſerved Inhibition before this Purſuers Inhibition, and before his Bond, which is the ground thereof; and that the Purſuer Alledged, and Replyed, that theſe preceeding Bonds of borrowed Money, and Inhibition before the Purſuers Bond could not be received, to ſuſtain this Contract, which had no Coheſion together; & if the Defender had any ground of Priority of Inhibition, before the Purſuers Bond, he might Reduce thereon, but it could not be received in this place, by way of Exception. The *Lords*, for ſhortning of Pleas betwixt Parties, Found, that they would *hoc ordine*, and in this ſame place, diſcuſs this Alledgance upon the Priority of the Defenders Debt and Inhibition; For if he thereby might in a Reduction, anull the Purſuers Bond, then the Contract quarrelled, might lawfully ſubſiſt, for that Debt alſo; and it was Found, that it might ſummarly be Cognoſced and Diſputed betwixt the Parties als conveniently in this Proceſs, without multiplication of more Proceſs, and without further Vexation of any of the Parties. Actor. *Advocatus*. Alter. *Nicolſon* & *Gilmor*. *Scot* Clerk.

Captain *Watſon* contra *Aiton*, *February* 7. 1635.

BY Contract of Marriage betwixt Captain *Watſon* and his Daughter on the one Part, and Mr. *Andrew Aiton* on the other Part; Captain *Watſon* is obliged to pay in Tocher with his Daughter, to the ſaid Mr. *Andrew Aiton* 10000 Merks, at the receipt whereof the ſaid Mr. *Andrew* is obliged to Imploy 5000 Merks thereof upon Land or Annualrent, to himſelf and his ſaid future Spouſe, in Liferent, and the Longeſt liver of them two, and to the Heirs gotten betwixt them in Fie; Which failzieing to his Heirs whatſomever. After the Marriage, and before the payment made of this Sum by the Captain, the ſaid Mr. *Andrew* aſſigns the ſaid Sum to his ſaid Spouſe, and the Heirs gotten betwixt them, (ſhe being then great with Child) conform to the Contract, which failzieing, *eo caſu* he aſſignes 3000 Merks of the ſaid 5000 Merks to his ſaid Spouſe, and the other 2000 Merks he aſſignes to his Siſters Bairns. This Aſſignation after the deceaſe of the ſaid Mr. *Andrew*, there being no Bairns on Life procreat betwixt him and his ſaid Spouſe, is deſired to be Reduced, as done in *Lecto ægritudinis*, at the inſtance of his Heirs; wherein his Relict, and the Captain her Father being Defenders, Alledged that this Sum was Moveable, and ſo the Diſpoſition thereof could not be quarrelled; And the Purſuer anſwering, that it was Heretable, being deſtinat for Infeftment upon Land: The *Lords* Found, that the Sum remained a Moveable Sum, even unto the time the ſame was Imployed upon Land, conform to the Deſtination; and that the Deſtination of the Imployment, whereto the Creditor was obliged, when it was payed to him by the Debitor, made not the Sum to be of the nature of an Heretable Sum; ſeing the Debitor was not obliged in Annualrent therefore, neither was he obliged in the Imployment, but only the Creditor at the receiving thereof; and albeit he had been ſo obliged, yet it remained ever Moveable, ſo long as it remained un-imployed upon Land, as the Deſtination appointed, whether it were in the hands of the Creditor or Debitor, and far more while it remained in the Debitors hand un-payed by him. *Gibſon* Clerk, *Vid. March* 20. 1633. *Anthony White*. *Decem*. 12. 1632. *Geills Shaw*.

Moſman contra *Lockhart* and *Laing*, *February* 10. 1635.

ONe *Moſman* Relict of *James Nisbet*, being Donatrix to her umquhile Husbands Eſcheat, after general Declarator Purſues *Lockhart* and *Laigg*, who had certain of her Husbands Goods and Gear in their Hands, by a ſpecial Declarator, for Delivery of the ſame to her; And they Alledging, that the ſaid Defunct being their Debitor, delivered the ſaids Goods to them, in his own Lifetime, long before the purchaſing of this Gift from the King, by vertue of

which Delivery they became in possession, proceeding upon a just cause of Debt: And the Donatrix Answering, that it was not Relevant, except that the Defenders Alledged, that the Delivery was made before the Rebellion, for after he was at the Horn he might do no Deed, which could prejudge the King, no more than a Rebel year and day at the Horn, might Dispone his Lands after the year expired, in prejudice of the Superiors Right to his Liferent. The *Lords* Found the Alledgance Relevant, and Found it not necessary to the Defender to say, the Delivery was made before the Horning, being done before the Gift was Disponed, as said is. Actor. Alter. *Heriot. Vid. February* 14. 1635; betwixt these parties.

Muire contra *Muire*, *February* 11. 1635.

IN a Reduction of a Bond of Alienation of a Tenement in *Glasgow*, made by umquhile *David Muir*, in favours of *Janet Muire* his Fathers Sister, at the instance of the appearand Heirs of the said umquhile *David*. The *Lords* Found, that this Action of Reduction, moved at the instance of the appearand Heir, could not be Sustained to Reduce an Heretable Disposition of Lands, made by the Defunct, to whom the Pursuers were neither Heirs, nor had any other real Right to the Lands; and this Action was not Sustained at the Pursuers instance, as appearand Heir to the Defunct, maker of the Disposition, upon that Interest, as if they as appearand Heirs, might crave Reduction to that effect, that they by the Discussing of this Action, might know whether they might enter Heirs or not to the Defunct; for they ought to consider of their hazard themselves, and ought not to be suffered to Pursue upon that Interest, for that end. Actor. *Nicolson & Maxwel*. Alter. *Stuart & Gilmore*. *Gibson* Clerk. *Vid. December* 12. 1635. *Wardlaw. December* 3. 1634. L. *Johnston*.

Cock contra Parochioners of *Auchtergovan*, *February* 12. 1635.

John Cock Writer having the Right of Feu of a peice of Kirk-Land in *Auchtergovan*, which was Feued in *anno* 1562. and since continually Possest by him and his Predecessors, while lately that the same was designed to the Minister, and Evicted by him for his Gleib, Pursues the rest of the Parochioners, Heretors of the Kirk-Lands, for their proportional part of his Relief: And they Alledging, that he ought to have no Relief, because by the *Act* of *Parl.* 1563. *the Viccars Manse and Gleib are Discharged to be Feued*; and this Land Libelled, designed to the Minister, was the Viccars Gleib of old, and therefore the Feuar thereof ought to have no Relief; And albeit the Pursuers Feu be in *anno* 1562. and so a year before the *Act* of *Parliament*, yet it must fall under that Act, because the Feu was not Confirmed untill the year 1565. and so is null, and therefore is alike as if it had been Feued after that *Act*. The *Lords* Repelled the Alledgance, and Found that there ought to be Relief granted; And it being thereafter Alledged, for one *James Rattray* a Parochioner, that his Lands ought not to be subject to any Relief, because he holds his Lands of the Colledge of *St. Andrews* in Feu, to which Colledge the same is Mortified, before the *Act* of *Parliament* 1594. *which appoints Relief*, and so belonging to the Colledge, they cease to be Kirk-Lands: This Alledgance was also Repelled, and Found that these same Lands, albeit Mortified to the Colledge, yet ceases not to be Kirk-Lands, but that they ought also to pay their part of the Relief, for they were Feued to the Defender for a small Feu-Duty of 8 Pounds only. Actor. Alter. *Nairn. Hay* Clerk.

Brown contra *Binnie*, *Eodem die*.

BY Contract of Marriage betwixt *Robert Brown* on the one part, and *Margaret Binnie* his future Spouse, with consent of *John* and *Alexander Binnies* her Brethren on the other part, the said *Robert* is obliged to imploy the Tocher

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to himself, and his future Spouse in Liferent, and to the Heirs gotten betwixt them in Fee, which failzying, the one half to himself, and the other half to the said *John* and *Alexander Binnies*; which Contract, after the Decease of the Wife, being Registrat by consent of Procurators, at the instance of the said *John* and *Alexander Binnies*; and the said *Robert Brown* Charged thereupon to fulfil the same, and he Suspending the saids Charges; The *Lords* Found that seing the Principal Party, *viz.* the Wife, who by the Procuratory contained in the Contract, gave Warrant to the Procurators to Compear, and consent to the Registration, was Deceast before the Registration thereof, that the same could not be so summarly Registrat, by the consent of Procurators Adhibited for the Parties consenters, notwithstanding that it was Alledged for them, that they were Parties Contracters, and had Subscribed the Contract, and so that they might lawfully Registrat the same, and seek Execution thereupon; And that being the case, it was more than if there had been only a Clause conceived in their favours, *quo casu* such summar Registration could not have been Sustained, but they being expresly Contracters and Subscribers, the case was far different: Which Alledgance was Repelled, and notwithstanding thereof the *Lords* Found that the Contract could not be so Summarly Registrat, at the instance of the Consenters, after the death of the Principal Party, but reserved to them their Action, to Pursue for fulfilling to them of that Contract, in any Head Obligator in their favours, by way of ordinar Action *prout de jure*; *Vid. January* 15. 1635. *Shanks*.

Hepburn contra *Seaton*, *Eodem die*.

James Hepburn Brother and appearand Heir to umquhile *John Hepburn* his elder Brother, Pursues Dam *Margaret Preston*, Relict of umquhile Sir *Robert Hepburn* of *Alderstoun* their Father, she being their Mother, and *Isobel Seaton* Relict of the said Brother, who were Liferenters of the whole Estate, whereto he was to succeed, for a Modification to him, during their Lifetimes; And the said *Isobel Seaton* Alledging, that this Action should abide continuation, and also, that the *Act* of *Parliament*, which was the Ground of this Action, Ordained Modifications to be granted to the Heirs of the Defunct, so that this Pursuer being only appearand Heir, and neither being Infeft as Heir, nor Retoured Heir, he could have no Action upon the *Act* of *Parliament*, which ought to be respected, seing the Defender has Action due to her against the Heir of her Husband, which she cannot move against the Pursuer, before he be Entred Heir. The *Lords* Repelled the Alledgance, seing the Action was Alimentar, and so needed no Continuation; And also the appearand Heir ought to have Modification, that he might have Means whereby to live, and that the *Act* of *Parliament* did militat for the appearand Heir: Likeas the Pursuit after Sentence would furnish Action against the Defender, as behaving himself as appearand Heir to the Defunct, and if she pleased also, she might Charge him to Enter Heir, and if he refused, then she had reason to Dispute, why she might be freed of this Modification, or make other advantage thereby. *Actor. Nairn.* Alter. *Hay* Clerk. *Vid. July* 21. 1636. L. *Ramorny*, and the cases there.

Lockhart contra *Mosman*, *February* 14. 1635.

IN this Cause mentioned *February* 10. 1635. The Defenders Alledging, that the Rebel was their Debitor, and qualifying the same by the Disposition made to them by the Rebel, of the Goods therein contained, made by him to them, for satisfying of his Debt, contained in that Disposition, and which he therein confest was owing by him, and which they Alledged was sufficient, for if they had had a preceeding Bond, it could have born no more than that Disposition bore, *viz.* That he was their Debitor in that Sum, and when they recei-

ceived that payment, made by the Disponing of these Goods, they destroyed the first Bond; So that the Disposition alone was sufficient to prove the Debt, specially seing when they Acquired the said Disposition, and payment thereby, The Disponer was then Relaxed from the Horn, and was a free person. The *Lords* Repelled the Alledgance, and Found the Disposition, albeit proporting a Confession of the Debt, was not enough to prove the Debt preceeding the Horning; for after Horning any Rebel might by such Deeds defraud the King, and his *Donatars*, to confess *Debts*, which truly they were not owing, and so frustrat the King altogether, if this were Sustained; and albeit the *Rebel* was then *Relaxed*, yet that did not purge his preceeding *Rebellion*, which made all his Goods to fall, which he had before the *Rebellion*, and at the time thereof before he was *Relaxed*. *Partibus comparentibus ut notatur*, *February* 10. 1635. betwixt these Parties. *Vid. February* 24. 1635. *Rait* of *Halgreen*. *February* 3. 1635. *Innes*.

Cunninghame contra *Stuart*, *February* 19. 1635.

ONe *Cunninghame* made *Donatar* by *George Rome*, to the Liferent Escheat of *Rob. Neilson*, of the Lands of which were holden of the said *George Rome*, after general *Declarator*, recovered against the said *Robert Neilson*, in a special *Declarator* he Pursues one *Stuart*, Intromettor with the *Duties* and Profites of the saids Lands, for refounding of the same to the *Donatar*, of all years since the said *Rebel* was year and day at the Horn, *viz.* continually since the year 1615. And the *Defender* Alledged, that he was Infeft in the saids Lands by the said Rebel, and by vertue thereof uplifted the Profites of the Lands *bona fide*, which being now consumed, & he never interrupted by any special Citation, he ought not to be compelled to refound the same; and the *Donatar* Opponing the Horning, which preceeded the *Defenders* Infestment, and which put the Rebel & all the Leidges in *mala fide*, to do any Deed thereafter in prejudice of the Superior, for the Casuality of the Liferent; specially also there being a general Declarator recovered against the Rebels self, which declares the *Right* in effect to pertain to the Superior, since the time that he was year and day Rebel. The *Lords* Found the Alledgance Relevant to exclude this Pursuit, for all the bygone years Duties acclaimed, which the *Lords* Found to have been *bona fide* Uplifted and Consumed by the Defender, who was never interrupted by the Superior, nor his Donatar in the Possession of the same; for albeit the Defenders Infestment was made by the Rebel to him, after he was Rebel, yet the same was sufficient for the saids bygones, intrometted with by vertue thereof, wherein he was not interrupted, albeit it would not defend for the time to come, since the time of his special Citation in this special Declarator: but Found the said Infestment sufficient to liberat him for all the years before this his special Citation in this particular Declarator, and that he was not interrupted, neither by the Process, nor Decreet of general Declarator, whereto he was not specially called, and so no respect was had thereto, and the same was also only lately recovered in *anno* 1634. Therefore he was Assoilzied from the bygones; for he could not be in any worse case, than a Tennent who payed his Farms yearly to his Master, albeit Rebel, yet not being specially intimate to him, that payment would ever have freed him from the Donatar for bygones. *Item*, the *Lords* Found, that the Liferent pertained to the same Pursuers Author, albeit the Rebel was not Rebel a year since he Acquired the Right of the Superiority; for the Lord *Sanquhar* was Superior the time when the Rebel was at the Horn year and day, and before he sold the Lands to *Rome* the Rebel was relaxed; Whereupon it was Alledged, that *Rome* could not have right to the Liferent of the Vassal, who since his *Right* was not *Rebel*, being *Relaxed*, as said is, before his *Right*: Which Alledgance was *Repelled*, seing the Vassal was *Rebel*

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a year unrelaxed, which made his Liferent fall to his Superior; And seing the Lord *Sanquhar* was Superior when it fell, and that he sold all his Right which he had to the Lands to *Rome*, and had not Gifted that Casuality before to another; they Found that it pertained to *Rome*, notwithstanding that the Vassal was relaxed before the right was Acquired by him, seing the year was expired before he was Relaxed. Actor. Alter. *Gilmore*. *Scot* Clerk. *Vid. February* 24. 1637. *Pilmuir*. *February* 24. 1635. *Rait* of *Halgreen*.

L. *Earlstoun* contra L. *Grimmet*, *Feb.* 21. 1635.

IN a Redemption, the *Lords* sustained the order of Redemption, albeit the Instrument of Premonition made no mention that the Procurator, who made the same, did show his Procuratory and Warrand to premonish, and also albeit the Instrument of Consignation made no mention therein, neither of the Production of the Procuratory, nor yet of the Production or shewing of the Reversion, by vertue whereof the Redemption was used, without which had been both produced, & also the Instrument of Premonition and Consignation had made mention expressly, that the same were shown, as the Defender Alledged to be necessar in all Orders of Redemption, he Alledged, the Order could not be sustained, but Absolvitor ought to be granted therefrom; which Alledgance was Repelled, and the Order sustained: But Declared, that they would not draw this hereafter in a preparative, in respect the Pursuer had sustained great trouble in Actions, for recovery of the said Reversion from the same Defender. Actor. *Mowat*. Alter. *Nicolson*. *Gibson* Clerk.

L. *West-Nisbet* contra L. *Swintoun*, *Eodem die*.

THe L. *West-Nisbet* Pursuing L. *Swintoun*, for the Tack-duty of the Miln of , which Miln was Set in Tack to the Tennent for certain years, by the umquhile L. *Swintoun*, to whom *West-Nisbet* was Executor, for payment of 30 Bolls of Meal yearly for the Miln and Miln-Lands, betwixt *Yuill* and *Candlemass* yearly; the Entry of the Tennent was by the Tack appointed to be at *Whitsunday*, and so to continue from that *Whitsunday* to the next *Whitsunday*, and so yearly thereafter, till the expiring of the Tack. The L. *Swintoun* Setter of the Tack, dies in the second year of the Tack, after the *Martinmass* in that second year, and before *Yuill*, which was the Term appointed by the Tack, for payment of the Tack-duty; whereupon it being controverted before the *Lords*, whether *West-Nisbet*, who was Executor to the Defunct, or *Swintoun*, who was his Heir, and Heretor of the Miln, should have that years Tack-duty, or if it should divide betwixt them; The *Lords* Found, that the Executor ought to have the whole years Tack-duty, and that the Heir ought to have no part thereof; albeit the Heir Alledged, that the least he could be found to have Right to of that years Duty, behoved to be the just half thereof, because the first year of the Tack behoved to rule the whole subsequent years (as was agreed on betwixt the Parties) and if *Swinton* had died after the *Martinmass* in the first year, and before the Term of payment, *viz.* before *Yuill*, as he did the second year now controverted, the Executor could never have had Right but to the half Duty, because the Entry being at *Whitsunday*, the Miln-Lands could never have been Tilled by the Tennent, while the *Martinmass* thereafter; for at the said Term of Entry, the Cropt was then Sown, and pertained to the preceeding Tennent, and the Entering Tennent could not Enter, while that Cropt was off the Ground, which could not be till the *Martinmass* after his Entry: Likeas the Miln Libelled is but a Winter Miln, so that betwixt his Entry thereto, and the *Martinmass*, whereat the Heretor died, the Tennent had not made any profit of the Miln, seing the whole profit thereof behoved to be in the Winter after that *Martinmass*, neither were the Terms of payment come

when the Heretor died; and if the Heretor had kept the Miln in his own hands, un-let out to Tennents, the Executors could not have had the whole year; for the whole profit thereof could not been uplifted by the Heretor at that time, and so the Executor could get no more than the Defunct would have gotten, and the half of the year was but expired when he died; for albeit he died after the *Martinmass*, yet that ought not to be considered as in Farm of Lands, where the Heretor dying after the *Martinmass*, that whole years Duty will pertain to the Executor; the reason whereof is, because the whole Cropt is then off the Ground, and both the Legal Terms are bypast, *viz. Whitsunday* and *Martinmass*; but in this case it is not so, where at the Heretors decease, neither was the Miln Libelled, nor the Multures of the Miln payable, nor the whole year past, nor the Legal Terms both come; for the Entry of the Tack being at *Whitsunday*, as said is, the Legal Terms behoved to be sustained, not *Whitsunday* and *Martinmass*, but *Martinmass* and *Whitsunday*; so that the first Term was *Martinmass*, and the other Term, *viz. Whitsunday* was not yet come: Which Alledgance was nevertheless Repelled, and the Executor Found to have Right to the whole, *nemine Contradicente*. Actor. *Cunninghame*. Alter. *Nicolson* & *Craig*. *Hay* Clerk.

L. *Hallgreen* contra *Feb.* 24. 1635.

RAit of *Hallgreen*, as Donatar to the Escheat of umquhile L. *Dunnipace*, after general Declarator, Pursuing a special Declarator against certain Defenders, for payment of certain Bolls Libelled of Teinds adebted by them to *Dunnipace*, of certain years before his decease: And one of the Defenders Alledging, that the said Rebel was Debitor to him in Sums of Money, before the Gift granted to the Pursuer, so that he had just cause of Retention of thir Teind-Bolls Libelled, in his own hands, for his own payment *pro tanto*; for it must be to him in that same case, as if he had delivered the samine to the Rebel, and reported his Discharge thereupon, before any Declarator specially Intented against the Defender therefore, *quo casu* the Gift and general Declarator could never have put him in *mala fide*, far less can his Retention for a just Cause of Debt, preceeding the Gift, be quarrelled. This Alledgance was Found Relevant to liberat the Defender; And it being Alledged for *John Livingstoun* Burgess of *Edinburgh*, another Defender, for another quantity of the Teind-bolls Acclaimed, that the Rebel had Disponed the samine to him for just Debt, owing by the Laird to the Excipient; which being done before the Execution of the Summons of special Declarator, it must be sufficient to him who is a distressed Creditor of the Rebels, and hath no other means of satisfaction, especially seing the Rebel remained still in Possession of his own Teinds all this time, which might easily warrand the Defender to receive this Disposition. This Alledgance was Repelled, seing the Disposition did neither preceed the Gift of the Rebels Escheat, nor the General Declarator, but was made after them both. *Gibson* Clerk. *Vid.* 15 *Feb.* 1635. *Lockhart*, and the Cases there. 24 *Feb.* 1637. *Pitmuir.* 3 *Feb.* 1635, *Innes.* 19 *Feb.* 1635. *Cunninghame.*

La. *Borthwick* contra L. *Gallasheills*. *March* 4. 1635.

LAdy *Borthwick* being Infeft in the Lands of *Coblebaugh* and others, and Pursuing the Laird of *Gallasheills* for the Maills and Duties of certain of these Lands; who defending himself with a Right of a Tack of the same, Set to him by *Walter Cairncross*, Son to umquhile *Cairncross*, which Setter forelaid was Heir to his umquhile Good-sir, who was Heretably Infeft in these Lands by the umquhile Lord *Borthwick*, Heretor of the same: And the Lady Replying, that he could not cloth himself with any Right flowing from *Walter Cairncross*,

Cairncross, because Sentence of Reduction was obtained at *Gallasheills*'s own instance, & the E. of *Lothian*'s instance, against the Son and appearand Heir of the said *Walter*, & also against the Lo. *Borthwick*, Husband to this Pursuer, Reducing the Lord *Borthwick*'s Heretable Infestment of the Lands, and Reducing *per consequentiam* expressly also the Heretable Right of the saids Lands, made by the Lord *Borthwick* to the said *Walter Cairncross*; after the which Sentence Reductive, the said Excipient was Decerned by a Decreet Arbitral betwixt him and the Earl of *Lothian*, and this Pursuers Husband, to quite all the Rights which he had to the Lands, in favours of her said Husband, that he might be Infeft validly in the same Lands of the Lordship of *Borthwick*; and that this Pursuer, Spouse to the said Lord, might be Infeft in Conjunct-fie of the Lands Decerned thereby. Likeas accordingly she is Infeft in thir Lands Libelled, Acclaimed as a part of the Lands provided to her in Liferent; in respect of which Decreet of Reduction obtained at his own instance, and deed done by him, depending thereon, he could never thereafter lawfully acquire any new Right of the Lands, the Rights whereof were Reduced by that Sentence *Reductive*, procured by himself, and the Deeds done thereupon by himself depending thereon. And the Defender Answering, that he comes not against any Right which ever he had devolved in the person of the Lord *Borthwick*, after that Sentence; but that it was lawful to *Cairncross*, against whom that Sentence was recovered, or his Heir, to Reduce that Decreet Reductive, upon good Reasons, Relevant in Law; so it was lawful to this Excipient to acquire that Right from them, wherein he cannot be prejudged, if the *Right* be in Law valid, to maintain his *Possession* thereby, notwithstanding that he had obtained the Sentence *Reducing* that Right, and which Sentence Reductive he now desired to be Reduced, to the effect the Heretable Right, made to the said *Walter Cairncross*, might remain and be tryed to be good and lawful, and not to fall for any Reason contained in that Sentence, whereby it was Reduced: And he Alledged, that it were great unjustice, that because the Right was become in his person, therefore that it should not have the course and effect of a good and sufficient *Right*, it being so in it self, but that it should fall, because he had acquired it. Likeas he further Alledged, that he was but Tacks-man to the said *Walter Cairncross*, and so Tennent only to him, and that the Heretable *Right* subsisted in the said *Walters* own person; for which *Walter*, the Advocats and Procurators Compearing in this Process, declared they Compeared expressly, and proponed the Exception for him, and insisted in the said Reduction of the Decreet Reductive at his instance, the same being specially raised in his name. *And* the Pursuer Answering, that albeit *Walter Cairncross* be Reducer, yet his name cannot be obtruded against the Pursuer, because he was denuded of all Right competent to him, in favours of *Gallasheills*, who can never be heard to Evert his own *Deed*, as said is. The *Lords* Repelled the foresaid Exception, either proponed for *Gallasheills*, or for *Cairncross*, in respect of the *Reply*, *viz.* That *Cairncross* was absolutely denuded of all his Right in favours of *Gallasheills*; and Found, that *Gallasheills* could not valiably nor dutifully acquire from him his *Right*, thereby to prejudge the effect of the Sentence, Reducing the same Right obtained at his own instance; which Sentence he was Found he could not quarrel himself, neither directly nor indirectly, nor upon any ground of Right acquired by him from any person, which might lawfully have Impugned the same, albeit purchased by him after that Sentence, and not being in his person at the time of the obtaining thereof, nor yet being acquired by him at any time, when he Contracted thereafter with the Lo. *Borthwick*, no more than if the saids Rights had been then standing full in his person, and as if the Right had been acquired by him the time of the Sentence, and when he Contracted thereafter

with the Lo. *Borthwick*, *quo casu* he could not have come against the Decreet, and Deeds thereafter done; Even sicklike the *Lords* Found, he could not be heard to come against the samine, upon any Purchase of any other mans Right acquired thereafter; for albeit the Party Principal, to whom the Right belonged, might have quarrelled that Decreet, which was given against him; yet it was not Found alike competent to that Party, who had obtained the Sentence, and had transacted therefore. Actor. *Nicolson* & *Mowat*. Alter. *Advocatus*, *Stuart* & *Cunninghame*. *Hay* Clerk. *Vid.* 5 *March* 1629. La. *Borthwick*. 11 *Decem.* 1634. L. *Lesnoris*.

Dick contra *Spence* and *Thomson*, *March* 11. 1635.

William Dick having certain Goods belonging to *Spence* a Bankrupt in his hands, which being Arrested by one *Hunter*, Creditor to the said *Spence*, the said *William* is Cited upon the Arrestment, to make the Goods forth-coming; and after that Arrestment, and Citation, *Thomson* another Creditor of the said *Spence*, having upon his Bond Registrat against *Spence*, by vertue of the *Lords* Letters, Poynded the same Goods, out of the said *William Dicks* Sellers in *Leith*, where they were the time of the Arrestment preceeding, and also at the time of the Poynding: The said *William* being conveened by the Arrester, to make the Arrested Goods forthcoming, and he Defending, that the same were Poynded from him, as said is; Likeas the Charger Compeared, and in respect of his Poynding claimed Preference to the Arrester; And the Arrester Alledging, that he ought to be Preferred to the Poynder, in respect of his Anteriority of Diligence, in his Prior Arresting, and Citation also of the Haver before the Poynding, which so affected the Goods, that the Haver could not have suffered any other to Poynd in his prejudice thereafter; seing if that were allowed, it should tend to make all Arrestments unprofitable, and should give liberty to the Haver to Elide all Diligence of the Creditors, and to give way to the payment of any other Creditors he pleased to prefer, which were against Justice; for the Haver should not have suffered the Poynder to enter within Houses to Poynd, while his Arrestment had been tryed, whereupon he was Summoned before the Poynding, as said is, and the Colluson of the Haver with the Poynder is manifest herein; Likeas he offers to prove by *William Dicks* Oath, that by expres Paction betwixt him and the Poynder, they conveened and agreed together, that he should give way to the Poynder to Poynd, and make open doors to him for that effect, to the effect he might be preferred, and the other Creditor prejudged, which was not lawful to him to do; and the time of the said Arrestment, he took the Poynder expresly bound to Warrand him of the said Prior Arrestment, and of all danger, which he might incur thereby; and after that Agreement, the said *William Dick* sent down his Servant, to make his Sellers open, that the Poynder might have free access thereto, and so Poynd; which discovers a manifest partial proceeding of the said *William Dicks*, and that the Poynding was done by his Gratification of one Creditor, to the prejudice of another, which fraudulent dealing is always prohibited in Law; notwithstanding of which Alledgance for the Arrester (which was Repelled) The *Lords* preferred the posterior Poynder to the prior Arrester, and prior Citation, for the same was Found no Impediment to another Creditor thereafter to Poynd, and this gratification of the Haver was not respected, because it was not Found, as it was qualified, to be such a Deed as might derogat to the Arresters lawful Diligence, except that he had refused to suffer the Arrester to have the like liberty, which he granted to the Poynder, if the Arrester had desired the same, which not being done, the Haver was not Found to have done any unlawful Act permitting the Poynding to have its own course, which was an execution lawfully used, and done by the Authority of a Sentence of a Supream Judge, which

which he had no neceſſity to have ſtayed. Actor. *Gilmor.* Alter. *Stuart* & *Nicolſon. Scot.* Clerk. *Vid. July* 29. 1634. betwixt theſe Parties. *Feb.* 12. 1636. *Leſly.*

M'kay contra *Menzies, March* 14. 1635.

ONe *Gilchriſt Mckay*, purſuing *Archibald Menzies*, both Indwellers in *Athole*, for ſpuilzieing of a Horſe, with a Seck and Meal therein, being on the Horſe-back; and the Defender Alledging, that he might lawfully intromet with the ſaid Horſe and Meal, becauſe, conform to the Law of the *Majeſty*, the Purſuer being Tennent in the Lands of which are Thirled to the Miln of pertaining to ſuch an Heretor, on whom he condeſcended; and of which Miln the Defender is Miller, the ſaid Purſuer was tranſporting the Meal of the Corns Growing upon the ſaid Lands ſo Thirled, having grund the ſame at another Miln, then to the ſaid Miln whereto the Corns were aſtricted, which he having ſo apprehended, it was lawfull to him, conform to the Law of the *Majeſty* ſo to do, and keep the ſaid Horſe and Meal, but danger of ſpuilzie, at the leaſt ay and while the Purſuer be ſatisfied for the Multures of the ſaids Corns, ſo abſtracted. The *Lords* Found this Exception Relevant to purge the Spuilzie, the Defender Re-delivering the Horſe again, with Seck and Meal, als ſufficient as the ſame was the time of the ſaid Spuilzie, albeit it was Founded upon an old Law of the *Majeſty* un-allowed, and not being in conſuetude and obſervance; ſeing it was offered to be proven by the Defender, that it was the continual Cuſtom of *Athole*. not only at the Miln Lybelled, but alſo at other Milns, to do the like in caſe of Abſtraction foreſaid; and becauſe thereafter the Purſuer offered to prove, that the Heretor of theſe Lands, whereof he was Tennent, was Infeft in the Lands, *cum molendinis, &c.* And that the Excipient qualified not the Thirlage of the ſame Lands to his Miln Lybelled clearly, whereby it might appear that the Thirlage was conſtitut and un-controverted, but Alledged only; that the Poſſeſſors of the Lands foreſaid, were in uſe paſt memory of Man, to come and grind their Corns at the ſaid Miln, as aſtricted thereto, and to pay greater multures than out-ſuckin Multur, and was not more ſpecial, upon an determinat and clear Conſtitution of Thirlage, therefore the Alledgance was Repelled, and the uſe of coming to the Miln as Thirled, and paying of Multure not as out-ſuckin, as ſaid is, was not ſuſtained, to make a Thirlage, but the Spuilzie ſuſtained, reſerving alwayes the modification to the *Lords. Vid. Jan.* 22. 1635. betwixt theſe Parties. *Feb.* 5. 1635. *Dog.*

La. *Borthwick* contra L. *Gallow-ſcheills, March* 18. 1635.

THe Lady *Borthwick* purſuing *Gallowſchiells*, for Reduction of a Bond of 10000 Merks granted to him, by the umquhile Lord *Borthwick*, upon a Reaſon of Interdiction, and producing the Extract of the Interdiction Regiſtrat, The Defender Alledging, that the Principal Interdiction ſhould be produced, becauſe he offered to Improve the ſame, therefore this Extract ought not to be reſpected, as is provided by the 118 *Act Parl.* 7. *K. Ja.* 6. Which appoints this objection to be received, by way of Exception. The *Lords* Found no Proceſs ought to be granted upon this Extract, while the principal were produced, in reſpect the Defender proponed preſently Improbation, which the *Lords* Found ought to be received by way of Exception, to ſtay further Proceſs, in reſpect of the ſaid *Act* of *Parliament*, but the *Lords* doubted, and decided not, if the Principal had been produced, if the Defender might be heard to propone any other Exception *in cauſa*, or againſt the Interdiction, except the ſaid Exception of Falſet, as they appeared to incline, that he could not be heard to do. Actor. *Nicolſon.* Alter. *Stuart. Hay* Clerk.

Hume contra *Riddel*, *March* 19. 1635.

ONe *Hume* of *Ogstoun* having Compriſed the Lands of *Ogſtoun* to himſelf, and his Wife in Liferent, and to *John Hume* their Son in Fee, and thereupon Infeftment being exped; Thereafter thir Lands are ſold by the Son, with conſent of his Father, and Curators to him, he being then Minor, to *Walter Riddel*, whereupon the Son purſues Reduction againſt the ſaid *Riddel*, and Reſtitution againſt the ſaid Infeftment, as done in his Minority, to his great and Enorm Prejudice and Leſion: The Defender Alledged, that no Proceſs ought to be granted at the Purſuers inſtance, except he ſhew and produced his Title, which might give him intereſt to purſue this Cauſe; for except he produce his Infeftment, whereby he had Right, and was Infeft in the Lands lybelled, he can have no intereſt to purſue: and the Purſuer anſwering, that he was not holden to produce any more Right now *in ingreſſu litis*, ſeing he ſhall produce his Right *cum proceſſu*; for the Reaſon was founded thereupon, and it was *medium concludendi*, which he was not holden to produce, before Litiſcontеſtation; Likeas he could not produce the ſame, ſeing the whole Writs of the Lands, and his Writs were in the Excipients own hands, being delivered to him by the Curators, the time of the Alienation made to the Defender, and which he refers to his Oath; Likeas he has Proceſs againſt him, for exhibition of the ſaids Writs, depending before the *Lords*; For this Action tends only to Reſtore him againſt that Deed done by himſelf, and if he have no Right, the Defender cannot be prejudged by this Purſuit: the *Lords*, notwithſtanding of this Reply, (which was not reſpected) Found no Proceſs, while the Purſuer ſhew'd, and produced ſome Right in his Perſon, made to him of the Lands Lybelled; and therefore Ordained the ſame to be Produced, before he inſiſted more in this Reduction, or elſe *primo loco* that he ſhould diſcuſs his Action of Exhibition, which was thereafter juſtly altered. Actor. *Craig.* Alter. *Gibſon* Clerk. *Vid. infra* *March* 21. 1635. betwixt theſe Parties.

Biſhop of *Glaſgow* contra *Mauld*, *March* 20. 1635.

THe Biſhop of *Glaſgow* purſuing Redemption of the Lands of *Guidlie*, againſt *Robert Mauld*, which Lands were Annailzied to umquhile *James Durham* of *Ardeſtie*, by umquhile *David* Earl of *Crauſurd*, and to whom the ſaid umquhile *James* granted back a Reverſion, in *Anno* 1575. to which Reverſion the ſaid Biſhop of *Glaſgow* is made Aſſigney by progreſs, and the ſaid umquhile *James Durham* Acquirer of the ſaid Heretable Right, & granter back of the Reverſion, Diſpones the ſaids Lands to umquhile *Andrew Mauld*, Father to this Defender, to be holden of the Earl *Crawfurd* his Superior, in the which Diſpoſition and Infeftment, there is no mention of any Reverſion, but the ſame is made purely and ſimply, without Reverſion; Likeas the ſaid Earl, to whom the Alledged Right of Reverſion was granted, by his Confirmation, has Confirmed to the ſaid umquhile *Andrew Mauld* the ſaid Charter *ad longum*, without any Proviſion, Reverſion or Reſervation, in reſpect whereof the Defender Alledged, that he ought to bruik the Lands Irredeemably, ſeing this Confirmation is done long before the Right of this Alledged Reverſion, was eſtabliſhed by the Earl of *Crawfurd*, in any of the Purſuers Author's Perſons. And it being Replyed, that *James Durham* could give no more Right to the Defenders Father than he had himſelf, ſo that his own Right being ſubject to the Reverſion, the Right made by him to another, muſt be alike affected alſo therewith. And as to the Earl's Confirmation, that cannot derogat to the preceeding Reverſion, which cannot be taken away, but by ſome direct and expreſs Deed, when it is ſo conveened on betwixt Parties Treating ſpecially for that end; and it cannot be extinguiſhed by this indirect Deed of a Confirmation, *quæ nihil novi*

novi juris tribuit; And it being Duplyed, that albeit *Durham* could give no otherways his Right, than he had it himself, yet he and the Earl might together give it, and transmit the same to another, and in a better condition than he had it, and which he has done, and the Earl has allowed; For *Confirmatio ejus, qui dare potuit, est nova Datio.* And if the said *Durham* had Resigned the Lands in the E. hands, and that the E. had thereafter Disponed the same, without mention of any Reversion to the Defender, or his Father, *eo casu* they would have bruiked the Lands Irredeemably, even siclike by this Confirmation of an Heretable Right, not mentioning Reversion; And as if a Vassal Holding Ward, had Disponed the Lands to another, to be Holden of the Superior Blensch, the Superior confirming that Blensch Holding, could never thereafter claim the Casuality of any Ward, in case any had thereafter fallen even so in this case; For this is not, as if the Superior had confirmed an irredeemable Right, granted by the Vassal, to be Holden of the Vassals self, *quo casu* the Superior would never have been prejudged; but this being a Confirmation of a Right granted in such a manner, to be Holden of the Superior, must be of the same force, as if Originally the Superior himself had granted it, in that same Tenor; for thereby he has expresly allowed all contained in that Charter Confirmed, and the whole Articles thereof, and has made no Provision, nor Reservation therein, and so it must have full force, as it bears, both against himself, who would have ever been excluded by his own Deed, if he had pursued the like Cause, and by necessar consequence must sicklike meet this Pursuer, having Right from him: This Alledgance and Duply was Repelled, and the Reversion found to be intire unprejudged by this Confirmation; for the Right Confirmed was found to be affected with this Reversion, even as his Right was, who Disponed it. *Gibson* Clerk. *Vid. Decem.* 20. 1632. L. *Innerweik.*

Hume contra *Riddel*, *March* 21. 1635.

IN the Action betwixt *Hume* of *Ogstoun* and *Riddel* mentioned *March* 19. 1635. The *Lords* Changed that Decision, and Found, that the Pursuer could not in Law be holden to produce any Right to the Lands *in ingressu litis*: And therefore Found Process, notwithstanding that he produced not any such Right; for if a Minor had Disponed another Parties Lands, whereto he had no Right himself, Process could never have been refused to him, for not showing that he had some Right to that Land; no more ought it to be in this Case, where the Disposition made by himself to this Defender was only desired to be Reduced, and any Right in consequence, depending upon that Disposition; and that Disposition being produced, there was enough produced to sustain the Action, at the Minors instance; for the Proposition is good, and is founded in Law, *Minor læsus est Restituendus*, and the Assumption being Relevant subsumed thereupon, that the Pursuer is Minor and hurt, needs not to be instructed nor verified before Litiscontestation, that the same be admitted to Probation, and then he may prove it. *Partibus ut illic Comparentibus.*

Lo. *Tester* contra L. *Innerwiek*, *Eodem die.*

THe Lo. *Tester* having Compriſed from his Debitor an Heretable Bond, bearing Obligement to Infeft in Lands, which Bond being Judicially assigned to him by the Compriſing, whereupon he having Charged the Debitor of the Sum in that Bond, to pay the Sum to him, as Compriſer; and the Debitor Suſpending, Alledging that a Compriſer cannot so ſummarly Charge by Letters of Horning, but ought to Purſue by way of Action the Debitor, to bear him to be Decerned to pay the Sum. The *Lords* Repelled this Reaſon, and ſuſtained the Charges, and Found, that the Bond being Compriſed at the in-

stance of the Charger, and the same being thereby Judicially Assigned to him, the *Right* of the Bond was als valiably *Assigned* to the Compriser, as if the Creditor had Assigned the same to him, *quo casu* upon that Assignation, he might have raised summar Charges of Horning, the Cedent and all the Parties being yet living, even so the Compriser might do the same. Actor. *Stuart.* Alter. *Hay* Clerk. *Vid. March* 25. *infra*, betwixt the same Parties, *July* 22. 1635. L. *Renton*, *July* 15. 1642. La. *Garleis.*

Lord *Tester* contra L. *Innerweik*, *March* 25. 1635.

IN this Cause mentioned, *March* 21. 1635. another Reason of Suspension was poponed, bearing, *That the Bond Compriſed was diſcharged by the Creditor, to whom it was made*, who granted that the same was satisfied to him, and Discharged to the Maker of that Bond, which Discharge, albeit done after the Compriſing, and so whereby the Compriser Alledged that *Di*scharge ought not to be respected against him, and to his Prejudice, who after his Denunciation and Compriſing compleit thereupon, could not be prejudged by no Deed done by his *De*bitor thereafter; yet the Suspender, Granter of the Bond, Alledged, that the Discharge granted to him by the said Creditor, to whom he was bound, *quocunque tempore* done, ought to produce Liberation to him *contra quoſcunque*, seing the Compriſing was neither Deduced against him, nor he ever warned thereto, nor yet was the same Intimat to him; so that it was lawful to him to pay his Creditor, and satisfie whatever he was bound in to his *C*reditor, albeit the *C*reditor had made another Assigney thereto; yet satisfaction being given by the Debitor to the *C*edent, before any Legal Intimation made by the Assigney, the same would have fred him also against the Assigney, so ought the like to be in this Case, where he knew nothing of the Compriſing. The *Lords* Repelled this *R*eason, and Found, that the *Di*scharge of the Bond, being given to the Compriſers Debitor after the Compriſing, whereby the Bond was Assigned to the Compriser Judicially, the Bond could not thereafter be valiablie Discharged by the Creditor, in prejudice of the Compriser, and the Judicial Assignation: For the Bond contained an Obligation, made by the Granter thereof, to Inseft this Debitor to the Compriser, in Lands therein Compriſed, so that if the Discharge was granted by real fulfilling of the same, *viz.* That the maker thereof had given real Infeftment to his Creditor, as the Bond obliged him, which was not done, *eo caſu* the Infeftment would have been profitable to the Compriser, and *A*ccreſced to him; but that not being done, the Discharge given, granting the Bond to be satisfied, and no Infeftment really given, but being discharged without Implement, it was not found such a satisfaction, as thereby the Compriser might be prejudged: and therefore it was *F*ound, that the Compriser might still Charge for giving to him of the Infeftment, obliged by the Bond, notwithstanding of the Discharge. *Hay* Clerk. *Vid. July* 21. 1632. *Hume.*

L. *Lawriſton* contra La. *Dunnipace*, *Eodem die.*

IN a Reduction, at the instance of the Laird of *Lawriſton*, against La. *Dunnipace*, of a Bond granted by her umquhile Husband to her *ſtante Matrimonio*, and long after the Marriage, whereby he obliged him to Inseft her, during her Lifetime, in the Lands enumerat in the Bond, which he obliged him to make worth 30 Chalders of Victual to her yearly, and that in *R*ecompence of the Tocher of 11000 Merks, which by that Bond he had confeſt, he had received from her, and also in recompence of a Third, and Terce, of whatsoever Lands, which she might claim by his decease; which Bond, with the Infeftments given to her, following thereupon, was desired to be Reduced by the Purſuer, upon this *R*eason, because the same was *Donatio facta inter conjuges ſtante Matrimonio*, and so

so in Law was Revockable, and the same was Revocked, in so far as thereafter, after that Bond, and Infeftment thereupon, her umquhile Husband had Disponed these Lands to this Pursuer, for relief of the Cautionry, wherein the Pursuer was Bound for her said Husband, to his Creditors; and which Burdens he was compelled to pay to the saids Creditors, which Disposition he Alledged to be a tacit Revocation of the said Bond, and Infeftment given to the Defender; and the Defender contending, that tacit Revocations has no place, to revock Donations betwixt Married Folks, neither of the Law, nor of the practique of *Scotland*, specially where the posterior Disposition, made by the Husband was only a Wodset, and so only an Hypothecation granted, for warrandice of his Cautionry, and was not an Heretable and Irredeemable Alienation; for which the Defenders Procurators Alledged *Novel. Constit. 162. Authent. Collatione 9. cap. 1°.* Attour, they Alledged that this Right to the Lady could never be revocked, but in Law was Irrevockable, either by tacit or expres Revocation, because it was not *Donatio simplex & propria*, which is only subject to Revocation, but the same was *Donatio Remuneratoria*, given by the Husband, in compensation of her Tocher-Good, and also in satisfaction of all Terce, which Donation might be also constitut *post Matrimonium*, where the Tocher-Good was truly payed (as really it was offered to be proven in this Case) as if it had been constitut before the Marriage, *in initio:* The Pursuer contended, it was *Donatio Revocabilis*, and was in Law revockable, as well tacitly as expresly, as well by Hypothecation, as by Irredeemable Alienation, *per legem. si liqueat §. nam quod. & in Glossa de inofficiosis donat: & hic in Glossa dicitur solo eventu fieri Revocationem, licet non intervenerit consilium Revocandi*; for which he Alledged *Leg. si Maritus tuus. Cod. de donat: inter Virum & Uxorem, & L. quod de suo Cod. de Dote Cauta, &c. idem clare dicit lex. cum hic status. §. si maritus. ff. eodem, tit. 1°. lib. 24. ubi Glossa dicit, sola Pignoratione Donationem Revocari*; Likeas the Pursuers Disposition must be reput an Irredeemable Alienation, seing albeit there was a Reversion therein, yet it was provided, that if the same was not Redeemed at the time conveened upon in their Contract, that the Land should be Irredeemable thereafter for ever; whereupon he had obtained Declarator in her Husbands own Lifetime, Finding the Lands to be Irredeemable; Likeas the Sums, for which he had taken Order with the Creditors, were more than the worth of the Lands extended to. And whereas it was Alledged, that the Bond lybelled, was *Donatio* given in recompence of her Tocher-Good, and so not Revockable in Law. He Answered, that it could be reput no otherways but *pura Donatio*, because he produced a prior Bond made by the Husband, to the Defender, long after their Marriage also, but long before this Bond now quarrelled, by the which he obliged him to Infeft her in Lands worth 20 Chalders of Victual, in recompence of her Tocher, which by that Bond he confessed he had received, in respect whereof she having a Conjunct-fee provided to her before this Bond Controverted, and which was Answerable to the Tocher, this posterior Bond behoved to be found a Donation Revockable, and Revocked, and not to be Remuneratorie; And where the Bond quarrelled, would appear to be given in satisfaction of her Terce, that ought not to be respected as a Cause, seing it was uncertain, and depended *ab eventu*; Likeas in effect when he died, he stood Infeft in no Lands, but all was sold or evicted from him, whereby her Terce was not of any worth, and by that Bond she never accepted of these Lands for her Terce, nor never Renounced the same, so that it was in her option thereafter to claim a Terce, if it had been for her Advantage, and she could not have been excluded therefrom by that Bond, nor yet by the Infeftment, and Seasin given to her thereon, although the Defender contended, that the Bond was accepted by her, as effectually, by taking of the Seasin of the

Lands contained in the Bond, as if by Contract made betwixt them, and Subed by her, she had accepted the same for her Terce, and had Renounced *per expressum* all Right to her Terce, *quo casu* being so done by Contract, and Subscribed by her, it would have undoubtedly bound her. The *Lords* Repelled this Alledgance and Duply, in respect of the Reason and Reply Founded upon the Anterior Bond, for albeit the *Lords* Found, that *tam Dos quam Donatio propter Nuptias* might be Constitut betwixt Man and Wife, after they were Married, and which being so Constitut, was not Revockable (being done in Competency of Proportion) yet where there was once a prior Bond, made betwixt them, that behoved to be *Reput*, to come in the Place of a Contract of Marriage, after which, whatever was done betwixt them, behoved to be thought to be of the nature of a pure Donation, which was subject to Revocation, and which was found als Revockable in Law, by a Tacit Revocation, as by an Expres, and which the *Lords* Found to be *Revocked* by the Disposition made, as said is, to this Pursuer; neither was it Found to be a Remuneratory Donation, or that it was not *Revockable*, because it bore *To be given in satisfaction of her Terce*, in respect the Wife had not Subscribed the Renunciation of the Terce, and that she was not bound thereto; for she might ever have claimed her Terce, if it had fallen out profitable to her, nevertheless of that Bond, which the *Lords* Found tyed her not thereto, and that the same was not accepted by her, by the Seasin taken thereon, which might have been taken without her knowledge; & which also in her *Lifetime*, she might have Renounced, and Revocked, as done to her prejudice. And where the Defender Alledged, that she never accepted the Prior Bond, that was Repelled, because she had Registrat the same her self, after her Husbands decease, which was Found an Acceptation; yet nottheless of the Premisses, The *Lords* Found the Reason and Reply Relevant, only to Reduce this posterior Bond (Found, as said is, to be a Donation Revockable) in so far as it Exceeded 24 Chalders of Victual, and Found, that it should stand for that quantity, *viz.* 20 Chalders of Victual, contained in the first Bond, and Four more, for the which they Found, that the Second Bond should stand valid to her, and no further, for there was no Terce befel to her. *Actor, Nicolson & Stuart.* Alter. *Advocatus Regius & Primrose. Gibson* Clerk. But this Cause being again called, and at length reasoned before the *Lords*, upon the 22 *July* 1635. The contrair to this Decision in Just Opposit Terms was Decided, and the last Provision made to the Lady was sustained, and Found Good, notwithstanding of the posterior Disposition, made by the Husband, to his Creditor the Pursuer.

Irvin contra Commissar of *Dunkel*, *June* 17. 1635.

ONe *Irvin* Pursuing the Laird of *Weym* and his other Curators, for Compt of their Intromission, *&c.* In this Process compeared the Commissar of *Dunkeld*, who was Constitute Factor by the Curators, to intromet with some of the Goods belonging to the Minor, for a certain Sum, which the Commissar was obliged to pay to the Curators for the same; Which Process, after divers times Calling thereof, the said Commissar compeared therein, and took a day to Compt, and nominat Auditors for that effect; and at the day appointed for Compting, being desired to give in his Compt, he declared he would not compear in that Process, seing he was not a Party called, but only the Curators were Called, to whom he would remit to give in their own Compts, and nominat their own Auditors, and that he would not meddle therein. The *Lords* in respect the Commissar compeared in the Process, *& suscepit in se judicium*, and took dyets therein, Found that he could not *defugere susceptum*, unless he would pay such a pecunial Sum, which instantly the *Lords* modified to the

Party

Party for his Expenses, through his delay of Process. Actor. Alter. *M'gil. Hay* Clerk.

Rule contra *Hume, June 19. 1635.*

JAmes Rule, after Decreet obtained against *Alexander Hume*, as lawfully Charged to enter Heir to umquhile *Andrew Hume* his Father, for Registration of a Bond of 3000 merks, adebted to him by the said umquhile *Andrew*, he thereafter Compriſes from his said Son, as lawfully Charged to enter Heir, the Lands of with all Contracts, Tacks, and Rights thereof, which were in the said umquhile *Andrew's* person, and thereafter pursues for the Mails and Duties thereof: This Action was Sustained at the Compryſers Instance, albeit it was Alledged that the Compryſing was null, and could not produce the Action Libelled, for payment of the Mails of the Lands; becauſe there ought to have been a special Charge, execute at the Pursuers instance against the Defender, Charging him to enter specially to the Lands, which he intended to Compriſe, before which had been done, there could not be any Compryſing Deduced of the Lands. 2°. He Alledged that the Pursuer was not Infeft, without which he could have no Action upon his bare Compryſing, for Mails and Duties. Thir Alledgances were Repelled, seing the Debitor was never Infeft in the Lands, but bruiked by a Tack, so that there needed no special Charge to preceed the Compryſing of a Tack, and of the Debitors Right Constitute without Seasin, as is required where the Debitor is Infeft, *quo casu* the person Charged to enter Heir to the Defunct, ought to be specially Charged to enter Heir in these Lands, or else no Compryſing could be lawfully Deduced: And also Found, that the Compryſer needed not to be Seazed, nor could be Seazed, seing the Debitor was not Seazed, but that he bruiked by vertue of a Tack, and as he might have pursued by vertue of the Tack for the Mails, so might this Compryſer of his Right likeways. Actor. *Craig.* Alter. *Gibson* Clerk.

Walker contra *Polwart, Eodem die.*

UMquhile *Patrick Walker* being Married upon one *Polwart's* Wife, betwixt whom there were Bairns Procreat, he gives a Bond *stante Matrimonio* to *Henry Polwart*, Brother to his Wife, and to her behove, for payment of 2000 merks, she not being Provided to any Liferent, or Conjunct-fee, or any other Benefit or Means of Maintainance by her Husband; at the time of giving of the which Bond the Defunct was Debitor to sundry Creditors, by sundry Bonds preceeding this Bond, given to his Wife, in more Sums of Money than all his Goods, or Means extended to; thereafter after his Decease the Relict and the Creditors contesting in a Double-poynding, Raised by the Executors of the Defunct, which of them should be answered of the Defuncts Goods, which were not sufficient to pay the half of his Debts: The Creditors Alledged, that the Bond given to the Wife could give her no Right to any of the saids Goods, seing the same were given to her long after these Bonds, at which time he could do no Deed to their prejudice, he being then in effect a Bank-rupt; seing then he had not so much Gear as might pay his Debts, whereby he could not give to his Wife any thing, but *deductis debitis, & post solutum as alienum*, and so this being *Donatio inter virum & uxorem*, and for no lawful onerous Cause, it cannot be respected against them; & where the Relict opponed, that it was given for her Maintainance and Living, she having no other thing whereupon to live, and receiving no other Provision, and that it is in effect *Donatio propter nuptias*: They Answered, that it is not *Donatio propter nuptias*, becauſe there is no Contract of Marriage can be shown betwixt them. Likeas she gave no Tocher, nor other Benefite to her Husband, and so of Law and Reason can seek no Recompense of his Goods, for *Dos & Donatio propter nuptias in jure paribus paſsibus ambulant, & æ-*

qualiter regulantur, notwithstanding whereof this Alledgance proponed for the Creditors, was Repelled, and the Relict was Found ought to have her proportion with the rest of the Creditors, according to the free Goods in the Testament, and according to the quantity of their Debts, albeit there was neither Contract of Marriage, nor Tocher given; And albeit the Creditors Bonds were anterior to the Relicts, seing she had a Debt owing to her, *de jure naturæ*, for her Maintainance and Living, which in its own proportion is as favourable as the Creditors Debts. Actor. *Hamilton.* Alter. *Vid. Feb.* 7. 1632. *Downie.*

L. of *Wauchtoun* contra *Hume* of *Foord*, *June* 26. 1635.

IN an Action for Abstracting of Thirle-Multures, the ground whereof was a Charter, granted by the umquhile Lord *Hally-rud-house* to umquhile *William Lermonth* of *Hill*, whereby he Thirled his Lands of *Foord*, and others particularly therein designed, to the said *William Lermonth* his Miln of *Lintoun*, and also all the Corns in-brought by the Possessors of the saids Lands, which should happen to be Grinded by them; this was the Tenor of the Astriction, the Right whereof being come in the Laird *Wauchtouns* person, and he pursuing therefore, and the Defenders compearing to Defend; It was Found by the *Lords*, that the Astriction, albeit of the Tenor foresaid, whereby the Lands were Thirled to the Miln, albeit not bearing *Omnia grana crescentia in dictis terris*, to be Thirled; and albeit also bearing in the subsequent Clause, (*viz.* and sicklike the Corns inbrought, which should happen to be grinded there) did extend to oblige the Tennents and Possessors of the saids Lands, to pay the Multures acclaimed for the whole Corns, which should grow upon the saids Lands, aswell for the Corns that should be Grinded at other Milns than the Miln of the Astriction Libelled, as for the whole other Corns growing thereon, which should not be Grund any where, and Found, that the said subjoyned Clause, *viz.* anent the Corns which should happen to be Grund, did extend only to the Corns inbrought by the Tennents, and not to the Corns growing upon the Lands. And whereas the Defender Alledged, that the Astriction did extend only to the Corns growing upon the Lands, for so much thereof as should happen to be Grund at any other Miln, according to the words and meaning of the said Astriction, as said is, and no further, ought to be enlarged to all the Corns growing, which should not happen to be Grinded, as said is, at no other Miln; in respect he Alledged that it was not so expressed in the Writ, and Thirlage, being in it self odious, and not favourable, it should rather be Retrinshed than Inlarged; For albeit by the Custom of this Realm, Parties by expres paction may Thirle all their Corns growing, *quo casu* such Thirlage being so particularly and *specifice* conveened upon, the same may have effect; but where the Paction does not *specifice* comprehend the same, it ought not to be extended; for it were against Equity and Reason, that Multures should be keeped for Corns not Grund, *nisi sit ita Conventum*; Likeas of the common Law, all these Astrictions are Institute and allowed, only that Vassals and Tennents should come to their over Lords and Masters Miln, and Grind their Corns thereat, rather than at any other Miln, in respect of the natural Bond betwixt Vassal and Superior, and Master and Tennent; but that they should Grind all their Corns, and such as they have not use nor necessity to Grind, it is in it self most unjust, and tends to Oppression, and ought not to be mentioned: Likeas in this Instance of the Case controverted, he Alledged that the words of the Writ of Astriction proports no otherways, and also according thereto the Defender and his Authors these fourty years by-past, without question, has been in use to use & Dispone upon the Corns, growing upon the saids Lands, alledged Astricted, at their pleasure, and where they pleased, except such as they had necessity to Grind, and no more; during the which whole space they were never questioned, nor conveened for any of the

the saids Abstracted Corns, and so the Pursuer and his Predecessors has acquiesced with the said Thirlage; so Retrinched to the Corns Grund, and now cannot be heard to desire the Astriction to be any further extended, than as has been possessed these 40 years by-past, as said is; This Allegeance was Repelled *in supra*; and Found, that albeit the Defenders nor their Predecessors were not troubled, never so long of before for their Corns Abstracted, & that never any question nor Pursuit was moved against them thereanent, during all that space; yet seing the Defenders has Grund a part of the Corns Growing on the Lands Thirled, it was sufficient to Sustain the Astriction, and the Desuetude to pay the Multure for the whole Corns, growing these 40 years by-past, and the not pursuing therefore, did no wayes prejudge the Thirlage; but Found, that notwithstanding thereof they remained Astricted in the whole Corns growing, as effectually as if *omnia grana crescentia* had been Astricted, with Deduction of such particulars as the Lords should find in Law and Reason, ought to be deduced, when the particulars should be proponed. Actor. *Advocatus* & *Nicolson*. Alter. *Stuart*. *Gibson* Clerk. *Vid. December* 20. 1632. L. *Innerweek*.

Grieve contra *Hepburn*, *Eodem die*.

ALexander Grieve, as Heir to his Father umquhile George Grieve, who had bought a Dwelling-house in *Edinburgh* from Mr. *Alexander Hepburn*, with ample Warrandice; and the whole Tenement, whereof this Dwelling-house was a part, being affected with a Grounds Annual of 100 merks yearly, Redeemable to the Author of the Annualrent, by payment of 1000 merks before the Alienation made to *George Grieve*; the said Mr. *Alexanders* dwelling house being distrest for the whole Annualrent by *Lawrence Scot* Advocat, who was Heretor of another part of the Tenement affected with the said Burden, and which *Lawrence* had acquired the Right of the said Annualrent from the Heretor thereof, whereby he laid the burden of the whole Annualrent, & the total payment thereof, upon the Pursuers dwelling-house, and made his own part free; the said Pursuer pursues the said Mr. *Alexander Hepburn* his Author, for warrandice from that Annualrent, and for that effect to be Decerned to pay all the bygones of the years payed by him, and also to hear and see the said Annualrent for time to come, to be liquidat to a certain particular Sum, for which he might have Execution by Poynding, or Comprising of the Defenders Goods, or Lands, when he should find occasion to deprehend the same thereafter, according to such a quantity, as the *Lords* should extend the said Annualrent to, for times subsequent; which Summons being Called, and no Party Compearing, the *Lords* having considered the same, and the desire thereof, they sustained the same, & the Conclusion thereof, (albeit it was not usual to Decern the like, *viz.* to liquid a distress which might ensue *in futuro*, to a particular principal Sum, before the Party should be Decerned and Distressed *pro tanto*, seing it was *futurum quod potuit contingere vel non*) but in regard the Cause was seen and perpetual, *viz.* a distress yearly of 100 merks, ay and while it were Redeemed by payment of 1000 merks. The *Lords* therefore liquidat the distress to 1000 merks, for which they Found, the Pursuer might seek Execution against the Defenders; and which Sum, if he recovered, the *Lords* Found, that the said Pursuer should make equally and alike profitable to the whole rest of the Heretors of the Land affected, to the effect that the whole Tenement thereby might be relieved of the said burden, and that the Annualrenter might receive payment of the Principal Sum thereby: And the *Lords* Found, that albeit the Annualrenter might distrain any part of the Tenement affected, for the whole Annualrent; yet that the Heretor of that part which should happen to be distressed, or which was distressed sometime by-past, might well and lawfully seek his own relief of the rest of the Land and Tenement affected with the burden;

den;

den, and of the Heretors of the same *pro rata*, and for their own parts proportionally, according to the Worth and Rent of their Lands, to be equally divided amongst the saids whole Heretors; and that every one of them ought to bear his own part of the burden, both for bygones already payed, and als for all years to come, while the Principal Sum might be recovered for all their Reliefs. Actor. *Nicolson* & *Heriot*. Alter. Absens. *Gibson* Clerk.

L. *Monymusk* contra L. *Leslie*, *July* 4. 1635.

IN a Reduction, the L. *Leslie* being Uncle to the L. of *Monimusk*, and Tutor to him *sine quo non*, after the L. *Monimusk* was past Curatory, about the space of half a Year, or seven Moneths, and no more, *Leslie* Contracts with him for a Wodset of his Lands of *Banchrie*, whereby *Leslie* furnishes to him 30700 merks upon the Wodset of these Lands, and Provides therein, that if any time within six years thereafter, he should pay to him 6000 merks more, that then the Lands should pertain to him Heretably and Irredeemably for ever; And this Contract bore no Clause, giving power to *Monymusk* to redeem the Land, either within that space of six years, within which *Leslie* might pay the rest of the price, nor at any time thereafter: And by this same Contract also, *Monmusk* Sells and Dispones to *Leslie* some Plenishing and Moveables in the House of *Banchrie*, which were valued to the Sum of and beside the said Contract, by another Writ at that same time he grants to *Leslie* a Right and Licence to Fish and Draw upon this Pursuers Lands of *Torrie*, next adjacent to *Banchrie*, which gave him a great priviledge within his proper Fishing, and made the same unprofitable to the L. *Monymusk*, and which Priviledge bore, to be granted to *Leslie*, during his Right of the Lands of *Banchrie*. This Contract being desired to be Reduced by *Monymusk*, and he to be Reponed against the same, as done by Circumvention, and to his great prejudice, by reason that it was craftily conveyed and purchased by him, who was his Curator *sine quo non*, immediatly before; for albeit the Pursuer was Major, yet being done but about six Moneths or thereby after Majority, and no more, and consequently *in consimio Curatela*, it was not then lawful to him, who was immediatly before his Curator *sine quo non*, to Circumveen him, by acquiring the Heretable and Irredeemable Right of his Lands, under colour and pretence of a simple Wodset, as manifestly appears by the Draught and Course of the Contract, and under pretence thereof, to cast in a Clause of a Right Irredeemable, which depends also upon the pleasure of the Party, and whereby he had six years option to pay the price, and that to the Pursuers sensible and great prejudice, delaying the payment of the price the space of six years, which made the Lands not to be worth in price 15000 merks; whereas to buy and sell in the Countrey, the same was worth in true estimation 30000 merks, by and attour the Moveables Disponed thereby, and by and attour the licence of Fishing; which Contract was never read by the Pursuer, but Subscribed by him on Trust, thinking that it was only a simple Redeemable Wodset: Likeas there was neither friend nor other person, who ever knew of such a Bargain, nor any Witnesses insert, who ever heard the Contract read, or knew the Contents thereof; and the Defender had not before the Contract given *Rationes Curatelæ*: And seing in Law *ante reddidas Rationes etiam post Majoritatem per Authent. ut hi, &c.* The Person once Curator cannot take an Assignation to any Debt, owing by him who was Minor; far less ought he *ante reddidas Rationes*, be permitted to Contract with him, to his so great and enorm Lesion, and so indirectly without treaty preceeding, *nemine conscio & testibus ignaris*; and by so indirect and unusual Clauses, which all in Law presumes Fraud, and at least furnishes just cause to Repone him against the Contract; notwithstanding of all which, the *Lords* Assoilzied from the Reason, and sustained the Contract; seing it was done the time when

when the Pursuer was Major, *me Reclamante*. Actor. *Advocatus*, *Stuart* & *Burnet*. Alter. *Nicolson* & *Baird*. *Gibson* Clerk. *Vid* 5 *Decemb*. 1626. *Shaw* of *Knockhill*, & 4 *Decemb*. 1623. *Gechan*. 11 *January* 1643. *Ramsay*.

L. *Innerweik* contra *Hamilton*, *July* 7. 1635.

A Decreet being given at the L. *Innerweik*'s instance, against one *Hamilton*, finding the Corns growing upon the said *Hamiltons* Lands of to be astricted to the Laird of *Innerweik*'s Miln of *Bancrieff*, whereupon he being charged to pay the Multures of the Corns growing thereon; and the other Suspender craving Deduction of the Teind, as use is; and the Charger Answering, that albeit by ancient Custom, the Teind of old was Excepted from the Thirlage; yet that now *res devenit in alium casum*, seing the Reason of the Exception was, that the Teinds pertained not to him, who was Heretor of the Lands Thirled, but belonged to the Titular of the Teinds, or to some others having Right from him, whereby he was subject to them for the said Teind, and therefore could not come under the Thirlage, not being his own; but now that Reason ceasing, the Exception ought to cease; seing according to the Order, universally taken and established by Law, every Heretor hath the Right of his own Teinds, as this Suspender hath also *Right* to his; and therefore the Teind ought to come under the Course and Rules of the rest of the Corns growing on the Ground, seing the Defender will make the like use of the Teind, as he doth of the rest of the Corns growing, and therefore ought to be subject to the same Thirlage; notwithstanding of which Answer the *Lords* Found, that the Suspender was not holden to Grind his Teind at the said *Miln*, as astricted thereto, and that the Thirlage did not extend to the same, notwithstanding that the Suspender had purchased the Right of his own Teind; for the Teind being Excepted *de sua natura*, and by the Custom and Practick of the Kingdom out of the Astriction, the acquiring of the same now by the person Thirled, altered not the Thirlage, to make it to extend further, and to enlarge the same more than it was of extent before this Law and Order of acquiring of the Right of Teinds; which acquisition was not purchast to add any benefit to him who had the Right of the Thirlage, and to make the Purchaser by that his own Purchase, to ly under a far heavier Servitude, both against his intention, and against all reason; & therefore Found, that the Suspender for the Teinds, might Grind the same where he pleased, or otherwise Use or Dispone thereupon, as he thought expedient; and that he was not tyed therein to the Charger, to Grind the same at the Miln of the Thirlage, neither as astricted, nor as a free Multure, but that he might use the saids Teinds, either to Grind, or not to Grind the same, as he pleased: neither was it respected, where the Charger offered to prove, that the Heretors of the rest of the Lands of the Barony Astricted, did Grind their Teinds at the said Miln, which was Repelled; for their Voluntar Deed could not bind any other, who was not alike willing. Actor. *Stuart*. Alter. *Nicolson*. *Scot* Clerk.

Lo. *Johnstoun* contra *Johnstoun*, *July* 17. 1635.

LO. *Johnstoun* Pursuing *James Johnstoun*, as universal Intromettor with the Goods and Gear of umquhile Captain *James Johnstoun*, to pay to him a Debt owing by the said Captain, who was the *Defenders* Natural Father; and he Excepting, that he was Donatar to the Escheat of the said Captain, whereupon he had Action of General Declarator depending, wherein *Litis-contestation* is made, by vertue of which Gift of Escheat he had *Right* to the Defuncts Goods and Moveables, so that this Intromission would not make him lyable to any of the Defuncts Creditors: And the Pursuer Replying, that the *Defender* immediatly after the Defuncts decease, intrometted with all his whole Goods,

both within and without the Houses, and used the same at his pleasure, which Intromission cannot be purged by any subsequent Right of his Escheat, Purchased by the Defender *ex post facto*, and a long space after his Intromission; for by his preceeding vitious medling with the Defuncts Goods, he became lyable to his Creditors; and that Deed cannot be purged, by purchasing of the Gift of the Escheat thereafter, which was not purchased while the space of after his said Intromission, specially also seing there is no Declarator obtained upon the said Gift hitherto; and the case of the Creditors is most favourably to be considered against a Donatar. This Exception upon the Gift, albeit purchast after the Intromission, and Declarator depending thereon, wherein Litis-contestation is made, albeit not yet Decerned; was Found Relevant, and sustained to purge the preceeding Intromission, and to Eleid the Action, Pursued against the Defender, as universal Intromettor. Actor. *Stuart.* Alter. *Nicolson.* *Scot* Clerk.

Lo. *Craighall* contra *Bothwell*, *Eodem die.*

THe Lo. *Craighall* Pursues Reduction against Mr. *Adam Bothwell* and his Son, and Mr. *Adam* having Infeft his Son, being then an Infant, in his Lands of with Reservation of his own Liferent, by a Base Infeftment to be Holden of the Granter; and so the Father continuing in Possession of the Lands, while thereafter that he sells the same to the Lo. *Craighall*, by a Publick Infeftment, to be Holden of the Superior, by vertue whereof the Lo. *Craighall* became year and day in Possession of the saids Lands; upon which Publict Infeftment, so clothed with Possession year and day, he Intents Reduction of the said prior Base Infeftment, upon the Reason of the Act of *Par. Ja. 5. anno* 1540. *Par. 7. Cap.* 105. which annuls Base Infeftments, where there is a Publick Right made to one for onerous Causes, and which is clothed with Possession year and day, as said is; albeit posterior to the said prior base Right, made by the Father to the Son; which Reason being referred to the *Lords* (the Party being absent) and the Production being satisfied by the Pursuers self; the Reason was Found Relevant, and the Reservation of the Fathers Liferent contained in the Infeftment granted to the Son, and the Fathers Possession according thereto, was Found no Possession, to warrand that Right made to the Son, as if the Sons Right and Infeftment had been thereby clothed with Possession, but the Publick Infeftment was sustained; and also because this Action was both a Reduction & Improbation, and that the Pursuer satisfied the Production in the Reduction, by Production of an Extract of the Writ called for to be Reduced, which was enough, so far as concerned the Reduction Libelled; and that the Pursuer insisted for production of the Principal Writ it self, and for Improbation of the same. The *Lords*, in respect the Principal was not produced, to satisfie the Improbation, Decerned the same to make no Faith, for not production; which Certification the *Lords* Found ought to be granted, albeit the Extract was produced by the Pursuers self *quoad Reductionem*, and that he acquiesced therewith in the Reduction, the Production whereof was found no impediment, to stay the Certification against the Principal of that same Extract *quoad Improbationem*, and therefore it was Decerned to make no Faith. Actor. *Advocatus* present. Alter. Absent. *Scot* Clerk. The like Reason of Reduction was Found Relevant betwixt *Cant* contra L. *Lawristoun*, 1632. *Scot* Clerk. *Vid.* 12 *July* 1634. Sir *James Oliphant's* Creditors, and the Cases there. 1 *July* 1634. *Bruce.* 29 *March* 1636. E. *Annandale.*

Edmiston contra L. *Edmiston*, *July* 18. 1635.

ONe *Edmiston* Sister to the Lady *Lugton*, being Executrix Decerned to umquhile *Edmiston* her Brother, who was Provided by umquhile *Andrew Edmiston* of that ilk his Father, to certain Lands of *Mellerstains*, *Falaw*; and

and others, being the Son, and she one of the Daughters, gotten by the said umquhile *Andrew* in his Second Marriage, with one *Gordon* his Second Wife, and whereto he was obliged to Provide the Bairns of that Second Marriage, by the Contract of Marriage made betwixt them; The said Brother being deceased, this Pursuer being one of the Defuncts Sisters, and she being only Decerned Executrix to him, and having licence to Pursue, conveens *Edmiston* now of that ilk, as Heir to Sir *John Edmiston* of that ilk his Father, which Sir *John* was the Eldest Son of the said umquhile *Andrew Edmiston* of that ilk, begotten of the first marriage, and who survived the Pursuers Brother, the only Son of the Second Marriage, as said is; and which umquhile Sir *John*, half Brother to his Defunct Brother, surviving his said half Brother, and for his Nonage, not being capable of the Office to be Tutor to him, acquired a right of Factory, to Intromet with the said Pupils Rents from him, who was served Tutor lawful, and according to that Factory Intromitted with the rents and Duties of the Lands, whereto he was appointed to be provided by the Contract of Marriage foresaid, and in the which Intromission the said umquhile Sir *John* continued, being Factor after he was Major, and so after he was capable of the Office of Tutory continually, to the time of his said half Brothers decease; the Pursuer being Executrix, and having licence, as said is, pursues the Heir of the said Factor, for payment of all the Duties of the saids Lands, Intrometted with by the said Factor, of all years since the decease of the said umquhile *Andrew Edmiston* their Father, to the time of the decease of the Minor, And the Defender Alledging, that the Minor was not Infeft in the said Lands, whereby that as he not being Seased could not have Action for the Maills of the Lands, no more can his Executor be heard to Pursue therefore, unless he had been Infeft; and this he Alledged, was most competent to be proponed for him, who was both a Minor, and only conveened as Heir to the Factor of a Tutor, the Tutors self never being conveened, nor Discussed, as ought to be first done. Attour he Alledged, that the Lands Lybelled were in Non-entry in the Superiors Hands, the Gift of which Non-entry was granted to the Defenders Father, and Declared, and by vertue whereof he Intrometted; and as the Superiors self might have Intrometted, after Declarator, *quo casu* the Minor could never have repeated these Duties, no more can they be repeated from the Donatar, even as they could not have been repeated from any Stranger, that had been Donatar. The *Lords* Repelled both these Alledgances, for they Found, that the Factor was Lyable to all that the Tutors self was Lyable in Law to the Minor, his Heirs and Executors; and the rather in this Case, because the said Factor had obliged himself to Relieve the Tutor of all, which might be in Law exacted from him; and the *Lords* Found, that the Tutor ought to have obtained the Pupil Infeft in these Lands, whereto his Father had Provided him, and wherein his Father died Infeft; which being the Tutors fault, in not doing the same, ought alike to burden the Factor; and the rather also, because it was offered to be Proven, that the Factor had Intrometted with the Duties of the Lands Lybelled, all the years acclaimed; neither was the Non-entry respected to Eleid the Pursuit, because the same becoming in the Factors Person, was esteemed, as if the Tutor had obtained the same, *quo casu* the Tutor could never have obtruded the same against the Pupil, seing in Law it would have been presumed to have been Acquired to the Minors use; & if a Stranger had obtained it, yet the Tutor in Law was obliged to have Relieved the Pupil of all prejudice he might have sustained thereby, seing in Law he might have Compelled the Superior to Enter the Minor, and thereby have purged all Non-entry, which if he Omitted to do, ought to prejudge himself, and not the Minor, and consequently the Factor was in that same Case as the Tutor, whom he was obliged to

Relieve, as said is; for albeit there might be some question in a Ward, if the Tutor, or his Factor had Purchased the Minors Ward from the Superior, yet it is not alike in Non-entry; for in the one, *viz.* the Ward, the Pursuer cannot be Compelled to Dispone the Ward to the Minor by no Law, but that he has the same in his Power to retain it to himself, or otherwise, at his Pleasure, to Dispone it to whom he pleases; but in Non-entries, it is not so; for the Superior in Law may be Compelled to Enter the Minor, where there is no Ward, and so by Diligence to Charge the Superior to Enter him, whereby the Non-entry may be Evited. *Actor. Stuart.* Alter. *Nicolson. Scot* Clerk. *Vid. Feb.* 22. 1634. *Jack.*

Scot of *Rossie* contra *Lindsay* of *Kilquisie*, *July* 22. 1635.

SIr *James Scot* of *Rossie* being Heretably Infeft in the Lands of *Rossie* with the *Loch* of *Rossie per expressum*, Pursues Declarator against *Lindsay* of *Kilquisie*, to hear and see it Found and Declared, that the Pursuer has the only Right to the *Loch*, and that the Defender has no Right at all thereto, neither in Property nor Community, and no Priviledge therein; And therefore he ought to be Secluded therefrom, and from all Possession therein; And the Defender Alledging, that he ought to be Assoilzied, because both the Parties Lands, and the Loch Lybelled pertained of old to one and the same Author, (*viz.* To the Earl of *Cranfurd*) in Property, and the Defender, and his Predecessors were Infeft in the Lands of *Kilqhousie*, *cum Lacu & Piscationibus*, by the Earl of *Cranfurd* 200 years since, long before ever the Pursuer or his Authors were Infeft in the Lands and Loch Lybelled; Likeas by vertue of the said Anterior Right, the Defender, and his Predecessors has been in continual Possession, past memory of Man, Immemorially in Fishing within the Loch Lybelled, with Nets and Wands at their Pleasure; neither ought the Pursuers Posterior Right, being many score years after the Defenders Right foresaid, of his Lands and of this Loch *per expressum*, specially denominat, Derogat to the Defenders prior Right of his Lands *cum Lacu*, &c. There being no other Loch within the Pursuers, nor Defenders Lands, but only the Loch Lybelled, and to the which Loch the said Defenders Lands lyes Bordering and Contigue. And the Pursuer Replying, that his special Infestment of the Loch of *Rossie per expressum*, albeit posterior to the Excipients Right foresaid, ought to give him Preference to the Defender, who was only Infeft *cum Lacu* generally; Likeas in Fortification of his Right, the Pursuer offered to prove continual Possession of Fishing within the said Loch, by Boats, Nets, and all other manner of Fishings; and by bigging of Eel-arks, and slaying and using the Eels and Fishes taken at his Pleasure, and also by debarring this Defender, and his Predecessors, from any manner of Fishing within the same, and impeding them therein. The Defender Duplying, that he being *prior in tempore* must be *potior in Jure*; and for the Alledged Interrupting of the Excipient, by debarring of him to Fish, that ought not to be respected, seing that Debarring, being done *via facti & non via Juris*, ought not to corroborat, or establish a Right to the Pursuer, which was not in it self Good without that Act, neither ought that Deed to prejudge the Excipient; For that Impediment, Alledged made to the Defender, and his Predecessors, never being Authorized in Law, but being violent and unlawful, ought not to add force to the Pursuers Right, specially seing notwithstanding of any Debarring, the Defender and his Authors retained, and keeped still their said Possession of Fishing, and they could not hinder the Party to do wrong, but notwithstanding of that wrong done, they ever keeped their said Possession, and therefore ought not now to be excluded from that manner of Possession, which they have Immemorially had, by vertue of their said Right; for the Pursuer might retain the Possession which he had, and the Defender his also, as he had it, and as ilk one of them has prescribed by their Rights, according

to

to the quality and manner of their Possession, as said is. The *Lords* Repelled this Exception, and Duply, and admitted the Pursuers Reply, and in respect of the said Interruption, Found the Right to pertain to the Pursuer, and excluded the Defender totally from all Right to the Loch, and all sort of Privilege therein, notwithstanding of his Anteriority of Right, and offer to prove Retention of Possession Immemorially as said is. Actor. *Nicolson*. Alter. *Stuart*, *Scot* Clerk.

Mosman contra Earl of *Abercorn*, *Eodem die*.

ONe *Mosman* Donatrix to the Escheat of one *Nisbet* her Husband, after general Declarator, Pursuing a special against the Earl of *Abercorn*, as intromitting with the Goods of the umquhile Lady *Abercorn* his Mother, who was Debitor to the said Husband in 500 pounds, for payment of the said Sum to her, as Donatrix. The *Lords* sustained this Action, notwithstanding the Defender offered to purge his Intromission, Alledging that his umquhile Mothers Escheat was Gifted, and Declared in favours of Sir *James Fullarton*, from whom he had obtained Assignation thereto, and conform to the same Intrometted, and so ought not to pay any of her Debts, which Alledgance was Repelled, seing the Assignation made by Sir *James Fullarton*, was confest to have been made before the Ladies decease, and it was made to a Conjunct Person, *viz.* to her own Son, notwithstanding whereof the Lady still retained Possession, during her Lifetime, to the time of her decease, at which time the Earl her Son Intrometted, and so in respect of the *Act* of *Parliament* 1592, the Gift is Null, in prejudice of the Creditors, as this Pursuer is, which Reply the *Lords* sustained. *Gibson* Clerk. *Vid. July* 17. 1635. *Lord Johnston*.

L. *Renton* contra L. *Wedderburn*, *Eodem die*.

THe L. *Renton* being made Assigney by one *Heriot*, to a Contract betwixt *Heriot* and the L. of *Wedderburn*, whereby he made to *Heriot* an Heretable Feu of an Husband Land in [illegible] for payment of the Feu-dutie therein contained, and bearing no other Clause obligator upon the part of the Feuar, upon which Contract there was a Charter Subscribed to *Heriot*, bearing some Clauses different from the Tenor of the Contract, as a Clause Irritant to Amit the Feu, if the Feu-duty should not be payed two years together, and that the Feuar should compear in the Lairds Courts, *&c.* And upon the Charter *Heriot* being Infeft and Seased, and by vertue thereof, since the date thereof, ten years in Possession of the Land; thereafter *Heriot* makes the Laird of *Renton* Assigney to the Contract, who Charges *Wedderburn* to give him as Assigney, Infestment of the Land, conform to the Tenor and Clause of the Contract; Alledging that the Charter Subscribed, and given to his Cedent, was different from the Tenor of the Contract; And therefore he ought to give him another Charter, agreeing with the Contract; who Alledging, that such Summar Charges ought not to be sustained, at the Assigneys instance, seing there was an Heretable Infestment, and Seasin exped upon the Contract, which being a real Security, could not be transmitted by a simple Assignation, to produce such summar Charges; but if any difference was therein, from the Contract, the Assigney ought to Pursue by way of Action, and ordinar Pursuit therefore, to hear it be Found, that the Contract was not fulfilled, or by any other Pursuit, which he might best move in Law thereanent, but it ought not be sustained after this manner by Charges upon an Assignation. This Alledgance was Repelled, and the Order and Charges were sustained, without necessity of any other Action to be made thereanent; and because *Wedderburn* Alledged, that the Cedent, having accepted a Charter from him, whereupon he was Seased Ten years since, and bruiked it, and Possessed the Lands ever since conform thereto, so

that this being done *inter majores prudentes & scientes & tacentes*, and wherewith he acquiesced, therefore it ought not to be permitted to an Assigney, to Charge for any other Charter, than for that which was accepted by the Cedent, as said is, albeit it be of a Tenor different from the Contract. The *Lords*, before they Decided this Alledgance, Found that they would examine the Cedent, who was a mean, simple, ignorant man, who could neither Read nor Write, and the Nottar writer of the Charter, who was also Nottar to the Seasin, and the Witnesses insert therein, to try if the Charter, at the Delivery thereof to the Cedent, was read to him, and if he knew the Contents thereof, and was acquaint with the Clauses, which differs from the Contract, and rested content therewith, or if he was any wayes Ignorant thereof, and the Clauses keeped obscure from him. Actor. *Advocatus*. Alter. *Stuart*. *Gibson* Clerk. *Vid.* for the first Part of this Decision, *July* 15. 1642. La. *Garleis*. & *March* 21. 1635. Lo. *Tester*.

La. *Cardross* contra Lo. *Cardross* her Son, *July* 28. 1635.

LAdy *Cardross* being provided in her Contract of Marriage by her Husband, to a quantity of Rent of Teinds, which her Husband in the said Contract was obliged to make worth yearly to her the quantity of the said Rental, and by the course of this Commission of Parliament anent Ministers Stipends, there being two Chalders of the Teinds contained in the said Contract and Rental, taken from her and assigned to the Ministers more than they had before, whereupon she charging her own Son as Heir to her Husband, to warrand the said Rental to her, and consequently to provide her to as much as was taken from her, and assigned to the Ministers, as said is; And he Suspending and Alledging, that he could not warrand her from any supervenient Law, which as it diminished & took away from her a part of her Conjunctfee, so it took away that same part from him and his Heirs perpetually and for ever, and she ought to bear that burthen for her lifetime, which would ly on him and his posterity for ever, being done by a publick and general Constitution, for the publick Good, whereto all privat interests ought to cede, and there being no fault on the part of the Contracter, there ought no Warrandice to be granted, except he had failzied, For he was obliged only to make that Rental given up for her Conjunctfee, should pay that quantity to her, and it is true that there is no Failzie in the Rental, but it holds good, albeit a part be taken from her thereof by a subsequent Law, which cannot make him lyable therefore. This Alledgance and Reason was Repelled, and the *Lords* Found that the Suspender ought to pay the quantity of the Rental to the Charger, which decreased by taking away of a part thereof from her, and giving of it to the Ministers; And Found that the supervenient Law, prejudged not the party of her Warrandice, albeit the Rental was no less than the same quantity whereto it was extended in her Contract of Marriage, seing it was not so much to her, and by the Contract it was obliged to be worth to her yearly so much; For if the whole Teinds had been Evicted both from her and her Husband by any Law, It was not thought reasonable that therefore she should want Warrandice of her Conjunctfee. Actor. *Stuart*. Alter. *Advocatus*. *Hall* Clerk. *Vid. March* 27. 1634. La. *Dunfermling*. *March* 10. 1636. La. *Dunfermling*.

Richardson and the Lo. *Cranston*, *Riddel* contra *Sinclar*, *penult July* 1635.

UMquhile Sir *Robert Richardson* Father to the Pursuer, having Disponed his Lands of *Pancaitland* to *John Sinclar*, Heretably and irredeemably, for the Sum of fourscore and five thousand merks, whereof 30000 merks were appointed to be payed to the said Sir *Roberts* eldest Daughter, and thirty two or thirty three thousand merks were appointed for payment of Debts owing to his Creditors, and the rest was divided amongst the rest of his Bairns, *viz.* 7000 merks

merks to his second Son, other 7000 to his second Daughter, and the rest, *viz.* about 10000 merks to his eldest Son; and the said *John Sinclar* being thereupon Infeft, Holding of the Superior, the said Sir *Robert* thereafter, about the space of one year or thereby dies; before whose Decease the said *John* intents an Action of Declarator against the said umquhile Sir *Robert* in his lifetime, and against the same Pursuer, his Son and appearand Heir, to hear it Found and Declared, that the undoubted Heretable Right and Property of the saids Lands pertains to him, by vertue of the said Alienation; after Execution of the which Summons, and Citation of the saids Parties, the said Sir *Robert* died before any further Process was deduced in that Action; after whose Decease the said Sir *Robert* his Son Dispones his Right of the Lands to my Lord *Cranstoun Riddel*, and his Right to Reduce *John Sinclars* Securities; and the said Sir *Robert* being Served and Retoured general Heir to his Father, the said Lord *Cranstoun Riddel* Pursues for Reduction of the said Contract, & Disposition made by the Father to the said *John Sinclar* upon this Reason, as done *in lecto ægritudinis* to the Heirs prejudice; in which Action the Retour being quarrelled, as being done after Advocation, and after the Judge was Discharged to proceed; This Alledgance was Repelled, in respect that the Judge was by the Letters of Advocation, only Discharged to proceed, ay and while *John Sinclar* was Warned to the day of the Service; and the Pursuer offered to prove, that he was lawfully Warned, and Cited before the Day of the Service, to compear to the Service, in respect whereof, that being proven (as it was admitted by the *Lords* to Probation) the Retour was Sustained. And it being further Alledged, that this Right made to the Lord *Cranstoun Riddel*, was null, and could not be Sustained to produce this Pursuit, but the party ought to be Assoilzied therefrom, because by *Act* of *Parliament*, It is Declared that it is not lawful to the *Lords* of Session to buy Pleas, or Actions, or Rights Pleadable; And this Action was of this nature, in respect of the nature of this Process, and that the Defender had Intented his Declarator before the Right was made to the Lord *Cranstoun Riddel*. This Alledgance was also Repelled, for the said Declarator being only Execute, but never called in Judgment, nor other Process Deduced thereon, It was Found, that the buying of the Right Libelled by the Lord *Cranstoun Riddel*, was not of a Litigious Right, which came under the compass of that *Act* of *Parliament*: Also the *Lords* Found, that the Certification of the *Act* of *Parliament* being expres, that such buyers of Pleas should be Deprived of their Offices, it ought not to be extended further, as to the tinsel of the Plea, but left to the Defender to Pursue for Depriving of the Pursuer: But the *Act* of *Parliament* Declares, that it shall not be lawful to buy any Plea, *Ergo* it would appear that if it be not lawful to buy, therefore that such Writs are not lawful, and consequently that unlawful Writs are null, and cannot produce Action, but it was Repelled *ut supra*; Also the *Lords* Found the Reason of Reduction Relevant, although it was Alledged, that the said Alienation could not be quarrelled as done *in lecto ægritudinis*, seing the Maker thereof was not affected with any such Sickness as might be called *lectus ægritudinis*, and which was an impediment *rebus agendis*, and which is called in Law *morbus Sonticus*, for his Disease was a Lent Sickness, which kept him continually in one estate, by the space of two years together before his Decease, *viz.* a Palsie in the one Arm and Leg: Likeas this Alienation was made a year or thereby before his Death, at the time whereof, and continually thereafter he had sound and perfect Judgment, and did all his Affairs as any other healthful provident Man used to do, and as he himself used before his Sickness, both in Directing of his Business, Guiding of his Rents, Subscribing of his Writs, and in his Diets, at Bed and Boord, Likeas this Alienation being made for the Causes within-written, of satisfying of his Creditors, and of his eldest Daughter, which were done,

Contracted, and Perfected, before ever he contracted any Sickness, and when he was in full and intire Health, and the rest of the Sums appointed to his Bairns unprovided, which was a Lawful Act to do, so long before his death, his eldest Son being also provided to the rest of the Sum of the price, and whose Provision the Father could not inlarge, in respect the price would extend to no more; and also that the eldest Son had so Estranged and Mis-behaved himself to his Father, that his Father with difficulty was moved to provide any thing to him: And also that the Defender was content yet to Supply and pay, what more price the Judge should think expedient, should be payed for the Lands; all which were Rejected by the *Lords*, and the Reason Sustained, seing the Party came not out to Kirk and Mercat after the Alienation, without which had been done by him, the Alienation was Found could not be Sustained; neither was it Respected, that the Party was of sound Judgment; for they Found, that the Sickness of the Body, albeit of never so long endurance, and albeit the Judgment was whole, if the Party continued unrecovered, and came not to publick places, but died thereof, was a just Cause to Reduce the Alienation, although made also for preceeding Just Causes; Which the *Lords* Found not enough to Sustain the same in prejudice of the Heir, as said is; but the Reducer was ordained to Repay to the Defender, the just Sums for which the Alienation was made, and truly Debursed. Actor. *Advocatus*. Alter. *Nicolson* & *Craig*. *Hay* Clerk. *Vid. July* 18. 1623. *James Cranston*, and the Cases there. *July* 6. 1625. *James Mowat* and the Cases there. *July* 13. 1632. *Pollocks*. *July* 7. 1629. *Fairly*.

Dickson of *Head-rig* contra an *Donatar*, *November* 14. 1635.

THE Gift of Ward and Marriage being Gifted and Pursued for, by a Donatar against *Dickson*, Appearand of *Head-rig*, Appearand Heir to that prior first Appearand Heir of that umquhile deceast Vassal, who died Tennent to the King; for the *Action* was not pursued against the Appearand Heir of the Vassal, in his own Lifetime, but the Appearand Heir, whose Marriage was Gifted, being deceast before any Action was Intented against him upon that Gift, the Action was Intented against his Brother, who was the next Appearand Heir upon that Gift, for that first Appearand Heirs Marriage, who was deceast, and whose Marriage was Gifted before he died, and not for the Marriage of the Defender, who was then Appearand Heir himself, in respect of the others decease; and after the Intenting of this Pursuit, this other Appearand Heir, who was Defender, being deceast since the Intenting of the Cause, and the Process being transferred in the next Appearand Heir, and after Transferring being insisted upon against him, not for his own Marriage, but for the Marriage of the first Appearand Heir, as said is; In this Process, it being Alledged, that the same could not be sustained against the Appearand Heir, either of the Vassal, or of that Appearand Heir, whose Marriage was sought, except the Defender were called, either as Heir Entered to that Appearand Heir, or as Charged to Enter Heir to him; for he Alledged, that this Action ought to be considered otherwise, than if the Vassals Appearand Heir were Pursued, for his own Marriage, in which case he being the *Appearand Heir*, who was conveened, it sufficeth; but in this case, the Appearand Heirs Marriage being craved after his decease, some ought to be called to represent him; seing it was craved as a Debt of his, the Pursuit whereof cannot be sustained, as when the Appearand Heir to the Vassal deceased, is conveened for his own Marriage; for in that case, he cannot be otherwise conveened, seing if he had been Entered, or Infeft before the other Vassals decease, his Marriage would not have fallen; but now the Appearand Heir being dead un-entered, and yet his Marriage craved, the Process cannot be sustained therefore against none, but some called to represent him, either as Heir, or Charged to enter Heir; seing the Defender,

who

who is conveened as Appearand Heir, his own Marriage is not crayed, but the Marriage of the other Appearand Heir deceast. The *Lords* Repelled this Alledgance, and sustained the Transferring, and Process pursued thereupon, against the said Appearand Heir, without necessity that he should be either Heir; or Charged to Enter Heir to that Appearand Heir, whose Marriage was sought, in respect that this Pursuit was real against the Ground, and that the Pursuer sought no Personal Action, nor Execution thereupon against the Defender, but past therefrom. Actor. *Advocatus* & *Craig.* Alter. *Nicolson* & *Heriot. Gibson* Clerk. *Vid. January* 29. 1635. *Moncrief.*

Fenton contra *Carnegy, November* 17. 1635.

ONe *James Fenton* pursuing *William Carnegy*, for delivery to him of 950 Merks, which was given by umquhile *James Fenton*'s Wife, in custody to umquhile *Margaret Hepburn*, Spouse to the said *William Carnegy*, and was delivered in Trust to her, being her Kinswoman, without the Pursuer her Husbands Knowledge, seing it behoved to be repute his Money; and the Defender granting, that his Wife before her decease declared to him, that that Money was so delivered to her, and Willed him to deliver the same again to the Right Owner, but Alledged, that he could not be *in tuto* to deliver it, before the Womans Testament were Confirmed, who Depositat it, and that he might thereby lawfully be Exonered thereof. The *Lords* Repelled this Alledgance, and Found no necessity of Confirmation of the Wifes Testament; but that the Husband might Challenge, and Pursue for any Money given out by his Wife *stante Matrimonio*, as for his own proper Money, given out during their Marriage by himself. *Vid. March* 16. 1622. *Hume* contra *Mcmath.*

Williamson contra *Hagie, November* 28. 1635.

ONe *Williamson* having obtained Decreet against *Hagie*, indweller in *Perth*, before the Baillies of *Couper*, for Removing from a dwelling House in *Couper*, which being Suspended, because it was *a non suo Judice*, seing the Defender dwelt in St. *Johnstoun*, and so was not subject to the Jurisdiction of the Baillies of *Couper*. And it being Answered, that the Process and Sentence should be sustained, being for Removing from a House within Burgh, to the which the Magistrat of the Burgh is sole and only Judge, albeit the Party Defender therein dwelt not within their Liberty, seing they had Summoned Defender, by vertue of the *Lords* Letters, granting them Warrand to Summon the Parties, albeit they dwelt not within their Teritories; for *ratione rei* they are Judges to them, and this is the Inviolable Custom within Burgh, so to proceed in the like Cases; And in respect of the Warrand foresaid of the *Lords* Letters, and perpetual Custom of the Burgh, the Decreet ought to be sustained. And the other Answering, that the *Lords* Letters are Impetrat *periculo petentis*, and cannot be a Warrand to an Act, which otherwise in Law is Reprobat; for albeit *ratione rei* the Magistrat, *ubi res sita est*, may be Judge; yet that holds in Law only, when the Party is deprehended within the Territories of that Judge, and is not keeped by the Laws of this Kingdom, where there is a Soveraign and Superior Supream Judicatory, where such Actions may be Pleaded, and where all Parties, within whatsoever Subaltern Judgment in the Realm, may be both Conveened and Sentenced; and if this Ground were maintained within Burgh, then of the like Reason out with Burghs in all Sherifdoms, one Sherif may proceed against Parties in other Sherifdoms, not subject to his Court, which were to confound all Judgments, and greatly should prejudge Parties, notwithstanding of all which the Decreet was sustained, and the Custom within Burgh, and Warrand of the *Lords* Letters was allowed. Actor. *Mowat.* Alter. *Barclay.*

The Relict of *Mowat* contra *Gray* & *Mowat, Eodem die.*

ONe *Keith* of *Pitindrum* having Wodset the Lands of to one *Mowat*, Redeemable conform to the Reversion granted thereupon, for

2000 Merk, and by vertue whereof he being in Possession, thereafter this *Mowat* by a base Infeftment, gives the Liferent Right thereof to his Wife, to be Holden of himself, and making Relation to be done for Implement of, and conform to their Contract of Marriage; after which Right the said *Mowat* Dispones the same Lands to Mr. *Rodger Mowat*, who was his Creditor, and had payed great Debt for him, by a publick Infeftment, who siclike was diverse years in Possession by vertue of the said publict Right. Thereafter *Keith* of *Pitindrum* Dispones the said Lands to the Earl *Marschel*, and payes the Sum to the said Mr. *Rodger Mowat*, who had the foresaid publict Right of the Wodset Redeemable, as said is, conform to the Reversion, and obtains a voluntar Renounciation of the said Right, no Order of Redemption being ever used thereupon; and thereafter the Earl *Marschel*, and *William Gray*, to whom the Earl Disponed the Lands Irredeemably, became in Possession after the decease of *Mowat* his Relict, by vertue of her preceeding base Right, Claiming and Pursuing, for the Mails and Duties of the Lands; and a Defence being proponed upon the Renounciation made by the said Mr. *Rodger*, Successor in her Husbands publict Right, which was under Reversion, and which she had confessed, to be Redeemed by his receipt of the Money, and Renunciation of the Wodset, in favours of the Heretor; which was lawful for him to do, seing the Heretor could know no other but his own Wodsetter, he not having received, nor acknowledged the Wife, by vertue of her base Right; so that as the Heretor might have payed the Husband the Money, and received his Renounciation valiably, *quo casu* the Wifes Right would have ceased, so might he do to the singular Successor: And the Wife Answering, that her Infeftment being given, conform to a Contract of Marriage, her Husbands Possession behoved to be esteemed her Possession, and this voluntar Renounciation ought not to derogat to her Right, except there had been an Order of Redemption used, and she Warned to the Order and Declarator, that the Money, in stead of the Land, might have been imployed to her use. The *Lords* sustained the Exception, upon the preceeding voluntar Renounciation and Reversion, and preferred the Singular Sucessor to the Relict, in respect thereof and of his Possession. Actor. *Baird.* Alter. *Mowat. Vid. July* 4. 1628. *Hamilton* of *Kinblaithmont* for a voluntar Renounciation. *March* 8. 1622. *Corsindie.*

Morison contra Tennents of *Orchardtoun*, *Eodem die.*

JOhn *Morison* pursues the Tennents of the Lands of *Orchardtoun*, for payment of the Mails and Duties thereof to him, by vertue of his Infeftment, and Comprising of the Lands from the Heretor, and they, and certain others, of the Heretors Creditors Compearing, and Defending with a Tack of the Lands Set by him to the Tennents, for payment of the Duties therein expresst, which Duties by the said Tack they were obliged to pay, to the particular Persons specially enumerat in the said Tack, who were the saids Heretors Creditors, for satisfying of the Annualrent of their Debt yearly, and so much of their Principal Sum, as the saids Rents, by and attour these Annualrents will extend to; In respect whereof the Creditors foresaid Alledging, that they ought to be preferred in the Duties of the said Tack to the Compriser, seing the said Tack not only preceeds the said Comprising, and all other Diligence done by the Compriser, but also is before the Debt, whereupon he Comprised; and this Tack must be reput, as if the same had been set to these Creditors themselves *per expressum*, seing it is expressly Set, for payment of the Duties to them *nominatim*. And the other Answering, that his Comprising and Infeftment, gives him Right to the Duties of the Tack, he being Heretor now, and Singular Successor, and the Tack must be esteemed, as if the Duty thereby had been payed to *Orchardtoun* himself, *quo casu* he would have been preferred. The *Lords* Repelled this Alledgance

Alledgance, and preferred the Compriser in the Mails and Duties of the Tack, to the Creditors, albeit specially named, to whom by the Tack the Duties thereof is appointed to be payed; seing the Author of the Tack being denuded of his Heretable Right, by the Comprising and Infeftment, the Duty behoved to pertain to the Heretor, and could endure no longer to the use of his other Creditors, then during the space that the Heretable Right remained with him, who Set the Tack; but Found that the said Tack-Duty pertained to the said Pursuers Singular Successor, by Appriſing and Infeftment, as said is. *Scot* Clerk. *Vid. Feb.* 13. 1627. *Samuel* and the Cases there. *Feb.* 14. 1637. *Hume. July* 3. 1630. *Cochran.*

Hume contra La. *Hadingtoun, December* 2. 1635.

GEorge *Hume*, Son to Sir George *Hume* of *Manderstoun*, being Inseft in the Lands of *Slegden*, Pursues the Lady *Hadingtoun* for payment of the Duties of the saids Lands, for some bypast years; and she Alledging, that she had lent 5000 merks to the Pursuers Father, for the Profit and Security whereof his Father put her in Possession of the Lands, conform whereto she uplifted the Duties thereof the years bypast, now Acclaimed, and received Acquittances thereupon from the Father, who is in Law Administrator to his Son, the Son being for these years Minor, whereby for these bygons she must be liberat, having done that *bona fide*, the Sons Right never being intimat to her; and the Father having purchased the Right of the Lands himself, without putting the Sons name in the Security, to whom also he was Administrator in Law, which gives him Right to Intromet with the Sons Estate. And the Pursuer Answering, that his Father albeit he were Administrator, yet by that Title he can have no Right to meddle with the Rents, especially to convert the same for payment of his own Debt, which is not in Law Admissable; so that the Defender hath her Action of Warrandice, or other Pursuit against the Father, as in Law may be best competent to her, for Repetition thereof, or for recovery of her Debt; but it cannot defend her against this Pursuit. The *Lords* Found this Defence sufficient to exclude the Pursuer from seeking of these bygone Duties, which were Intrometted with by the Defender, by warrand of the Father, he being in Law Administrator to his Son, who was Minor all the years Libelled, and was Minor the time of the acquiring of the Right to the Lands Libelled; so that these being *fructus præteriti & percepti, & bona fide consumpti*, and not interrupted before the uplifting thereof. The *Lords* Found, the Defender ought to be Assoilzied from bygones. Actor. Alter. *Stuart* & *Belshes*. *Gibson* Clerk. *Vid.* 12 *Feb.* 1633. *Govan*, and the Cases there.

Robison contra *White, December* 3. 1635.

ONe *Robison* Baxter in *Dundee*, having obtained Decreet *in foro contentioso*, against *David White*, Maltman there, for payment of the price of certain Victual wrongously intrometted with by him; which being desired to be Reduced, upon this Reason, *viz.* That the Witnesses who proved that Cause, and upon which Probation the Sentence only depended, has since confest, that they had Deponed falsly, and were Suborned to do the same; whereupon the Reducer Alledged, that they ought to be Re-examined, that the verity might be known, and that he might not suffer by an unjust Probation and Sentence. And the Defender Opponing his Sentence given against the Party Compearing, and that there was no Protestation made by the Pursuer, for Reservation of his Action of Reprobation, which ought to have been done, if he intended to have quarrelled their Depositions, and which is the only way permitted in Law to Parties, fearing to be hurt by the Depositions of Witnesses, whereby they may help themselves, and not by such Actions of Reduction, as is now In-

tented, the preparative whereof he Alledged to be of so dangerous consequenes, that never shall any Party be in security, if such Reductions be permitted by Alledging the Witnesses to be Suborned, and so to crave them to be Re-examined, who after any space may either forget the particulars, whereupon they have Deponed, or otherways may be Suborned by the Party, to alter their Depositions: The *Lords* Found, that this and the like Reductions were receivable, notwithstanding of the Sentence given *parte comparente*; and therefore that they would try this Reason, if the Witnesses were Suborned, and had Deponed falsly *in prima instantia*, and to that effect that they would Examine the saids Witnesses thereupon; and Found this Action was of the nature of a Reprobator: and becaus there might be peril in the Form, to give way to such Pursuits, where there were Sentences given upon Probation against Parties Compearing, if after tryal there should be found no just cause to Infringe the Sentence, and to Cohibite the Preparative, if any should move the like Action without good Grounds: Therefore the *Lords* Ordained the Reducer to Consign 100 pounds to be given to the Party Defender in this Process, in case after tryal it shall be found, that there is no reason for this Action; which Sum was modified, becaus the Sum contained in the Sentence, was not far above this Penalty, and also the Parties were but mean persons; whereas if the Sentence had been a matter of more consequence, the *Lords* would have modified a greater Sum for Penalty. *Scot* Clerk.

Paterson contra Baillies of *Striviling*, *Eodem die*.

John Paterson Pursuing the Baillies of *Striviling*, for payment of the Sum of adebted to him by the Laird of *Abercairny*; becaus they being Charged to put him in Prison, he being Rebel, they Dimitted him: And the Baillies Alledging, that he had a Protection under the Kings Great Seal, which was shown to them, and was un-expired: Likeas they were Charged upon the morrow immediatly after the E. of *Marr*'s Burial, the said L. of *Abercairny* being then coming therefrom, he being Sister-bairns with the Defunct, & then actually at the same, which was a probable cause to excuse the Baillies. And the Party Replying, that the Protection cannot excuse the Baillies, becaus the same hath an expres Clause insert therein, Providing that the Party pay his Annualrent to his Creditors, which not being done, the Protection becomes void; and which Clause was by the Messenger, who Charged the Baillies, Intimat to them, and who shew'd, that the Party had not gotten payment of his Annualrents. Likeas they were Charged to take him both for Principal and Annualrents. The *Lords* Found this Exception upon the Protection Relevant, to liberat the Magistrat, albeit it bore the Provision foresaid; for the words of the Provision were only nakedly conceived, *viz. That the Party should pay to his Creditors their Annualrents*, but had no other word subjoyned thereto, appointing the same to expire, or to be null, in case of not paying thereof; and the *Lords* Found, that it was not the Baillies part, nor of any other Inferior Judge to Examine and Cognosce, if the Party payed his Annualrents, or not; neither was there any tryal taken if the Partie had incurred that Failzie, which might have put the Magistrats in *mala fide*; And this was the more sustained, seing the Party was desired to be taken the morrow after the E. *Marr*'s Burial, he being his Kinsman, coming therefrom. *Scot* Clerk.

L. *Craigivar* and his Donatar contra *Aikenhead*, *Decemb.* 4. 1635.

THe Laird of *Craigivar* and his Donatar, craving Declarator upon the Liferent of Mr. *Adam Bothwell*, of the Lands of *Glencorss*, whereof *Craigivar*, as succeeding in the Lord *Saltouns* Right, of whom these Lands were Holden, was Superior: In which Process Mr. *James Aikenhead*, as Donatar to the King of

of the ſame Liferent, ſeeking ſpecial Declarator thereon, Compeared, and opponed againſt this Declarator of *Craigivar*'s, who claimed the ſame as pertaining to him as Superior, and that the King had no Right thereto, by reaſon that Mr. *John Abernethie* was Vaſſal of thir Lands to the Lord *Saltoun*, and Proprietar thereof, which Mr. *John* had Diſponed the ſame to umquhile *Adam Bothwell*, Father to the ſaid Mr. *Adam*, and to the ſaid Mr *Adam* Heretably, by two Infeftments, one to be Holden of the ſaid Mr. *John*, and the other of his Superior (which Infeftment granted to be Holden of the Superior, was not Confirmed) by the which Charter Subſcribed by the ſaid Mr. *John*, granted to be Holden of Mr. *John*'s Superior, (*viz.* the Lord *Saltoun*, in whoſe place *Craigivar* hath come) the ſaid *Craigivar* and his Donatar Alledged, that the ſaid Mr. *John*'s Right to the Caſuality of Liferent, was altogether excluded, and did ceaſe, ſeing he was Denuded of all Right which he had, both to the Property and Superiority of theſe Lands. Likeas the ſaid *Adam* and Mr. *Adam* his Son, who had acquired the ſaid Right, as ſaid is, Diſponed the Lands Heretably to *Adam Bothwell*, Son to the ſaid Mr. *Adam*, to be Holden of the Superior, with Reſervation of the ſaid *Adam* and his Son Mr. *Adam*, Father to the youngeſt *Adam* their Liferent, which Charter was Confirmed by *Craigivar*; within three days after the ſaid Mr. *Adam*, whoſe Liferent was reſerved, was put to the Horn, and ſo long before he was year and day Rebel; by the which Confirmation, bearing the ſaid Reſervation, and by the remaining of the Liferenter year and day thereafter Rebel, the Liferent of theſe Lands ſo reſerved pertained to him as Superior; and Mr. *James Aikenhead*, Donatar to the King of the ſaid Liferent, Alledging, that the ſame pertained to the Kings Donatar, and could not pertain to any other Superior, becauſe Mr. *Adam* was never Vaſſal to *Craigivar*, neither by any Original Right, nor Reſignation, nor by Confirmation; and that Confirmation of the Right granted by Mr. *Adam* to his Son, Confirmed by *Craigivar*, bearing the Reſervation of Mr. *Adams* Liferent, cannot be ſuſtained to make Mr. *Adam* his Vaſſal, except he had been his Vaſſal before that Charter Confirmed, which cannot be ſhown; ſeing by the contrary he was Vaſſal only to the ſaid Mr. *John Abernethie*, & Held of him, and what-ever Reſervation of his Liferent was made in the Charter granted to his Son, Heretably to be Holden of the Superior, and which was Confirmed by the Superior, that cannot make him his Superior; ſeing his Liferent was not conſtitute by that Reſervation, but was lawful and ſufficient of before; and that Reſervation was only an Exception annexed to his Sons Fee, with which it was affected, and tranſmitts no Right of Superiority over his Liferent, but only to the Property given to the Son, to be Holden of that Superior. And albeit it might be Alledged, that his Liferent would not fall to Mr. *John Abernethie* his proper Superior, in reſpect that he might be Alledged to be Denuded of all Right competent to him by the Charter, granted to be Holden of Mr *John*'s Superior, yet the ſame accreſceth to the King, ſeing there was no other Superior *ratione Coronæ*, whereby he is juſtly repute Superior to all, when another cannot be ſhown. The *Lords* Repelled this Alledgance, proponed for the Kings Donatar, and Found the Right of this Liferent pertained to *Craigivar*, whom they Found to be Superior to this Rebel, by this Reſervation contained in the Charter granted by the Father to his Son, to be Holden of the Superior, and Confirmed by him; which Reſervation ſo made, and Charter which bears the ſame, being Confirmed, they ſuſtained as ſufficient to make him his Vaſſal, although the Rebel had Right to the Liferent of before, and Found the Superiors Right not prejudged, albeit before his Confirmation the Liferenter was Rebel ſome days before, and that thereby no Right was acquired to the King, the Superior having Confirmed long before the year expired, and within a Moneth after the

date of the Charter granted to the Son, and so the Superior was preferred to the King, and the sole Reservation Found enough to make him Vassal. Actor. *Advocatus* & *Nicolson*. Alter. *Stuart* & *Gibson*. *Scot* Clerk. *Vid.* 23. *January* 1624. *Meldrum*, *Feb.* 16. 1631. Lo. *Cranstoun*.

Sutor contra *Crawmond*, *December* 5. 1635.

IN a Spuilzie and Ejection, the Defender Alledging, that the Husband to this Pursuer had Renounced and Over-given the Land to the Defender, whereupon he was Entered to the Land, and the Pursuer his *Relict* was Ejected and put out of the *Room*, and Houses thereof, conform to the Precept Direct and Execute by the Sheriff-Officer, which was Proponed, and admitted to Probation, to Eleid the Ejection. Likeas the said Disposition bore, that her said Husband Disponed the particular Goods contained in the Disposition (and for Spuilzie whereof he was Conveened) to the said Defender, for satisfaction of the Farms and Duties, owing by him to the Excipient his Master, according to a preceeding Tack, Set to him by the Defender, the which Tack-duty was resting unpayed divers years, as the said *Disposition* Propones. Likeas the Defender also Poynded the saids Goods by the Sheriff Officer, according to the Execution made upon the Sheriffs *Precept* direct thereanent; which Exceptions being admitted, to purge the Ejection and Spuilzie, at the Advising of the Cause, The Pursuer Alledging, that the same could not be found proven, because the Disposition made by the Pursuers Husband, Adduced to prove the same, was null, being a matter of 400 or 500 merks, and was only Subscribed by one Nottar, which in a matter of so great importance against the Act of Parliament, cannot be sustained: And also Alledged, that the Sheriffs Precept of Poynding was not a Warrand to Poynd, and to purge the Spuilzie, except both the Sheriffs Decreet, whereupon it was direct, had been also produced; neither were these sufficient, although the same had been produced, to give a Warrand to Poynd, except the Letters had been granted and directed by the *Lords* upon that Sentence, to proceed to Poynd, without which the Inferior Judge could not Execute his *Precept* of Poynding: Attour he Alledged, that both the Sentence given by the Sheriff, if any there was, whereby the Execution of the Precept might be sustained, and also the Precept and Execution were all null, because the same was Execute in the time of the *Tuill* Vacance, which is a *Feriot* and close time, wherein all Judgments should cease. All thir Objections and Alledgances were *Repelled*, and the Writ sustained, and the Exceptions found Proven sufficiently thereby; for albeit the Disposition had but the Subscription of one Nottar only for the Party, yet it was found good, being made for satisfying of the Masters Tack-duty, which was not Alledged to be payed, and proponed to purge a Spuilzie: neither was there Found any necessity to have any Warrand of the *Lords* Letters, to preceed the Execution of the Sheriffs Precept of Poynding; And also the *Decreet* and Precept of Poynding were sustained, albeit they were done in the *Tuill* Vacance; for the Precept was dated 26 *December*, and the same bore the Decreet to be dated 24 *December*; In respect Inferior Judges used to sit frequently, and Minister Justice in these times, and it were hard to Infringe and Annull all their proceedings done in these times; and this was considered, that it tended to purge a Spuilzie, which is odious Actor. *Johnstoun*. Alter. *Craig*. *Scot* Clerk. *Vid* 7 *December* 1630. *Lands* contra *Dick*, where the contrary seems to be done.

E. of *Rothes* contra *Leslie*, *Decemb.* 9. 1635.

THere being a Submission made betwixt one *Leslie* and to a certain Judge, who by his Decreet Arbitral following thereupon, having Decerned the other party to pay to the said *Leslie*, the Sum of eightscore pounds, where-

whereunto he having made the Earl of *Rothes* a Right, who Charged for payment of the Sum; & the other Suspending, that the Decreet Arbitral, which was insert in the blank on the back of the Submission was null, because the same wanted Witnesses, and so was against the Act of Parliament, which required the Subscription of the Party and of the Witnesses, before whom it was Subscribed, otherwayes that it could not make Faith; for by the want of Witnesses the means of Improbation were taken from the Party: This Reason was Rejected, and the Decreet Arbitral Sustained, seing the same was insert in the blank upon the back of the Submission, and bore, *that the same was all Written and filled up in the same by the Judge Arbiter himself, to whom it was Submitted*; and bore *to be all his Hand Writ*: Likeas the said blank was Subscribed by the Parties Submitters themselves also, & in respect it bore *to be Holograph*. The *Lords* Found, that there was no necessity to have Witnesses insert therein; neither was it respected that it was Alledged, that the Argument of Holograph might well have place to excuse the not Exhibiting of the Witnesses among Parties, where any Party had Written a Writ, whereby himself might be Bound; but it ought not to have a like force, in respect that any other than the Party himself might bind another Party, but in a Legal manner before Witnesses, at least it ought to be proven, that the said Writ was Holograph, if that were Found to be sufficient, as the Party contended, that it was not; which being Reasoned and Proponed, as a Doubt among the *Lords*, it was Repelled, and no necessity Found thereof, and the Decreet Sustained, bearing *as said is*. Actor. *Stuart*. Alter. *Baird* & *Gibson* Clerk. *Vid. December* 1. 1632. *Hunter* contra *Haliburton*.

Rowan contra *Wardlaw*, *December* 12. 1635.

MR. *David Wardlaw* having Comprysed from *Rowan* some Lands, wherein *Rowan* was Infeft, for Debt owing to him by the said *Rowan*, and upon the said Comprysing, he being Infeft; after the Decease of the said *Rowan* his Debitor, another *Rowan* Brother to the Defunct, as general Heir to their Father, who was Infeft in the same Lands, pursues for Reduction of Mr. *David Wardlaw's* Comprysing and Infeftment: And the Defender Alledging, that the Pursuer by vertue of this Title of General Retour, as Heir to his Father, could not have interest to Pursue for Reduction of his real Right of Comprysing and Infeftment, except he had been specially Served and Infeft *per expressum* in these Lands. The *Lords* Repelled this Alledgance, and Found this general Retour of the Pursuer, as general Heir, was sufficient to give the Pursuer a Title & Interest to Reduce the said real Right, and Sustained the same. Actor. *Bruce*. Alter. *M'gil*. *Gibson* Clerk *Vid. Feb.* 4. 1630. E. *Kinghorn* and the Cases there.* *February* 11. 1635. *Muire*. *February* 7. 1634. *Gilhagie*.

Seaton contra *Clerk*, *Eodem die*.

BY Contract betwixt *John Seaton* of *Achorty*, and Mr. *Robert Udney*, it is Provided, that neither of the Parties shall take any Right of the Teinds of the other Parties Lands, and if any does, that the same shall accresce and belong to the other Party, his Heirs and Successors to his Lands; After which Contract the said Mr. *Robert Udney*, then Heretor of the Lands of *Tullichortie*, Dispones these Lands to *Mr. William Barclay*, who thereafter Dispones the same to Mr. *James Clerk* Defender in this Action of Spuilzie, and who is Conveened for Spuilziation of the Teind-Sheaves of the saids Lands of *Tullichortie*, so acquired by Progress from the said Mr. *Robert Udney*. The said Mr. *Robert* the time of the Alienation, being Tack-man of the Teind-Sheaves, as also he was Heretor of the Lands Disponed, but neither having Disponed his Right of the Teinds to the said Mr. *William Barclay*, to whom he sold the Lands, nor having made him Assigney to that Clause of the Contract, made before, as said is, betwixt him and the

said *John Seaton*, providing therein that neither of them should take the Right of the others Teinds of their Lands, and if they did, that the Right should Forefault to the other Party; And the said Mr. *Robert Udney*, after the Alienation of the Lands to *Barclay*, having made this *Seaton* Pursuer, Assigney to his Right of the Teinds of the saids Lands, so Disponed by him, as said is, before which *Seaton* having also Acquired new Tacks thereof from the E. *Marischal*, and by vertue thereof Pursuing Spuilzie against the Defender, and he Defending with the Clause foresaid of the Contract, Alledging him to be Successor to Mr. *Robert Udney* in the saids Lands; And the Clause being conceived in favours of his Successors *per expressum*, it must accresce and be profitable to him, & must Liberat him from Spuilzie: The *Lords* Repelled this Alledgance, and Sustained the Action of Spuilzie, in respect the Defender nor his Authors, was not made Assigney by Mr. *Robert Udney* to that Clause of the Contract, the time when the Heretable Right of the Lands was Disponed; For as Mr. *Robert Udney*, who Disponed the Land, might have Pursued the Defender, or *Barclay* his Author for the Teinds thereof, so might the Pursuer his Assigney to his Right. Likeas they Found that the said Mr. *Robert* might Discharge that Clause of the Contract to the Pursuer, notwithstanding that he had Sold the Land before that Discharge, to the Excipients Author, by the which preceeding Alienation of the Land, the Defender Alledged, that he was in his place as Successor in the Lands to him; and so Alledged that he could do nothing thereafter to his prejudice, in respect of the Clause foresaid, Which the *Lords* Repelled, as said is, seing he was not made Assigney to that Clause, nor to no Right of the Teind which he then had, and the Action of Spuilzie was Sustained.

Maxwel contra *Wright*, *December* 16. 1635:

ALexander *Maxwel* having Comprysed the Lands of *Wringly* from *Ker* of *Redpath* his Debitor, in *January* 1632. and being thereupon Infeft by publict Infeftment upon the 2*d* of *March* that same year, and Pursuing for the Mails and Duties of these Lands; *James Wright* the Defender Alledging a prior Infeftment in *anno* 1630. granted to him, to be Holden of the Granter, *viz.* the said *Ker* of *Redpath*, for most onerous and just Causes, which albeit Base, yet was for a true and just Debt, and done in *anno* 1630. long before this Parties Publick Right, by vertue whereof he Alledged and Claimed preference, in respect of Anteriority, and that he had become in Possession of the Lands, by vertue of his Right, by puting one of sixscore of Sheep, and sixteen Kine, and some Yeld Goods, of his own proper Goods, and by Conducing and Hyring of Herds for keeping of them, and paying the Herds their Fees; and it being a Grass Room, this should be Found sufficient Possession, for whatever Corns were thereupon, he could not have more Possession than of the Grass, seing before the Acquiring of his Right the Corns were Sowne on the Ground, so that he could not have any other Possession of Labouring: Likeas, when he put on his Goods, as said is, his Debitor being then Possessor, he removed off all his Goods, and Sold and Disponed thereupon, and made the Ground void and red to the Defender, and the next year he Arrested in the Tennents hands their Farms, and obtained thereupon Decreet against them, which is all the Diligence that could be done, seing this Pursuer had neither done Diligence, nor recovered any Possession, by vertue of his Publick Right: This Alledgance was Repelled, and the Pursuers Publick Right upon the Compryfing Sustained, and preferred to the Excipients prior Base Right, in respect that the Pursuer offered to prove, that *Ker* of *Redpath*, their common Debitor, remained in continual Possession of the whole Lands, notwithstanding of the Excipients Right, continually to the time of his Compryfing, and had his own Goods Pasturing thereupon; and whatever alledged Goods the Defender had thereupon, the same cannot be ascribed as a Possession to maintain his Right, seing he had the like Possession by tollerance,

or

or only by oversight from *Redpath*, divers years before, so that he continuing that same Possession which he had before only in tollerance, as said is, cannot be ascribed to his Infestment: Likeas he did nothing upon his Infestment, to make the same subsist in Law, before the Pursuers Comprysing and Infestment, as he ought; for he might have made Warning to the Deditor, his Author, or to the Tennent to Remove against the next *Whitsunday*, which he did not; and his Arrestment and Decreet cannot be respected, being all after his publick Right, and so can derogat nothing to the Pursuer. This Reply was Sustained to prefer the Publick Right, albeit no more was done upon the said Publick Right before this Pursuit. Actor. *Nicolson* & *Dunlop*. Alter. *Gilmore*. *Gibson* Clerk.

Keith and L. *Glenkindie* contra *Irvin*, *December* 23. 1635.

ALexander *Irvin* of *Fortrie*, being obliged by Contract, betwixt him and *Patrick Gordon* of *Kincraigie*, to grant to him in his Name, but to *Patrick Keiths* proper use, two Bonds, the one of 400 Merks, the other of 500. In which Contract the said *Patrick Keith* is also bound to Deliver to the said *Alexander Irvin* certain Bolls of Victual, according to which Contract the said *Alexander Irvin*, having Subscribed the said two Bonds to the said *Patrick Gordon*, wherein no relation was made to the said Contract, nor bore, *To be done to the behove of the said Patrick*, but two pure and simple Bonds of borrowed Money, to which two Bonds the said *Patrick Gordon* having made *Keith* & L. *Glenkindie* Assigneys, and they Charging thereupon the said *Alexander Irvin* to pay, he Suspends upon Compensation of the Victual, owing by the said *Patrick Keith* to him, conform to the said Contract, which was the ground of the Bonds, whereupon he was now Charged, and which Compensation he Alledged, ought to be received against thir Assigneys, as it might be received against *Keith* his Debitor, or against *Gordon* their Cedent, who Acquired the Right of the Bonds, albeit in his own Name, yet to the behove of *Keith*, as was appointed by the Contract: and albeit the Bonds be pure and simple, and neither make mention, that they are given to the behove of *Keith*, nor yet depend upon the Contract, whereby it was Alledged, that this reason of Compensation cannot be received against these Chargers, who are true Creditors to *Gordon*, and who seeing the Bonds in their Debitors Name, and to be simple, not affected with any quality or condition were in, *bona fide* to take Assignation thereto, & ought not to be prejudged by any other Bargain, betwixt this Suspender and the Cedent; Likeas they Alledged, that the Compensation cannot be received against them, who are Assigneys, for a true just Debt owing to them, and so much the rather, because the Debt owing to the Suspender by *Keith*, is only Liquidat, since they were made Assigneys, and since their Charges Execut thereon, and since the time that they obtained Protestation against a prior Suspension, raised in this same matter: notwithstanding of which Alledgance, the *Lords* Found the Reason of Compensation Relevant, as well against the Assigney, as against the Cedent, and Found it would have Militat against the Cedent, as if *Keiths* Name had been insert in thir Bonds, in respect albeit the Bonds were simply made to *Gordon*, yet the same behoved to be reput, conform to the Contract, to be made to the use of *Keith*, who was the Suspenders Debitor, seing it could not be Qualified, that there was another Cause, whereupon the said Bonds were given to *Gordon* the Cedent; and albeit the Debt was Liquidat since the Charge, yet the Compensation was Relevant, seing the Debt was Existant before the Assignation, and was contained in the same Contract, which was the Ground whereupon the saids Two Bonds depended, as said is. Actor. *Nicolson* & *Davidson*. Alter. *Gilmor*. *Gibson* Clerk.

Oliphant contra Tennents, *January* 19. 1636.

ONe *Patrick Oliphant*, upon an Infestment of Annualrent granted to him by Sir *James Oliphant*, Pursuing the Tennents of the Land for Poynding of the

It was Found by the *Lords*, that no Proceſs could be granted in this Action, nor the like caſes (as was Alledged in this Proceſs) while the Party, *viz.* were Summoned, who in the time of the Raiſing of this Summons, ſtood Heretably Infeft in the Lands Lybelled; neither was the Reply reſpected, whereby the Purſuer Replyed, that he needed not to Summon him, ſeing his Heretable Infeftment, is but a baſe Infeftment, granted to beHolden of the Giver, and was not granted by the Immediat Superior; ſo that the ſaids Heretors Right being only made by a mediat Superior, he had no neceſſity to Summon him, but it was enough to Summon the Perſons, who were Heretors by Infeftment from the immediat Superior, which Reply was Repelled; and the like neceſſity Found to cite Heretors from the imediat Superior, as theſe who were Infeſt by the Immediat, ſeing their Seaſins were alike extant in the Publict Regiſter. Actor. *Cunninghame.* Alter. *Oliphant. Hay* Clerk, *Vid. Feb.* 1. 1631. *Gilb. Williamſon.* &c.

Mcaula contra *Watſon*, *Eodem die.*

THe Husband of an Heretrix of a Tenement of Land in *Edinburgh*, who ſurviving his Wife, had the Right and benefit of Curiality competent to him, and who ſurvived his Wife 30 years after his deceaſe, during all which time, he never claimed the benefit of his Curiality, but was ſilent; after his deceaſe the Executor Confirmed to him purſuing *Mcaula*, who had bought the Land from the Heir of the Heretrix, and who all this time had, by vertue of his Right foreſaid, Intromett with the Maills of the ſaids Lands, for refounding of the Mails ſo intromett with by him; and he Alledging, that the Curiality never being ſought by the Husband, during the ſpace foreſaid of 30 years at leaſt, which ſpace he outlived after his Wifes deceaſe; it muſt be preſumed thereby in Law, that he *tacitè* had Renounced and quitted that Benefit, and that the ſaids bygone Mails being *Fructus bona fide percepti & conſumpti*, by vertue of a Right never interrupted by the Husbands ſelf; Therefore the ſame cannot be craved by any, as either Heir or Executor to him; his Right being only a Perſonal Priviledge, competent allenarly to himſelf to have ſought it, if he pleaſed, and not having done it, it muſt expire with himſelf: even as if a Lady Tercer, who had Right to claim her Terce, if ſhe had deceaſed, never having ſought it, not being Served nor Kenned thereto, her Executors or Heirs could never have Right after her deceaſe, to claim the ſame; and the other Party Anſwering, that this was ſuch a Right competent to the Husband, that needed no other Title, or Declarator, but belonged to him *hoc nomine*, as Husband, and ſo being his Properly it muſt pertain to his Executors, even as the Duties owing to a Liferenter pertains after the Liferenters deceaſe, to the Liferenters Executors, which muſt be alike here, the Husband being a Liferenter by the Law of *Scotland* without any other Title: and the living of the Husband ſo long, and not claiming the ſame, could not have prejudged himſelf, if he had claimed it any year before his deceaſe, for all the bygones wherewith he had Intromett, to ſeek the years preceeding, and ſo it muſt be als proper to his Executors as to himſelf; and the ſimilitude of a Terce holds not, becauſe the Lady, who might pretend the Right, never being Served nor Kenned, would not have had Right in her own time to purſue therefore her ſelf, and far leſs her Executors could do the ſame, ſeing there is required a Brief out of the Chancellary, and a Kenning by the Sherif for her Title; but here there is no neceſſity of a Title, but only that he was Husband, and for the Huſbands Ceſſation, he was all that ſpace out of the Countrey. The *Lords* Found the Alledgance Relevant, notwithſtanding of this Reply; for they Found, that this Courteſie being a benefit competent to the Huſband, who ſought not the ſame, conform to the Law and conſuetude of this Realm, therefore his Executors could not ſeek the ſame, ſpecially after ſo long a time, where th

the Mails of the House Lybelled were up-lifted and spent, by vertue of an Heretable Title, never Interrupted within the space of the years acclaimed, and therefore Assoilzied. Actor. *Stuart* & *Sandilands*. Alter. *Nicolson* & *Megill*. *Gibson* Clerk.

Temple contra Lady *Whitinghame*, *January* 20. 1636.

THe Lady *Whitinghame* in her Widow-head having granted a Bond of 2200 merks to *Patrick Temple*, which was all Written and Subscribed with her own Hand, which being desired by the said *Patrick* by way of Action, to be Registrat against her, and against the Laird of *Prestoun* her second Husband, upon whom she was Married after the date of the said Bond. The *Lords* Assoilzied the Laird of *Prestouns* Estate from all Execution which may follow against him thereupon, during his Lifetime, because the said Bond wanted Witnesses insert therein, neither was it admitted to Sustain the Bond, that the Pursuer offered to prove, that it was all the Ladies proper Hand Writ, and offered to prove it by the Ladies Oath, and also by others who knew her Hand Writ; And also tho he *Replyed*, that there could be no suspition of antedating of the Bond, as if it had been made since her Marriage, because he offered to prove the real Furnishing made to her, which was the cause of the Bond, and also by divers Ministers, and other famous Witnesses who saw the Bond before the Marriage: And as this Bond was good in Law before the marriage, so of no reason could her subsequent Marriage prejudge the Bond; Which Reply was Repelled, and the Alledgance of Nullity of the Bond Sustained against the Husband, which against him was Found might not be Supplyed to receive any Execution, either against his own Goods, nor his Wifes, during their living together, albeit the Pursuer offered to *Restrict* the Pursuit to the Goods only pertaining to the Lady, which was refused; but prejudice alwayes to take the Ladies Oath, for this effect only, *viz.* to work against her self, in case she survive her Husband, or against such Goods as might be found properly to belong to her at her Decease, and no further. Actor. *Craig*. Alter. *Gilmor*. *Gibson* Clerk.

Coutis contra *Coutis*, *January* 21. 1636.

A Master pursuing his Servant for payment of the prices of Beer and Ale, which he laid in, in his House and Sellers, and which was vented and run by the Defender, and which was Lybelled to be resting and owing for the space of a year together, at least so much was owing as extended to 500 merks; and it being questioned, if this should be proven by Writ, or Oath of the Defender, or if it was probable by Witnesses; The *Lords* Found, that the Lybel being taken together, *viz. that it was resting, owing*, should be proven only by Writ or Oath of Party; For albeit the laying in of Drink by the Pursuer, and the Defenders Venting of it might be proven by Witnesses, yet that it was so long owing unpayed, was Found ought to be referred to the Defenders Oath; for in Cases of this Nature betwixt the Master and Taverner, it is presumed that they make their Compts Weekly or Nightly, and so they are in use to do: Neither is it likely that the Master would have suffered his Servant to go out of his Service, and to stay still in the Town of *Edinburgh*, where she remained ever since, and not all this time to have craved her therefore, there being three quarters of a year since she left her Service, during which space he never challenged her, while now that he intented this Action, to meet a Pursuit, which she had before moved against him for her Fees; in respect whereof it was Found probable, as said is. Actor. *Craig*. Alter. *Gray*. *Gibson* Clerk.

Buchannan Minister contra his Parochioners, *Eodem die*.

MR. *George Buchannan* Minister of *Kirkpatrick*, Pursuing the Parochioners for Spuilzie of the Viccarage Teinds; The *Lords* Found this Alledgance

Relevant; that the Intrometters conveened bruiked by Tollerance of the appearand Heir, to an umquhile Tacksman, who had Tacks for Terms to run, the years Libelled; and Found no necessity that the Granter of the Tollerance should Alledge, that his Author was Served and Retoured Heir to the Tacksman; seing as the appearand Heir might himself lawfully bruik, so might any having Tollerance from him, for thereby in effect he was Heir *Passivè*; but this Tollerance was only Found probable *scripto*, and not by Witnesses. *Vid. March* 3. 1626. *Douglas. February* 14. 1623. *Grahame.*

La. *Borthwick* contra *Ker*, *January* 26. 1636.

THe Lady *Borthwick* as being Infeft by her umquhile Husband in her Liferent Lands, Pursues Sir *Mark Ker* her Brother, for payment to her of the Mails and Duties of the same, wherewith he had Intrometted, for these two years and an half, immediatly subsequent after her Husbands Decease, and preceeding the date of this Summons and Action; and to hear himself Decerned to pay the same in all time coming, conform to the said Liferent right: And the Defender Alledging, that the Summons could not be Sustained in that part, where the Defender is craved to be Decerned to pay in time to come, seing it is against the ordinary Form and Custom, that such Sentences should pass in this case, craving personal payment of Duties of Lands for years to come. The *Lords* Found, that this Action could not be Sustained in that part *for years to come*, seing the bygone years might well be craved, because of the Defenders Libel'd Intromission therewith, and *in time coming* could not be craved; unless it were proven and Libelled, that the Defender had sicklike intrometted therewith, which albeit the Pursuer had offered now at the reasoning of the Cause to prove, for all the years interveening since the date of the Summons unto this time of the Disputation, yet the *Lords* Found it could not now properly be taken in, nor received, seing they could not of reason take more under their consideration, than that which was at the date of the Summons Libelled, to have been intrometted with by the Defender, and that did only extend to the bygone years before the Summons; For albeit Pursuers in many Cases crave also Sentences for time coming, yearly after the Summons (as in real Pursuits, really sought for poynding of the Ground, for an Annualrent, and sicklike others; and also in some Personal Pursuits, as when Parties upon Contracts are personally obliged to pay a yearly Duty, or as in Tacks and sicklike) yet it was not alike here, where Sentences could not follow, but upon tryal of a Deed *de facto*, which behoved both to be Libelled, to have been done before the Intenting of the Cause, and behoved also to be proven, as that the Party Laboured these years acclaimed, which behoved to be past, and not to come; Yet nevertheless the *Lords* Sustained this same Pursuit for times to come (albeit not for special payment) yet for a Declarator of the Ladies right, that she might be Found to have right generally to the Mails of the Lands, conform to her Infeftment, during her Lifetime, the Terms of payment being bypast: And the Ladies Seasin being quarrelled for the Lands of as not good to give her Action for these Lands, seing the same Seasin was not taken at the Ground of the Lands, but only was taken at the Ground of the Lands of which lyes discontigue from the same, for which he Excepts, that they are of a different Holding, the one being Holden of the Kirk, & the other Lands of the King: And the Pursuer Replying, that her Seasin was taken at the place, which in her Husbands Charter granted to her, he had appointed to serve for all the Lands therein contained, and which Charter was Confirmed by the King, whereby his Majesty (who had the only interest to quarrel that Union & Designation of the place of Seasin) hath allowed thereof. The *Lords* Repelled the Alledgance, and Sustained the Seasin for the Lands quarrelled, in respect of the Kings Confirmation: For albeit no Subject may make an Union, yet being made by a Sub-

Subject, and Confirmed by the King, that took away all other Parties privat Interest to Oppone to it; Thereafter it being Alledged, that Sir *Mark Ker* was Infeft by a publick Infeftment in the Lands Libelled, upon a Compryfing Deduced against the Lord *Borthwick*, her Husband and Author, for not payment of a Sum contained in a Bond, given to the Excipient by the said Lord *Borthwick*, to the which Bond the Lady had consented; and albeit the said Bond, Compryfing and Infeftment, be all posterior to the Ladies Infeftment, whereupon she now Pursues, in respect whereof the Pursuer Alledged that the Exception ought to be Repelled; Likeas she Alledged, the Bond Alledged Subscribed by her, to be null in Law, done by her *stante Matrimonio* and so not Obligator: Yet the Defender Alledged, that by vertue of that his publick Right, he having become in Possession of the Lands in her Lords Lifetime, and keeping and continuing that Possession also after his Decease, during the whole years & Terms acclaimed, before the Intenting of this Cause, without any interruption thereanent made to him by the Lady, he ought not to Restore the Fruits thereof, which were *bona fide* received by him, by vertue of the said Title, and are now consumed. The *Lords* Found this Exception Relevant, to Liberat the Defender from these years by-past before his Citation, in respect of his Publick Infeftment, standing Clothed with Possession for thir Duties, *qui sunt fructus bona fide percepti & consumpti*, ay to the time foresaid of the interruption by the said Summons, notwithstanding of the anteriority of the Pursuers Right. And it being further Replyed that the Defenders Infeftment and Possession Alledged, cannot make him *bonæ fidei possessor*, because the same is Reduced *ab initio*, at the Instance of Creditor to the Lord *Borthwick*, by reason of an Inhibition, Execute against the said Lord *Borthwick*, before the giving of the Bond to Sir *Mark*, which is the ground of his Compryfing and Infeftment; Which Infeftment, albeit it may appear that it may Convalesce whensoever the prior Creditor Reducer, shall be payed of the Sums in his Inhibition, yet while the same be payed, the Infeftment remains, and is null, and cannot be maintained as a lawful Title to the Defender, whereby to bruik. The *Lords* Found the Exception Relevant, notwithstanding of this Reply; for they Found, that that Reduction at a prior Creditors instance, upon this preceeding Inhibition, could not hinder the Defender, but that he might lawfully use his Infeftment against any other person, specially to Defend his Possession, for the bygone Duties foresaids against others, who could pretend no Right nor Interest to that Inhibition Actor. *Nicolson* & *Dunlop*. Alter. *Advocatus* & *Hope*. *Hay* Clerk. *Vid. March* 21. 1637. La. *Manderston* for *bona fides*. & for this of the Union. *Vid. January* 16. 1623. *Aitkin* and the Cases there cited, and for the *bonæ fidei possessor*. *March* 2. 1637. *Keith*.

Straton contra *Shirnside*, *January* 27. 1636.

ONe *Straton* Pursuing *Alexander Shirnside*, Son to umquhile L. *Eastnisbet*, for payment of 500 merks adebted by his Father, as behaving himself as Heir to him by Intromission with his Heirship Goods, or as Successor to him *Titulo lucrativo post contractum debitum*, in so far as he was Infeft in his Fathers Lands after the Date of this Bond Libelled, granted to the Pursuer; upon the which two Alternatives, the Parties being heard to Dispute, The *Lords* Found the first Purged, and that he could not be subject to pay the Debt Libelled, as behaving himself as Heir, by Intromission with his Fathers Heirship Goods, seing it was Alledged, that his Fathers whole Lands were Compryfed from himself by his Creditors, and the Legal Reversion Expired before his Decease, whereby he ceased to be *Baro*; and consequently could not have Heirship, by Intromission wherewith any could be Conveened as Heir: Likeas it was Alledged, that he died at the Horn, and his Gift of Escheat was Gifted, and Declared, whereby the Donatar would have Right to all the Moveable Heirship; Which two Excep-

tions were Found Relevant to Purge that first Alternative; and for Purging of the other, where he was Conveened as Successor by the foresaid Infeftment granted to him, he Alledged, that that Infeftment was Reduced *in foro contentioso* by a Creditor to his Father, which Creditor had Compryſed the Lands. And it being Replyed, that that Reduction cannot make the Defender to ceaſe to be Succeſſor to his Father, in ſo far as ſince the ſaid Sentence of Reduction, he had received great Sums of Money to Ratifie and Approve the ſaid Decreet; and ſeing he had gotten ſo great Sums, *quocunque nomine* the ſame were given, yet in effect and in truth the ſame being given to him, who was appearand Heir of the Debitor, and for no other cauſe, but under the name of an Act Compoſed and Accorded to, for the purpoſe to Defraud the Debitor, albeit it was truly given to Renunce all his Right, & to Ratifie the Compryſers Heretable Right, therefore he behoved to be Reputed Succeſſor. The *Lords* Found this Alledgance alſo Relevant, to Purge the Alternative, and in reſpect thereof that he could not be Conveened as Succeſſor, notwithſtanding of the Reply, which was not reſpected, but was *Repelled*; for in effect what Money was Alledged given to the Defender, to *Ratifie* the Decreet of *Reduction* of his *Right*, was in effect *Received* & Delivered, that he might not be Reputed Succeſſor, likeas if he had *Renunced* to be Heir, and had received Money to *Ratifie* that *Renunciation*, he could not be Found to be Heir thereby; And the *Lords* Found, that if the Creditor Purſuer could qualifie any prejudice, which he could ſuſtain by the Defenders *Ratifying* of the Decreet *Reductive*, and that there was any Ground ſubſiſting in his Perſon, whereby his Heretable *Right* might be Suſtained, and the Decreet *Reductive* taken away, from the which he is Debarred by the Defenders *Ratification* of the Sentence *Reductive*, *eo caſu* The *Lords* would conſider thereof as a *Reaſon*, which might make the Defenders lyable to the Creditor; but if that could not be ſhown (as it was not ſhown by the Purſuer) then the *Right* Competent to the Defender is yet ſtanding to the ſore, untaken away, and may be ſought for, and claimed by the Creditor, after what Legal manner he thought moſt expedient, whereof the *Lords* thought that in *Reaſon* he ought not to be prejudged. *Vid. February* 10. 1642. *Johnſton.* *

Hamilton contra the E. of *Buccleugh*, *Eodem die.*

Francis Hamilton Purſuing a ſpecial Declarator of the Mails of the Lands of pertaining to *Robert Eliot*, Intrometted with by the Earl of *Buccleugh*: And he Anſwering, that he being Superior of the ſaids Lands to the ſaid *Robert*, and the ſaid *Robert* being year and day at the Horn unrelaxed, the ſame pertains to him by his ſaid *Right* of Superiority. And the other *Anſwering*, that he ought to have done Diligence to have obtained Declarator upon his Liferent as *Superior*; for albeit he might have *Right*, if he had Purſued therefore, yet he could not intromet therewith *brevi manu*, nor ſtay the King's *Donatar*, who claims as ſingle Eſcheat, the *Duties* owing the time of the Horning: And the *Defender Anſwering*, *fruſtra petitur*, *quod mox eſt reſtituendum*; for whenever he intents *Declarator* therefore, he will evict the ſame, and force him to render the the ſame back again. The *Lords* *Repelled* the *Alledgance*, for they Found, that the Superior could not hinder this ſpecial *Declarator*, at the Kings *Donatars* Inſtance, except that he had Intented *Action* and *Declarator* thereon. *Actor*, *Craig* & *Hart*. *Alter*. *Nicolſon*. *Gibſon* Clerk.

Mowat & *Dagers* contra *Pennie*, *February* 5. 1636.

UMquhile *Dagers* having Purſued *Chriſtian Pennie* before the Commiſſars of *Edinburgh*, as Executrix to *Dagers* his Debitor, for payment of the Debt, and after *Litiſconteſtation* the ſaid *Chriſtian Penny* Dying, this Act and Proceſs is deſired to be Transferred in *Beſſie Pennie*, Siſter to the Defender, as Univerſal In-

Intromiſſatrix with her Goods and Gear, which Summons being admitted to Probation againſt her, (ſhe not Compearing) The *Lords* Found the Summons Proven againſt her, and Decerned againſt her *hoc nomine* as Univerſal Intromiſſatrix, albeit the Probation bore this only, and no more, *viz. That the two Siſters Dwelt together in a little Houſe*, where the ſaid Siſter died, after whoſe Deceaſe the other Siſter the Defender, Intrometted with a little Timber-Bed, and a Pint-Stoup, which pertained to the *Defunct*, and which the *Defender* Sold, & all wherewith ſhe Intrometted were not worth ſo much Money, as would pay a Terms Mail of the Houſe wherein they dwelt, and would not extend to ſix or ſeven Pounds, or thereby, Which the *Lords* Found ſufficient to make her lyable as Univerſal Intromiſſatrix, ſeing no Party compeared to propone any *Defence* of Hypothecation, of the ſaid Goods to the ſaid Heretor for the Houſe Mail, albeit the Debt, for which the *Defender* was Purſued, exceeded hundreth Pounds. Actor. *Mowat*. Alter. *Gibſon* Clerk. *Vid. January* 12, 1633. *Bruce*.

Edmiſton contra *Sym* and *Skeen*, *February* 10. 1636.

ONe *Edmiſton*, and *Rutherfurd* her Daughter, purſuing Reduction and Improbation of a Bond made by umquhile *Alexander Sym*, *Rutherfurds* Husband, to Mr. *Alexander Skeen*, of 3000 Merks, as done after the ſerving of Inhibition, uſed by the ſaid *Aliſon Edmiſton*, Mother in Law to the ſaid *Alexander Sym*, and by the ſaid *Anna Rutherfurd* her Daughter, Spouſe to the ſaid *Alexander Sym*, raiſed upon their Contract of Marriage; wherein the ſaid Mr. *Alexander Skeen* Compearing, and Alledging, that the Wife, nor her Mother (for the Husband was called as Defender in this Proceſs, for his Intereſt) had no Intereſt to Reduce, or Improve this Bond, upon this Ground lybelled, as that it is falſe in the date thereof, ſeing it bears a date before the Inhibition, albeit the Purſuers offered them to Improve the ſame *in data*, being as they Alledged, done after the Inhibition; for Eleiding of the which Intereſt, he was content that the ſaid Bond ſhould be Holden as done after the Inhibition, and that the Inhibition ſhould not be prejudged thereby, nor yet the Purſuer her Contract of Marriage, nor no head therein contained. The *Lords* nevertheleſs Found, that the Purſuer might Improve the Obligation in the date thereof, which being ſo Improven, they Found, that it ſhould fall *in totum*, & that it ought not to be reſpected, as a Bond made after the Inhibition, nor of any other date than it bore, *quia quod non eſt verum de data, quam præ ſe fert, præſumitur non eſſe omnino verum, nec ullo tempore fuiſſe geſtum*. *Hay* Clerk. *Vid.* March 29. 1626. *Keith*.

Murray contra *Sinclar* and *Meikle*, *Eodem die*.

ONe Named *Murray*, being Served and Retoured Heir to umquhile *Murray*, whereby he claimed Right to certain Bonds and Obligations made to the Defunct, to whom he was Retoured Heir, and purſuing the Haver of the Writs, for Exhibition, and Delivery of the ſame Writs, as belonging to him as Heir, and having made another *Murray* Aſſigney thereto, which Aſſigney purſuing for the ſame, the Defender Alledged, that this Retour could not furniſh this Action to the Cedent himſelf, and conſequently not to this Aſſigney; becauſe he referred to the Cedents own Oath, that he was not Attingent in no manner of degree of Blood, by no kind of diſtance, to the Defunct, to whom he was ſerved Heir, and referred alſo to the Aſſigneyes Oath, that he knew the ſame to be true; And it being Anſwered, that this ought not to be received ſo ſummarily, by way of Exception againſt a Retour paſt the Chancellary, which is a Sentence paſt upon the Oaths and Conſciences of 15 ſworn Aſſyſſers, but ought to be tryed by a Legal and Ordinary way of *Action* and Proceſs of Error. The *Lords* Found the Alledgance Relevant, and received the ſame in this place, to be tryed by the Parties own Oath, which they Found to be ſuch a manner of tryal, as the Party Served could not decline himſelf; and

that there was no necessity, in respect thereof, to Intent anorher Process of Reduction, or Error, where the Party himself was Judge. Actor. Alter. *Gibson. Hay* Clerk. *Vid. Feb.* 16. 1627. *Colvil. July* 3. 1628. *Maxwell.*

Sibbald contra *Wallace, February* 11. 1636.

ONe Mr. *William Sibbald* pursuing the Relict of Mr. *Alexander Sibbald*, who was his Brother, to hear a Reasonable Modification Decerned to be given to him, as Heir to his deceast Brother for his Aliment, out of 400 Merks yearly, whereof she was Liferenter and Conjunct-fier with her Husband; from the which Pursuit the *Lords* Assoilzied the Defender, because it was neither founded upon Law, Equity nor Practique, seing the Relict had only Infeftment of 400 Merks of Annualrent yearly, whereof 200 for the Annualrent of 2000 Merks given with her in Tocher to her Husband, and the other 200 Merks was for the like Sum, which her Husband by her Contract of Marriage, was obliged to furnish, effeirand to her Tocher received by him; no part whereof the *Lords* Found could be allotted to the Pursuer, for his Aliment, he being a Person Major, past the *Age* of 40 years at least, and who either ought to have taken him to a Calling, whereby to have lived, or els having an actual Calling whereby he might live; and the *Act* of *Parliament*, which is the Ground of the like Pursuits, is Introduced in favours of Persons being Minors; Likeas this Pursuer designed himself in this Summons to be a Preacher of the Word of GOD, and therefore Absolvitor was given. *Vid. July* 21. 1636. The Lady *Ramorny*, and the Cases there.

Colquhoun contra L. *Balvie, Eodem die.*

TWo Compriſers contending for the Mails and Duties of the Lands Compriſed, and the L. *Balvie*, who was Brother to the Laird of *Luſs* (which L. *Luſs* his Lands were Compriſed by both thir Creditors) being preferred, in reſpect of his Priority of Compriſing and Infeftment; the *Lords* Found, that he ought to do *exactiſſimam diligentiam*, for Recovering of payment from the Tennents, and Poſſeſſors of the Lands Compriſed, whereby he might be ſatisfied of his Debt, for which he had Deduced Compriſing, that after his payment there might be place to the ſecond and ſubſequent Compriſer, to recover payment in the ſecond Roum; and Found that it was not enough to give the Prior Compriſer ſuch Preference, that he ſhould not be Holden, to do all Diligence poſſible for to recover his own ſatisfaction, and to ſuffer either the Tennents to become Bankrupts, or to connive and ſuffer his Brother the L. *Luſs* the Common Debitor, to uplift the Duties of the Lands, and thereby to make his own Compriſing, and the Legal Reverſion thereof to expire; but that he was Holden as ſaid is to do *ſummam Diligentiam*, to obtain his own payment, notwithſtanding that by the *Act* of *Parliament*, he Alledged he was only lyable to Compt for his *Actual* Intromiſſion, and not for that wherewith he might have Intrometted; ſeing he Alledged, that the ſecond Compriſer had an Ordinar Remedy in Law, *viz.* The benefit of Redemption by vertue of the *Legal*, which if he uſed not, it was his own fault; Which Alledgance was Repelled, and it was Found he ought to do all lawful Diligence, as ſaid is, and if he did it not afterwards then when the matter ſhould be again drawn in Diſput betwixt the Parties, The *Lords* would conſider thereof, that in caſe he did not what he might, they would take Order, that thereby the ſecond Compriſer ſhould not be prejudged, by his wilful Omiſſion, Colluſion or Negligence. Actor. *Gilmor. Vid. January* 16. 1634. Tutor of *Balmaghie*. 2 *July* 1625. Doctor *Kincaid. Feb.* 9. 1639. L. *Lawder*.

Sheriff of *Tiviotdale* contra L. *Gledſtanes, February* 12. 1636.

THe Sheriff of *Tiviotdale* purſuing *Gledſtanes* to Remove from the Lands of *Coliford-hill*, as Part and Pertinent of the Barrony of *Cavers*, who Alledging,

ledging, that he was Appearand Heir to his Goodſir, who was Seaſed in the ſaids Lands, and by vertue whereof they had been Fourty years in Poſſeſſion. And the Purſuer Replying, that the Exception ought to be Repelled, except he condeſcended by what Warrand his Goodſir was Seized, if by Charter, Precept or otherways; for a naked Seaſin, without a Warrand, cannot give Right againſt an Heretor to Poſſeſs Lands; And it is ever required, that in ſuch Caſes the Party Alledge, that he is Infeft by one having a Power, otherwiſe the Exception is never admitted. The *Lords* Found the Exception Relevant in this Poſſeſſor Judgement, to Defend the Excipient from Removing, in reſpect of the Seaſin ſtanding, ay and while the ſame were Reduced, as wanting a Warrand, and Found no neceſſity to Alledge any Warrand here in this Judgement. Actor. *Craig.* Alter. *Gibſon* Clerk.

Leſlie contra *Nune*, *Eodem die.*

ONe *George Leſly* Merchand in *Edinburgh*, obtaining Decreet againſt L. *Ludquharn* for 1350 Merks, he *Arreſts* for ſatisfaction thereof in the hands of *George Nune* in the *Cannongate*, certain Coffers with Clothes therein, and Silver-work, pertaining to *Ludquharn*, being in the ſaid *George Nuns* houſe, and intents *Action* againſt him, to make the ſame forth-coming, who *Alledging*, that ſince the *Arreſtment*, another Creditor Poynded the ſame, by vertue of Letters of Poynding, and Letters to make open doors; And the Meſſenger, by vertue thereof, had taken out the ſaid Cheſt and Trunks out of the Defenders Houſe, where they were Input by the Laird of *Ludquharn*, and ſo this ought to liberat this Defender, who could not reſiſt this Execution, done by authority of the Kings Letters. And the Meſſenger, and the Purſuer Replying, that the Poynding of the ſaids Trunks by another Creditor, could not excuſe this Defender, in whoſe hands he had *Arreſted* the particular Goods, which were within the Trunks, *viz.* the Clothes, and Silver-work ſpecially lybelled. And it is not ſufficient to ſay, that the Trunks and Goods therein were Poynded, except he conde cended upon the ſpecial, and particular Goods, which were within the ſaid Trunks, that he may know what the ſame were, which was Poynded, and the avail thereof, and how far the Debt was ſatisfied thereby, or what Superplus was thereof. The *Lords* Found the Exception *Relevant*, notwithſtanding of the *Reply*, to liberat this Defender from this *Action*; and that the *Defender* ought not to be compelled, to condeſcend upon the Goods within the Chiſts, which he could not do, ſeing the ſame ſtood only in the Defenders Houſe, input therein by the Laird of *Ludquharn*, who keeped the Keys himſelf, and were not in the Defenders hands; but the ſame *Trunks* being taken out by the Meſſenger, and Appriſed by him, the *Defender* was altogether Ignorant what the Meſſenger Found therein. And the *Lords* Found, that the ſaid Poynding freed the *Defender* of the Arreſtment, without prejudice of the Purſuers Action againſt the Poynder thereupon *prout de jure*, which the *Lords* reſerved to him againſt the Poynder, as *Accords*. Actor. *Nicolſon*. Alter. *Belſhes. Gibſon* Clerk. *Vid. March* 11. 1635. *Dick.*

Hume contra *Fiſh*, *February* 13. 1636.

ONe *Nicol Hume* having Sold his Lands of with conſent of *John Hume* his eldeſt Son, and appearand Heir to *Archibald* and *Alexander Fiſhes*, for the Sum of 6000 Merks, which Sum by the Contract of Alienation is appointed to be payed to the Son foreſaid (the Father being in Diſtreſs for Debt) and according thereto the Sum being payed to them, and the Buyer having received a Diſcharge thereupon, Subſcribed both by the Father and the Son, which Diſcharge the Son deſiring to be *Reduced* upon a reaſon of Minority and Leſion; And the *Defender* Alledging, that he offered to prove, that according to his Diſ-

charge he truly and really made compleat payment of the Sum to the Father, and to the Son, being both personally present together, and receiving the same, which was all he was obliged to do by the Contract. Likeas the Pursuer was then 20 years of age, neither was he Fiar of the Land, but the Right only was in the Fathers Person, and his consent to the Fathers Alienation, was in effect unnecessar and superfluous. The *Lords* in respect of this Exception, Assoilzied from this Reason and Action, and Found the *Discharge* sufficient, and Sustained the same; Neither was it respected that it was Replyed for the Pursuer, that the real payment (which was offered to be proven for the *Defender* by Witnesses insert) ought not to be respected, except that therewith the *Defender* would also astrict him to prove, that the Sum after the payment was imployed to his use, without which had been done, the payment could not be Sustained, although never so really made, *Quia qui credit vel solvit pecuniam Minori, quam scit vel probabiliter scire potuit Minorem fuisse consumpturam, sibi imputet; & talis solutio in jure solventem non liberat*: Likeas the Pursuer in fortification of his Reason, offered to prove, that he had Right to the Land then, by vertue of Tacks Set to him, for the space of two nineteen years by the Father; conform whereto he was in Possession, and so he was heavily prejudged, it being of verity, that the Land was worth a far greater price to buy and sell than the price payed; which Answer was not respected, but the Exception Sustained, as said is, in respect the Son had no other Right, and the payment was made to the Father and the Son, both being present, and that the Contract appointed payment to be made to the *Son*, who received it; and the Tack was not respected, the Son remaining in the Family with his Father, and being then Minor, and so being a privat *Deed* betwixt so conjunct Persons; Neither was it Found necessar to prove the real Payment, in respect of the *Discharge*, Subscribed both by the Father and the Son, in respect of which *Discharge* Absolvitor was given. Actor. Alter. *Craig. Gibson* Clerk.

Oliphant contra *Oliphant*, *February* 24. 1636.

Patrick Oliphant Pursuing to hear the Ground of the Lands of pertaining to Sir *James Oliphant*, to be Poynded for an Annualrent of 250 merks yearly, which he had out of the saids Lands, by vertue of thir Titles, *viz.* a Bond granted to him by Sir *James* in *December* 1631. of the principal Sum of 2500 Merks, payable at *Whitsunday* thereafter 1632, containing an Obligment to Infeft, and containing therein a Procuratory, the Bond bearing an Obligation *to Infeft by two Infeftments, one to be Holden of himself, and the other of the King*; conform whereto he was Infeft in *June* 1632, and was Registrat in the Secretaries Register the same Month, and the said Bond bearing, as said is, *To be Holden of the King*, was Confirmed in *July* 1632. And having also received a Terms payment of the said Annualrent, but before the Seasin, for the Term interveening betwixt the Obligation, and the Term of taking of the Seasin, *viz.* For the Term betwixt *Martinmass* 1631, and *Whitsunday* 1632. In respect whereof he claimed the Ground to be Poynded, as affected with that Annualrent; and *John Oliphant* of *Bachiltoun* Alledging, that the Ground ought not to be Burthened therewith, because he stands Heretably Infeft in these Lands, and by vertue thereof in Possession, by vertue of a publick Right *Depending* upon Compryings; and albeit he be Posterior, yet being publick and Clothed with Possession, as said is, it should give him preference. The *Lords* preferred the Defender to the Pursuers prior Right, albeit the Pursuers Debt was anterior to the Defenders *Debt*, whereupon his Comprysing and publick Infeftments followed; And albeit the Pursuers Seasin was also Prior to the Denunciation of the Defenders Comprysing, and that the same was also Registrat in the publick Register, and Confirmed by the King, before the Defenders Infeftment, which two Acts the *Lords* Found made not

not the Pursuers Right publick; neither had the *Lords* respect to the Terms payment made to the Pursuer after the Bond before his Seasin, for that payment they Found could not corroborat the Infeftment, as the same would have done in Law, if it had followed the Infeftment, and had been payed before the Defenders publick Right; For they Found that the same payment could not be drawen to the Seasin, nor the Seasin to it, as the Pursuer Alledged it ought to be in Reason, which the *Lords* Repelled; neither did they respect, that the Pursuer had done most exact Diligence upon his Infeftment, seing he had shortly after the Term of Payment of the first Term of his Annualrent, by that whereof he was payed, as said is, before his Seasin, Intented Action upon his *Right* for Poynding of the Ground, which has ever been depending since in Plea and question, betwixt him and the Creditors of the Common Debitor: Likeas his Infeftment was known to the Defender long before his Right and Infeftment, and Compryfing whereon it proceeded, so that it cannot be repute a Base and Obscure Right, which was not known to the Party, and which might make him excusable to have taken any Right wherewith to Clothe himself, for freeing him of that Burthen, as might have been in two contrair Deeds, done by one Author, contrair to the Tenor of the Act of Parliament, which cannot militat in this Cause betwixt two Creditors, doing Diligence; Which Answers were all Repelled, and the Defender was preferred. Actor. *Cunninghame.* Alter. *Oliphant. Hay* Clerk.

L. *Meidhope* contra Sir *Robert Hepburn's* Sons, *Eodem die.*

THE General Heir of umquhile Sir *Robert Hepburn*, and the Heir of the second Marriage, being both Conveened for payment of a Debt owing by their umquhile Father, to the Goodman of *Meidhope*; And the General Heir offering to Renunce, The Heir of Provision Answering, that he could not, seing he had behaved himself as Heir to him, in so far as he had granted to his Father a Discharge of all Heirship Goods and Gear, which might befal to him, and which he might crave through his Fathers Decease, at any time thereafter; and that in respect his Father had then delivered to him certain Moveables, and Plenishing for his House, he being then to withdraw himself from his Father, to his own Dwelling a part after his Marriage, accomplished by the advice of his Father, whereof albeit the Discharge was granted to the Father in his own Lifetime, yet being given for satisfaction, and for Moveables received in place of his Heirship, whereto he might succeed, it behoved to be repute as if he had received and intrometted therewith after his Fathers Decease: This Alledgance was Repelled, and the Discharge given by the eldest Son to his Father, in his Fathers Lifetime, Discharging his Father of his Heirship, albeit done upon, and for Receipt of other Moveables, was Found ought not to make the eldest Son lyable to his Fathers Debts, as Heir, he Renuncing now to be Heir, which the said Discharge was Found to make no Impediment to him, but he might Renunce, albeit he offered not to restore, and make forthcoming to the Creditors, the particulars received by him from his Father, nor the avails thereof. Actor. *Heriot* the General Heir *per Stuart.* Alter. *Nicolson* & *Nairn. Hay* Clerk.

Lawson contra L. *Ardkinlass*, *Eodem die.*

ONE *Lawson* as Executor to his Goodsir, Pursuing the Laird of *Ardkinlass* for payment of 2000 Merks, contained in a Bond, made by the Defenders Father thereon, who producing a Discharge granted by the Donatar, to the Pursuers Goodsirs Escheat, who was the Creditor foresaid of this Sum, with consent of this same Pursuer, and Subscribed by him, bearing, *That they had Discharged this same Defender of this Sum of* 300 *merks, and other* 360 *merks contained in two Bonds*, wherein the Pursuers Goodsir was Cautioner for the Laird of *Ardkinlass*, and which he had payed as Cautioner for him, in the which Discharge the

said Donatar, and the Pursuer besides the Discharge of these two special Sums, by a general Clause therein-contained of this under-written Tenor, had also Discharged the Defender of all Action they had competent against him, for payment of any Debts or Sums of Money resting to the Pursuers Goodsir, by the Defenders Father, by Contract, Decreet, Bond, or otherways whatsoever, or payed by him for the said Laird of *Ardkinlass*, at any time preceeding their Deceasses; In respect of the which Discharge, bearing the said general Clause; granted by this Pursuer long after the date of this Bond, now Pursued for, the Defender Alledged Absolvitor; and the Pursuer Replying, that the general Clause contained in this Discharge, which is subjoyned, but accessory to the two particulars expressly Discharged, cannot extend to this Sum now acclaimed, seing the same is far greater than the Sums particularly Discharged; and it is not probable, that it was then intended, that this Sum of 2000 merks should have been Discharged under the general Clause, there being two less Sums mentioned *specialè*, and this greater Sum never being mentioned, so that the Discharge cannot be estimat to meet this, but this must be estimat as *non cogitatum*; for if it had been treated on, or thought it should meet the same, it could not have been conceived to Discharge 600 merks in two Bonds, and to have omitted a far greater Sum. This Reply was not respected, and the Exception was Found Relevant, and proven: for the general Clause foresaid, was Found ought to extend to this greater Sum, albeit the special Sums Discharged were less. Actor. *Hart.* Alter. *Vid. February* 14. 1633. *Haliburton.*

L. *Ernock* contra L. *Prestoun*, *February* 25. 1636.

LAird of *Ernock* Pursuing the young Laird of *Prestoun*, for payment to him of 100 Pounds promised to him by *Prestoun*; And it being questioned by the Defender, that this Promise ought to be proven by Writ, or the Defenders Oath, and no otherwayes. The *Lords* Found, that the same might be proven by Witnesses, and admitted the same to Probation, to be so proven, seing it was only the promise of 100 Pounds, and not above that Sum; for if it had been above that Sum, they would have Found it only probable *scripto vel juramento partis. Vid. March* 4. 1636. L. *Innerleith.*

Guthrie contra Tennents, *March* 1. 1636.

MR. *Alexander Guthrie* being Infeft in the Miln of *Frier-corse*, and astricted Multures thereof; And Alledging, that there was a Decreet obtained at the Instance of Mr. *Samuel Kirkpatrick*, Author to him in his Right, against the Tennents of *Frier-corse*, Finding them to be astricted to the said Miln, and Decerning them to pay in time to come, such a particular quantity of *A*strictions: upon this Decreet the said Mr. *Alexander* raises Letters of Horning, and Charges the saids Tennents, to pay the quantity of the Multure, for their Corns *A*bstracted diverse years by-past, since the said Decreet, *viz.* 1632, 1633, 1634, and 1635 years. *A*nd the Letters being Suspended, as given against all Form and Practique, and againtt the *Act* of *Parliament*, which prohibits such summar Charges of Horning, to be generally Execut for any special quantity, untill the time that particular Parties be Summoned for that effect; Likeas in these cases, there is no other Form allowed, but to pursue by Ordinar Action and Pursuit, for abstracted Multures, as ever has been observed in all times before; and further, this Pursuer can never claim the benefit of the said Sentence, specially so summarly to Charge therefore, because it is not obtained at his own instance. & he is neither made Assigney thereto by the obtainer thereof, nor has he obtained it transferred in him as Successor in the Right of the same, as Heretor of the Lands. The Reason was not respected, and the Process sustained at the same Pursuers Instance; but this Charge was sustained as converted into a Pursuit, and as if the same had been moved, for payment of abstracted Multures, which as so converted, the *Lords* Ordained the Defenders to Answer in this same Process of

of Suspension, in respect the Charger referred the quantity, to the Defenders own Oath; but the *Lords* Found, and Declared the Cautioner in the Suspension, to be freed of his becoming Caution in the Suspension, sicklike as if he never had been Acted, and Found no necessity, that the Decreet should be Transferred, or that the Pursuer should have been Assigned thereto. *Scot* Clerk. *Vid. July* 29. 1634. L. *Innerweik.* And for the last Part. *July* 25. 1626. *James Stuart*, and the Cases there.

L. *Alter* contra L. *Affleck*, *March* 2. 1636.

THe L. *Alter* Pursuing the L. *Affleck* upon a Decreet Arbitral, pronounced betwixt them, to pay a Sum contained in the said Decreet; It being Alledged, that the said Decreet was null, as being Written in a several distinct Paper, and not into the Blank upon the back of the Submission, as the Submission appointed, by the which it was provided, that the Decreet to follow upon the said Submission, should have been filled in upon the said Blank, on the Back thereof, which is not done; And therefore this Decreet being Contrair to that which was agreed on, and appointed betwixt the Parties, and being Written on a distinct Paper, as said is, and made by a Writer, under the Form of an Instrument; albeit it was also Subscribed by the Judges, to whom it was Submitted, it ought not to produce any Action. This Alledgance was Repelled, and the Decreet sustained, albeit not Insert in the Blank; For the *Lords* Found, that the not Inserting thereof, was no cause to Infring the same, seing the same might be yet Insert therein, if the Judges pleased; in respect that this Decreet produced, might be a Warrand to do it, the same being done by the Judges, and pronounced *debito tempore*. Actor. Alter. *Stuart. Gibson* Clerk. *Vid. March* 27. 1633. *Forrester* contra *Gourlay.*

Earl of *Tullibarden* contra *Barron* of *Monesk*, *Eodem die.*

THe Earl of *Tullibarden* pursuing the Barron of *Monesk*, as Assigney constitute to all the Reversions granted to his Brother, umquhile *William* Earl of *Tullibarden*, for Exhibition of certain Contracts, made betwixt his umquhile Brother and the said Defender, concerning the Wodset of certain Lands to him, under Reversion, that he might have the transumpts of the said Contracts; and the Defender Alledging, that the Assignation to the Reversions was not Registrat in the Secretaries Registers, as is required by the *Act* of *Parliament*. The *Lords* Repelled this Alledgance, because it was not proponed for any, who acclaimed any better Right to this Reversion, than this Pursuer; neither are Assignations to Reversions contained in the *Act* of *Parliament*, which the *Lords* could not Extend. Actor. *Nicolson*. Alter. *Stuart. Gibson* Clerk. *Vid. November* 25. 1626. *Turnbul* and the Cases there.

Geo. Melvil contra Lo. *Melvil*, and *L. Habil*, *Eodem die.*

THe Lady *Ross* Spouse to umquhile Lo. *Melvil*, in her Testament Testamentar, given up by her own mouth, Estimats all the Plenishing, and Moveables in the Three Houses, pertaining to the said Lord *Melvil* her Husband, and her, *viz. Bruntiland*, *Moni-mail*, and her dwelling house in *Edinburgh*, to 3000 pounds, and declared, that she thought it needles to give up any other Inventars of her Goods and Gear, or Debts, in respect all the same was Assigned by her, and her said Husband, to Creditors, for satisfying of their Just Debts, (these are the very words of the Testament) and therein she subjoyns, that she Nominats and makes her said Husband, her sole Executor, and leaves to him all her Goods and Gear whatsomever, in universal Legacy. After her decease the Lord *Melvil* her Husband Confirmed the said Testament in St. *Andrews*, within which Diocy she died, *viz.* in *Monymaill*. The Husband thereafter living five years, and no question being made thereanent, after his de-

ceaſe the ſaid *George Melvil* obtains from the Commiſſar of St *Andrews*, *a dative ad omiſſa & male appretiata* of the Lady *Roſies* Gear, omitted out of her foreſaid Principal Confirmed Teſtament, or which were not Juſtly appretiat therein, and purſues the Heirs and Executors of the umquhile Lord *Melvil* her Husband, to reſtore the ſame; the ſaids Goods and Moveables of the ſaids Three Houſes, and others Goods acclaimed by him, being particularly expreſt in his Summons, and Lybelled to extend to 40000 pounds, or thereby, whereas the ſame was only Confirmed to 3000 pounds: In this Proceſs, the Defender being conveened, as behaving himſelf as Heir to the deceaſt Lord *Melvil*, by Intromitting with his Heirſhip Goods; And it being Alledged, that he could not be ſoConveened, in reſpect by *Act* of *Parl.6.cap.* 76. *Ja.* 4. and *P.* 7. *Ja.* 5. *cap.* 106. It was appointed, that the Heir ought not to be Conveened within the year after the defuncts deceaſe, ſeing for that ſpace the Executor ſhould only be *Anſwerable*, and it was not yet a year ſince the Lord *Melvil* died. This *Alledgance* was Repelled, ſeing the Defender was not conveened as Charged to enter Heir to the Defunct, *quo caſu* the *Lords* would have given no Proceſs *hoc nomine*, againſt him within the year; but being conveened as behaveing himſelf as Heir by Intromiſſion, it was alike, as if had ſerved himſelf Heir, and had been Retoured *quo caſu* by his own Deed Proceſs would have been granted againſt him: and ſicklike in this Caſe, the *Lords* having heard the Parties Diſput in their preſence concerning this Caſe, they *Aſſoiſzied* the Defender ſimply from this Purſuit, and Found that there was no place to the Purſuer, as Executor Dative *ad omiſſa & male appretiata*, to purſue the ſame, in reſpect that there could be qualified, neither any Fraud upon the part of the Lord *Melvil*, who was principal Executor Confirmed, nor yet prejudice done to any Perſon, by any pretended Omiſſion, or evil appretiation, as was acclaimed; which Fraud or Prejudice is the only Ground or Cauſe, whereupon ſuch Datives *ad omiſſa* are in Law and Practique ſuſtained; for the Teſtament being given up by the Lady Teſtatrix her own mouth, wherein ſhe eſteemed the Goods to ſuch a particular expreſt avail, and ſubjoyning the Reaſon thereof, *viz.* That the reſt were aſſigned to Creditors for their Debts, the Executor nominat by her, in that ſame Body of the Writ, had neceſſity to Confirm that Writ, as it bore; and could of no Reaſon nor Equity do otherwiſe, that Eſtimation being her Deed, and not his; whereas if the up-giving of the Inventary had been committed to him by the Defunct, then poſſibly the Eſtimation within the avail, if he had made it, might have been queſtionable; and prejudice there could be none, for there is no Creditors, they being ſatisfied by the Aſſignation, mentioned in the Teſtament, and none is Compearing to oppone the ſame; And the neareſt of Kin to the Lady has no prejudice thereby, they being ſecluded by her univerſal Legacy made to her Huſband; and alſo no prejudice to the Quot, in reſpect the Commiſſar had *ſcienter* Confirmed this Teſtament, bearing this Valuation, and with that Reaſon admitted by him, anent the Aſſignation of the reſt of the Goods, to the Creditors, *&c.* So that no Perſon being thereby prejudged. The Executors ſelf, who was alſo univerſal Legatar, could never have been conveened in his own Lifetime, for that Omiſſion; and if he had, he would ever have been permitted, to have Eiked and Confirmed the ſame, which would ever have been Granted, and he therein would ever have been Preferred, to any Executor *Dative*; far leſs can this Action upon this *Dative* be now ſuſtained, after his deceaſe, againſt his Heirs and Executors, in reſpect he had the only Intereſt, as univerſal Legatar, which Benefit dies not with himſelf, as the Office of Executry un-execut doth, but is Tranſmitted in his Heirs and Executors, who may Claime all which he might; in reſpect whereof the *Lords* Aſſoilzied from this Purſuit, moved by the Executors Dative *ut ſupra*. Actor. *Stuart*, *Mowat* & *Robertſon*. Alter. *Advocatus*, *Nicolſon* & *Lermonth*. *Gibſon* Clerk, *Lilit*

Lillie contra Laird of *Innerleith*, 4. *March* 1636.

Janet Lillie Relict of umquhile *James Toures*, Brother to L. *Innerleith*, Pursuing him to be Decerned to pay to her, two Bolls of Wheat yearly, during her Lifetime, which the Laird promised to pay to her yearly in presence of diverse famous Witnesses, by whom she offered to prove the said Promise, and condescended upon their Names; and also that the Cause of the Promise was at the time, when her said umquhile Husband Disponed to the Laird the Lands of *Pitlothie*, whereto she consented; Likeas, conform to that Promise the Defender made her payment thereof yearly, the years 1614, & 1615, which being controverted betwixt the Parties, as a matter not Probable by Witnesses, being to pay a yearly Duty, during the Pursuers Lifetime, albeit the Pursuer Alledged, that it was probable by Witnesses, being a matter of so small Importance, and which she should prove by famous and unsuspected Witnesses, *& omni exceptione majores*, which she Alledged, was so Admissable; and the rather, the Promise having taken effect, by two years payment. The *Lords* Found this Promise only probable by Writ, or Oath of Partie, and not by Witnesses, being for a *Liferent*-Duty, although of never so small a Quantity; but Declared that it should be lissum to the *Pursuer*, to have her Witnesses present, when the Party was to be examined upon his Oath, and who might hear him *Depone*, and put him before his Deposition, in remembrance of any circumstances concerning that matter, and that they might no otherwise contest with him upon his Declaration, nor in any sort to Impunge the same. Actor. Alter. *Mowat. Vid. Feb.* 25. 1636. L. *Ernock.*

Stuart contra *Henderson*, *March* 8. 1636.

One *William Stuart* being Served and Retoured Tutor lawful to the Bairns of his umquhile Brother Mr. *Walt. Stuart*, Nottar in *Perth*, pursues *Agnes Henderson*, Relict of his deceast Brother, and *Stuart* now her Husband, for Exhibition of certain Bonds, made to the Bairns Father, and being in her hands, as Tutrix Testamentar nominat in her umquhile Husbands Testament; and she Compearing and Alledging, that the Pursuers Retour to this Office of Tutory is null, seing it was Deduced before the Baillies of the *Cannongate*; whereas the Defunct was indweller, and died in *Perth*, and consequently he ought to have been Served there, and not being done so, the same is null, as done *a non suo Judice, & Incompetente*. This Exception was Repelled; for the *Lords* Found, that the Brief of Tutory being directed out of the Chancellary, to any Judges generally, the Party might Serve the same before any Judge, even as a General Brief, to Serve one General Heir to his Predecessor is sustained, being done before any ordinar Judge, having Jurisdiction; And it being further Alledged, that the *Defunct* had nominat the Defender his *Relict* Tutrix Testamentar to the Bairns foresaids, so that there was no place to the Pursuer to pursue as Tutor lawful, from the which Office she cannot be thought to have fallen by her second Marriage; in respect that the said Defunct her Husband, in his said Testament, had nominat and appointed her to be still Tutrix to the said Bairns, during the whole time of their Pupillarity, as well after her second Marriage, as during the time of her Widow-head. *And* it being Replyed, that that Provision ought not to be sustained, as being against the Law, which provides, that no Woman can remain Tutrix, after she has clothed her self with a Second Husband, whereby she becomes under her Husbands Government, and so cannot manage the Office of governing another; and this being the inviolable Custom and Practique of the Realm, it cannot be Inverted by no private appointment set down in a Testament against Law and Practique, in respect of which Reply, which the *Lords* sustained, the *Lords* Repelled the said Exception; and notwithstanding of the Provision foresaid of the Testament, *Found* the Relict had tint her Office by her Second Marriage.

Stirling contra *Hamilton*, *March* 9. 1636.

STirling of *Law* Charging one *Hamilton* for payment of sixteen pounds contained in a Decreet, obtained before the Baillies of the Regality of *Glasgow*, for the price of some Corns destroyed by the Defender, and eaten by his Goods: And he Suspending upon this Reason, that the Charger had Poynded a Cow from the Suspender, for satisfaction of the same Cause, contained in this Sentence: which being controverted how the same should be proven, by Writ, Oath of Party, or Witnesses, the Suspender Alledged, it was probable by Witnesses, being a mean matter of so small Importance, and for such a Cause, *viz. for alledged eating of Corns*, which as it was proven and constitute by Witnesses, so might the Liberation thereof also be proven by Witnesses. The *Lords* not the less Found that Reason, bearing *the Poynding of a Cow*, ought to be proven by Writ, or Oath of Party, and not by Witnesses; seing there was once a Sentence obtained therefore: and this was in a Suspension also, which ought not to have Terms of Probation, after this manner by Witnesses, which would tend to more Fashrie and Expenses, than the whole matter extended to.

La. *Dunypace* contra L. *Lawriſtoun*, *March* 10. 1636.

THe Lady *Dunypace* as being Infeft by her umquhile Husband in the Lands of which he estimat to 30 Chalders of Victual, and in case the saids Lands thereafter should be Found less worth in yearly Avail and Duty, she is Infeft in the Lands of in warrandice thereof, she Pursues the L. of *Lawriſtoun*, who was after the Ladies Right Infeft in these warrandice Lands, to hear it Found, that she ought to have recourse to the said warrandice Lands, for the quantity of eight Chalders of Victual, which the said principal Lands inlacked in the yearly Avail of the saids thirty Chalders; And it being Alledged that there ought no Recourse to be granted to the warrandice Lands, for the alledged inlaik in the Principal, in the present yearly Decay of the said Rental, because they offered to prove that at the time of the Acquiring of the Pursuers Right, and by the space of ten years before, and divers years also thereafter, the principal Lands payed no less yearly Duty to the Master, than the whole Duty, whereto they were extended in the said Pursuers Right, Likeas her said umquhile Husband, by a Rental Subscribed with his Hand, Sold the same at the same yearly Avail; so that whatever decrese she presently Sustains in the said Rental, the same proceeds either from the Misgovernment of her Husband, and her self, through whose Distres the Lands have been left Lee, or else by the common Calamity of the Countrey, which universally has suffered by Gods Providence, through evil Seasons and Poverty, and decay of Tennents, which casual case, as it has reached to most part of all the Subjects of the Kingdom, ought to be suffered also by the Pursuer, in this Hazard of her Liferent; seing the Defender, who is a Singular Successor, acquired thir Lands, and bought the same Heretably, at the same Rental, and with exceeding great other Losses and Prejudice, at her Husbands hands, for which Debt he was heavily Distressed, having no other Relief but thir Lands, which will not relieve him of the half of the Burden, which he has payed for him, and will be far more prejudged in the Heretable Right, than she can be in her Liferent; whereas if the LORD shall be pleased to bless the Ground and the Seasons, the Lands will be als sufficient to pay the said Rental hereafter, as they have done before. The *Lords* Found this Exception Relevant, to exclude the Pursuer from her recourse to the Warrandice Lands Acclaimed, specially the Defender being a Singular Successor, *ex causa maxime oneroſa*. Actor. *Advocatus*. Alter. *Stuart*. *Hay* Clerk. *Vid. July* 28. 1635. La. *Cardros*, *March* 27. 1634. La. *Dumfermling*. *July* 7. 1637. La. *Balbegno*.

Crawfurd

Crawfurd contra L. Murdiston, *Eodem die.*

THe Lady *Murdiston* being Divorced from her Husband, in whose Contract of Marriage, her Husband was obliged to provide her to the Liferent of all Lands, to be Conqueſt by him after the ſaid Contract; To which Clauſe ſhe having made *Malcolm Crawfurd* Aſſigney, who Charging the Laird of *Murdiſton* her Husband, from whom ſhe was Divorced, for his fault of Adultery, to Infeft her in the Lands of which were a Part of the Ten pound Land of *Murdiſton*, and were Diſponed by his umquhile Goodſir to *Charles Gray* Heretably, to be Holden of the L. *Murdiſton*, and his Heirs, and which L. *Murdiſton* Held the ſame of the Earl of *Bothwell*; In the which Infeftment, granted to *Gray* by *Murdiſtouns* Goodſir, his ſaid Goodſir obliged himſelf, and his Heirs to Warrand the Lands from all dangers and inconveniencies, *&c. contra omnes mortales*, conform to the common Clauſe of Warrandice; from the which *Gray*, the ſaid L. of *Murdiſtoun* Defender, had bought his ſaid Right, and given a Price to him therefore conveened upon; and ſo thereby the Lady, and her Aſſigney Alledging this to be a Conqueſt of the ſaids Lands, ſhe therethrough claimed her Liferent thereof, conform to the ſaid Contract of Marriage. In this Proceſs it being Alledged, that the Acquiring of theſe Lands, could not be found a Conqueſt, becauſe the L. *Murdiſtoun* Defender loſt all the Lands himſelf, and conſequently *Gray* his Vaſſal loſt that Part which he held of him, by Reaſon of the Forefaultur of the Earl of *Bothwell* *Murdiſtouns* Superior, which Forefaultry did ſo extinguiſh the Right of the Property, Alledged to be in *Gray's* Perſon, being Baſe, and un-confirmed, that there remained no Real Right in *Gray's* Perſon, which he had to Sell, or the Acquiring thereof can be reput Conqueſt, and which Forefaultry, having preceeded the Alledged time of the Acquiring of the Right by the Defender from *Gray*, it cannot be eſteemed the Acquiring of any Heretable Right, as Conqueſt, but only a ſatisfaction for the Vaſſals kindneſs. And the Purſuer Replying, that it was a Conqueſt, ſeing he bought from *Gray* his Heretable Right, by an expreſs Contract of Emption and Vendition, neither can the preceeding Forefaultry be obtruded, ſeing the *Right* of that Forefaultry was eſtabliſhed in the ſame Defenders Perſon, before he Acquired the *Right* from *Gray*, which Defender being Heir to his Goodſir, Diſponer of the Lands to *Gray*, and ſo ſubject in Warrandice thereof, that ſupervenient Right of Forefaultry becoming in his Perſon, who was Heir to the *Diſponer*, and holden to Warrand, as ſaid is, behoved to accreſce to *Gray*, and to make his Heretable *Right* to revive and convaleſce, at leaſt *contra eum*, who is in effect his Author, being Heir to his Author, and who could never have diſtreſſed *Gray* thereby; ſeing in Law *Jura venditoris emptori prodeſſe non ambigitur*, and ſeing he was, and is holden to Warrand, he cannot obtrude the Forefaultry, *quia quem de evictione tenet actio, eundem agentem repellit exceptio*; and thereby it appears, that the Right ſubſiſted in *Gray's* Perſon, notwithſtanding of the Forefaultry, ſeing the Right of the Forefaultry was devolved in his Perſon, and conſequently the Purchaſing of the Lands by him from *Gray*, muſt be found Conqueſt. In this Proceſs it being Alledged for the Defender, that the ſuperveniency of the Forefaultry, in the Perſon of the Heir of the Diſponer of the Lands to *Gray*, could not make *Gray's* Right, which was once extinguiſhed, to be renewed; for there could be no ſuperveniency, but where there was a Real Extant, ſtanding Right, which was not here the ſame, being ſuppreſſed by the Forefaultry; and ſeing it was the Heir, who acquired the Forefaultrie, who, albeit he might be holden to Warrand, as is Alledged (which he alſo denyed) yet thereby there could be no ſuperveniency to make a *Real Right* revive, which once was extinguiſhed; albeit if that ſuperveniency had been in the Perſon of him, who firſt diſponed the Lands, it might have been probably Alledged, that

the Superveniency was Real, but not ſo in his Heir, againſt whom there can be no ground, but a pretence of Warrandice: And it being alſo Alledged, that the Heir could not be holden to Warrand, becauſe in ſuch caſes there could be no Warrandice, for the Forefaultry of the Superior, and it is againſt Law, to extend Warrandice thereto: And the Purſuer Anſwering, that he is expreſly obliged to Warrand *contra omnes mortales*; and it being alſo queſtioned, if this ought to be imputed as a fault of the Buyer, that he ſought not Confirmation of his own Right, to have thereby ſaved it from the Superiors Forefaultry, or if it was the fault of his Author, who was obliged to Warrand, and who, in reſpect that he was ſubject to Warrand, ought to have foreſeen the hazard of Forfaultry, and ſo that it was his fault, the not Confirmation. The *Lords* Found, notwithſtanding of all that was Alledged in the contrair, by the Defender, that the Purchaſing of the Lands foreſaid, was a Conqueſt, and that the Wife ought to have the Liferent thereof; and that the Forefaultry did not Derogat, but that it was a Conqueſt, ſeing the Right thereof was devolved in his Perſon, who was holden to Warrand, who ſo having the Right, could not obtrude the ſame againſt that Right, which he was holden to Warrand; ſo that albeit it might be queſtioned, whether there ſhould be Warrandice againſt a Forefaultry of the Superiors, yet ſeing that *Right* of Forefaultry, was become in the Perſon of the *Heir* of him who ſold the Lands, That *Heir* could no more Object that Forefaultry, inherent in his own Perſon, againſt his own Vaſſal, than the firſt Seller might have done; ſo that albeit a Third Party might have evicted the Lands, by reaſon of the Forefaultry from *Gray*, *quo caſu* the Warrandice againſt *Murdiſtoun* had been more Diſputable, yet being in *Murdiſtouns* own Perſon, it was Found, he could not thereby diſtreſs his ſaid Vaſſal; ſeing in effect it was *factum ſuum*, from which he could make no pretext to eſchew Warrandice; And therefore the Purchaſing thereafter of *Gray's* Right from him, by an expreſs Emption, was Found Conqueſt, as ſaid is. Alter. *Nicolſon.* Alter. *Advocatus* & *Stuart.* *Gibſon* Clerk. *Vid. Jan.* 31. 1628. La. *Dumfermling.*

Scot contra *Eliot* of *Stobs*, *March* 11. 1636.

MArgaret *Scot* having Compriſed the Lands of & Charging *Gavin Eliot* of *Stobs* as Superior, to Infeſt her, who Suſpending, that he was Heretable Proprietar of the ſaids Lands, & had acquired the Right thereof from theſe, who, & their Authors has ever been Heretable Proprietars; neither was any of his Authors, or himſelf, Superior at any time to that perſon, from whom ſhe had Compriſed the Lands, nor ever had acquired any *Right* from that perſon, of whom her Alledged *Debitor* is Alledged to have Holden the ſaids Lands; and it is againſt Reaſon that he ſhould be compelled to grant a Warrand to Seaſe any in his Heretage, where there is no *Right* of Superiority derived in his perſon, nor yet of Property, from thoſe, who are Alledged to be Superiors to the Compriſers Debitor, but flows *aliunde* from other perſons; notwithſtanding whereof the Letters were Found orderly proceeded, and the Alledgance was Repelled; but the *Lords* Declared, that the Infeftment, which the Compriſer ſhould receive from this Suſpender, being done for obedience of this Sentence ſhould be always without prejudice of the Superiors Right of Property *prout de Jure*, and that thereby his Right ſhould not be hurt; and it was thought he could not be a loſer, receiving a years Duty for the Lands, and bruiking the Lands alſo, if he had a better Right thereto than the Compriſer. *Item*, In this Proceſs the *Lords* Found, that no Defalcation ought to be made of the years Duty payable to the Superior, for the Entering of the Compriſer, through the Lands being Liferented by the *Relict* of the Debitor, from whom the Compriſing was Deduced, but *Declared*, that ſeing this *Defender* was in Poſſeſſion, by vertue of her Liferent, as acquired by him from her, or as in her name, that durin

ring her Lifetime that Duty ſhould not be payed to the Superior, but ordained the Compriſer to find Caution preſently to pay that years Duty, immediatly after the Liferenters deceaſe. *Vid.* 21 *Decemb.* 1626. *Logan* of *Coutfield*, but this was in a Charge upon a Retour.

Wier contra *Arnot*, *March* 17. 1636.

ONe *Wier* being made Aſſigney by in and to an Obligation of Moneys, which the ſaid Obligation bore the Cedent to have lent out to *James Dalyell* and *James Arnot* Debitors, in the name of his Pupill, to whom this Cedent was Tutor, and bearing to be the ſaid Pupills proper Moneys; and the ſaids Debitors being by the Bond obliged to pay it again to the Tutors ſelf, his Heirs, Executors, or Aſſigneys, *&c.* whereupon the Aſſigney having Charged *James Arnot* to pay, and he Suſpending upon this Reaſon that (the Moneys belonging to the Pupill) the Tutor, albeit the Bond bore, that the Moneys ſhould be repayed to him, could not make any profitable Aſſignation thereof; and that the ſaid Pupill being now paſt the age of Minority many years ſince, it being 34 years or thereby ſince that Bond was made, and he hath never ſought it, that muſt be a great preſumption for the payment thereof; and if he ſhall ſeek it, the Suſpender ſhall give him either ſatisfaction, or then ſhall be content that Sentence paſs againſt him; but he being only bound for *James Dalyell*, and after ſo long time, all Proceſs ought to ceaſe at this Aſſigneys inſtance made by the Tutor, who could never have made any ſuch effectual Aſſignation of his Pupills Moneys. The *Lords* Found this Reaſon no ways competent for the Suſpender to Alledge, he being Debitor, and never Alledging payment made to the Pupill, and the Pupill's ſelf not opponing to this Charge; for it might be that the Tutor in his Tutor-Compts, had Charged himſelf with this Article of Debt to the Pupill, and had taken order with him therefore; For which cauſe, and in reſpect that the Aſſigney Charger, offered Caution to relieve him at the Pupills hands, which the *Lords* ſuſtained, and ordained to be received, the Letters were Found orderly proceeded at the Aſſigneys inſtance. *Actor.*
Alter. *Johnſtoun. Vid.* 12 *Feb.* 1633. *Givan.*

Reid contra Mr. *Hary Gibſon*, *Eodem die.*

UMquhile *John Reid*, by Bond being obliged to *Hugh Reid* Minor, Son to *George Reid* of *Daldilling* in 3000 merks, the ſaid *Hugh* and his Father as Adminiſtrator, Purſues the Relict of the ſaid Umquhile *John Reid*, Maker of the Bond, and her ſecond Husband, for Exhibition and Delivery thereof to him; wherein the *Lords* Found no Proceſs ought to be granted (albeit the ſaid Relict and her Spouſe Exhibited voluntarly the Bond, being in her hands ever ſince the deceaſe of her Husband, Maker thereof) while ſome perſon were Summoned to repreſent the Defunct Debitor, Alledged Maker of the ſame; ſeing it was never Libelled in the Summons, that ever the Bond was the Purſuers Evident, or ever was delivered to him, but produced now after his Deceaſe by his Relict, it being amongſt her Huſbands Writs, the time of his Deceaſe; and this was ſo Found, being proponed by Mr. *Hary Gibſon*, who was Creditor to umquhile the Debitor, and his Brother, and the Daughter, only Bairn of the Debitors Brother, and ſo who is that only perſon, who was appearand Heir to the Debitor, and who thereby was Found to have intereſt to propone the ſame. *Actor.* *Alter.* *Nicolſon* & *Stuart*, *Hay* Clerk.

Bells contra *Parks*, *March* 18. 1636.

THe Bairns of one *Bell* their umquhile Father, Purſuing for a Legacy of 300 Merks, left to their Mother in Legacy by their Mothers ſiſter; and the Father of the Teſtatrix claiming the ſame Sums, as pertaining to him, in reſpect that by Contract made betwixt him and the Teſtatrix, it was expreſly appoint-

ed, that the Father should only receive payment of 300 merks, and which was Contracted by that Contract, to be payed to him out of the readiest Goods and Gear pertaining to his said Daughter, and which he bound himself to accept in full satisfaction of all which might befall to him, and which he might claim by the decease of his said *Daughter*; and the said Daughter thereafter in her Testament, leaving in Legacy this same Sum of 300 merks, contained in that Contract to her Sister, whose Bairns, and the Father Contracter foresaid, contending which of them hath best Right to this 300 merks, or if ilk Party should have Right to 300 merks, as distinct, and two several Sums. The *Lords* Found, that this was but one Sum, and not two; and the *Lords* Found, that the Legatars Bairns had the only Right thereto, and not the Father by the Contract, because albeit it was conditioned to the Father by the Contract, prior to the Legacy, yet the Contract in that part was repute as of the nature of a Testamentary Cause, and so the last Legacy done by the Testament, was preferred to that prior Will, specified in the Contract, which was Revocat by the said last Legacy; neither was it respected, the expressing of this in a Contract, to make it to cease to be accompted as an *Act sapiens naturam rei Testamentariæ*; or that thereby the Father was a Creditor, who if he had been one, could not be prejudged by any posterior Will or Legacy of the Testatrix, except that the Father could shew and qualifie, that the Defunct was his Debitor, and that in Law she was holden to him in this or the like Sum, and that she might have been Found Legally Astricted to him, in any Sum less or more, which not being shown, the Legatar was preferred. Actor. *Craig*. Alter. *Primrose*. *Hay* Clerk.

L. *Lawriſtoun* contra La. *Dunnipace*, *March* 19. 1636.

THE Lady *Dunnipace* younger being Infeft by her Husband and her Father in Law, in Conjunct-fee, in certain Lands of his, lying in the *Merns* principal, and in the Lands of *Seabegs*, lying within the Sheriffdom of *Striviling*, in special Warrandice of the said Principal Lands, and Seasin being given to her of the saids Lands, both Principal and Warrandice, at the Ground of the Lands in the *Merns*, which were the Principal, conform to an Union made by the Granter thereof, in favours of the Lady, whereby he appointed the Seasin to be taken at such a place designed by him for that effect, to serve for all the Lands, both Principal and Warrandice, and according whereto she was Seased at the said place, *viz.* at the Ground of the Lands of in the *Merns*, which was appointed to be the place of Union constitute in the Ladies Right; it being of verity, that all the saids Lands, both Principal and Warrandice, were united to the old Laird of *Dunnipace* himself, in a Barony by the King, and Seasin appointed to be taken at the place of *Lawriſtoun* in the *Merns*, and to serve for the whole foresaids Lands, notwithstanding of the discontiguity thereof; and this place of the Kings Union, contained in the Lairds Charter, not being that place designed in the Ladies Infeftment, whereat he appointed her to take her Seasin, to serve for the saids Lands provided to her in Liferent, but being another place designed by himself; and after the said Ladies Infeftment, the old Laird Disponing the Lands granted to her in Warrandice, to the Laird of *Lawriſtoun*, for Causes most onerous of Debt, wherein he was bound, and had payed the same for him, which Laird of *Lawriſtoun* craving by a Pursuit of Declarator, that it might be Decerned, that her Right might not be found to extend to these Warrandice Lands, Disponed as said is to him, for this Reason, *viz.* Because she was not Seased upon the Ground of the said Lands, they lying so far discontigue from the other Lands, whereat her Seasin was taken, conform to the Warrand of the said Union made by her Husband, which could not sustain, being done & made at another place than the place of the Union appointed to himself by the Kings Charter granted to him, as said is, and so could not strike against the

the said Warrandice Lands. The *Lords* Found this Reason Relevant, and Proven, and in respect thereof Found the said Seasin and Right, so far as concerned the Warrandice Lands, to be null, and Decerned against the same, conform to the desire of the Summons. *Actor. Nicolson.* Alter. *Gibson* Clerk. *Vid.* 28 *July* 1637. La. *Blairquhen.*

Forbes and *Fullarton* contra *Fullarton* of *Kinabar*, *March* 23. 1636.

BY Contract of Marriage betwixt *Fullarton* of *Kinabar* and *Janet Lindsay* his second Spouse, the said L. *Kinabar* being obliged to do certain Deeds, in favours of the Heirs to be Procreat of that Marriage, to which Deeds the Heir of that Marriage having made *John Forbes* of *Balnagask* Assigney, who conveening the eldest Son of the said L. *Kinabar*, procreat upon his first Marriage, as Successor to his said Father *post contractum debitum*, to fulfill these Deeds, and for qualifying of the same, that he was so Successor, he condescended, that his said Father since the Contract, whereby he was Debitor to this Pursuer and his Cedent, had by Contract obliged him to Infest the Defender his eldest Son in Liferent of his Lands of *Kinabar*, and the said Defenders Son, who was his Oye in Fee thereof, conform whereto they were Infest; in respect of the which Liferent granted to him, who was his eldest Son, and *alioqui succesßurus*, he must be found lyable to the Debt, and to the fulfilling of the said Contract of Marriage. And the Defender Alledging, that this Acquisition of the Liferent to him from his Father, could not be repute such a Right as might make him Successor, seing the Succession must be in some Heretable Right, whereunto he might have succeeded in Law, after his Fathers Decease, which cannot be Found to be in a naked Liferent; for albeit that Liferent might be found lyable to the Debt, or might be taken away and fall, in so far as the Creditor, or any other might be thereby prejudged, yet that thereby the Defender should be found lyable to pay all the Defuncts Debt, and thereby to lay a greater burden upon him, than all the Heretable Right of that Land, and thrice as much more is worth, it were unreasonable, and ought not to be sustained, and it were a Novelty not heard of before by the *Lords*. The *Lords* Repelled the Alledgance, and Found this manner of qualification of Succession by this Liferent-Right Relevant, to make the Defender to be universal Successor, and so to be lyable to the Defuncts whole Debts, specially seing in that Right of Liferent granted to himself, the Fee is granted to his Son. Actor. *Nicolson.* Alter. *Falconer. Scot* Clerk. *Vid.* 14 *January* 1637. *Courtie.* 23 *Feb.* 1637. Betwixt these Parties.

Mr. of *Corstorphine* contra Tennents, *March* 26. 1636.

THE Master of *Corstorphine* having Married the Relict of Mr. *Alex*r. *Keith*, to whom she was Executrix, and thereby Pursuing for certain Rests of the Farms of the Lands of adebted by the Tennents, Possessors thereof, of the Cropt 1623, 1624, and 1625. for the which Rests the said umquhile Mr. *Alexander* had obtained Sentence in his own Baron-Court against them, upon their own Confession, containing the special quantities of the same, and whereto his said Spouse had Right as Executrix to him; and the Tennents representing the danger of this Pursuit, if the same should have way, that poor Tennents, who takes not Acquittances when they pay their Masters Farms and Duties to them, may be in, the same neither being sought by their Master in his own lifetime, he living ten years after that Pursuit and Sentence, and never challenging them for payment, they nevertheless being many years still his Tennents, and Possessors of the same Lands: Likeas they offered them to prove, that by the space of three years together, immediatly subsequent to thir years, for which they are now Pursued, they made payment of the three last years next following of the saids Farms, to the Merchants to whom their said umquhile

quhile Master sold the Farms of the Lands, which is alike as if they had payed himself, this being done at his Command, and in Law *trium annorum cohærentium apochæ præsumunt solutionem præteritorum*; and they produced sundry Tickets of these three last years, Subscribed by the Merchants, bearing receipt of the Victual, as the same was delivered at ilk several time, which after Computation of the several Receipts, they Alledged would make appear, that all these three years were compleatly payed. The *Lords* Repelled this Exception, in respect of the foresaid Decreet obtained for the Rests now acclaimed, and Found, that the Merchants Tickets could not take away the same; in respect it was not shown, that the Masters self had granted three several Discharges of the three immediat years, next subsequent to the years controverted, without which the Ground in Law holds not; for the Master might have directed the Tennents to answer the Merchant of the Rests adebted by them, and the Merchants Tickets, albeit given in the years subsequent to the years acclaimed, did import nothing to the contrair, and therefore the Exception was Repelled. Actor. *Mcgill*. Alter. *Gibson* Clerk.

Lo. *Torthorrel* contra E. *Queensberry*, *Eodem die*.

LO. *Torthorrel* Pursuing the E. *Queensberry*, for Reduction of the Alienation of the Lands and Lordship of *Carleill*, upon a Reason of Interdiction; and it being questioned for the Defender, that *ante omnia* the Interdiction should be produced, which is the Ground of the Reason. And the Pursuer Answering, that he was not holden to produce it in *ingressu litis*, but he should produce it *in termino probationis*, after that his Reason is admitted to Probation; for it might be that he behoved to use Incident Diligence, to recover the same, not being in his own hand; and the Defender could not misken this Interdiction, seing in the Alienation controverted, he Contracted with the Pursuer, as with a person Interdicted, and mentioned therein the consent of the persons Interdictors, to whom he was so Interdicted. The *Lords* Found, that in Actions of Reduction, which were founded upon a Reason of Interdiction, or upon a Reason of Inhibition, that the Interdictions and Inhibitions should be produced in *ingressu litis*, and that no Process should be granted in the Cause, for discussing of the Reason (after the Production were satisfied) before the same were produced and shown to the Party; and therefore ordained the Pursuer to produce this Interdiction, before any further Process were granted in this Cause. Actor. *Stuart* & *Johnston*. Alter. *Advocatus*, *Nicolson* & *Mowat*. *Scot* Clerk.

E. *Galloway* contra *Gordon* of *Kingstair*, *March* 29. 1636.

IN a double Poynding, both contending who ought to be answered of the Duties of the Miln of *Sorbie*, which were Comprised in *anno* 1632, by the Earl of *Galloway*, and who neither had done Diligence, nor was Infeft upon the Comprising; and the other Party, after perfecting of the Earls Comprising, being Infeft in the said Miln by the common Debitor, by a Base Infeftment, for Causes most onerous, of Debt payed by *Gordon* for *Sorbie*; and by vertue of his said Infeftment he being in peaceable Possession of the Miln, and whole Duties thereof, two years together uninterrupted, and continually to this year 1636. now controverted; & so they both claiming preference, by reason of their Rights foresaids; wherein the Earl Alledged, that the voluntar deed of the Base Infeftment granted after his Comprising, could not be respected, nor no Act voluntarly done by the common Debitor, who is now, and was then *non solvendo*; for his Denounciation was enough, to take away all Deeds thereafter done by the Debitor, in prejudice of his Publict Act of Denounciation; and he contended, that his Comprising, without either Diligence or Infeftment, was sufficient to give him Right to the Maills and Duties. The *Lords* Repelled the Alledgance, in Respect

Respect the Compriser was neither Infeft, nor had done any Diligence by the space of almost these four years since his Comprising, to obtain himself Infeft, and that he was not yet Infeft, therefore they preferred him who was Infeft in this Judgment Possessor. Actor. *Stuart* & *Nicolson.* Alter. *Gilmore. Gibson* Clerk. *Vid.* 1 *March* 1637. *Moncreiff.*

E. *Annandail* contra *Johnston, Eodem die.*

IN a Removing, one *Johnston* of . having Infeft his Oye in the Lands of by a Base Infeftment, Holden of himself, reserving his own Liferent; and thereafter the Goodsir having made Disposition of the Lands to the Earl, and upon his Resignation he being publickly Infeft by the King, and becoming thereafter in the Goodsir's Lifetime in Possession of the Lands, while that after the Goodsirs Decease, and in the absence of the Earl, the Oye by vertue of his Base Infeftment apprehends Possession; by vertue of which Right and Possession he Defends against the Removing, pursued against him by the Earl, and Alledges, that no Possession Acquired by the Earl in his Goodsirs Lifetime, can prejudge his Right, which albeit Base, is Clothed with Natural Possession, and the Possession of his Goodsir must be his Possession, his Liferent being reserved in his Fee. The *Lords* Repelled the Alledgance, in respect of the Pursuers Reply upon a Publick Right, Clothed with Possession in the Granters Lifetime, and that the Excipients Right was Base, and was granted by the Goodsir to the Oye, and there was no lawful manner qualified, how he apprehended Possession, but he might be Decerned as succeeding in the Vice, and so he was Decerned to Remove notwithstanding of that Exception. Actor. *Advocatus.* Alter. *Johnston. Scot* Clerk. *Vid. July* 17. 1635. L. *Craighal.*

contra *Eodem die:*

ONe having obtained Decreet against another, for payment of thirty Bolls of Victual, and seven score pounds also of Money, which being Suspended upon a Discharge, granted by the Obtainer of the Sentence; which Discharge was only Subscribed by one Nottar, and so was quarrelled as null, not being Subscribed by two Nottars before four Witnesses, conform to the *Act* of *Parliament,* being in a matter more than 100. pounds; and the Party offering to Retrinch the Discharge to worke only Liberation for 100 pounds, and no more of the quantity in the Sentence; And the other Alledging that this being the Body of a Writ, Peccant against the Law, it could not be Restricted to be good in one part, and to fall in the rest. The *Lords* Found, that the Party might restrict his Discharge to 100 pounds, and Repelled the Alledgance, and Sustained the Discharge for to Liberat from 100 pounds. Actor. *Baird.* Alter. *Gibson. Hay* Clerk.

Cowan contra L. *Elphingstoun, Eodem die.*

ONe *Cowan* having Compriſed *Bruce* of *Polknavies* Lands, and Charging the L. *Elphingstoun* Superior, to Infeft him therein, he Suspends, Alledging, that his Vassal was at the Horn, against whom the Compryſing was Deduced, and albeit he was not year and day Rebel, yet the Rebellion being *in cursu,* he as Superior, by any Entry of the Compryser, ought not to be prejudged of his Casuality of the Vassals Liferent, when it should fall; This Reason was Found no impediment to stay the Compryſers Entry, without prejudice always of the Superiors Casuality, when it should fall out *prout de jure,* which was not meet to be Tryed, nor Discussed in this place: And another Reason was, *That he could not Enter him, while he were payed by the Compryser of all the bygone Feu-duties owing by* Polknavie, *and for which he was at the Horn at the Superiors Instance;* This Reason was also Repelled, because the Compryser was not Found personally subject to pay them, but the Superior might Poynd the Ground therefore, which was reserved to him; *Item,* The Superior claiming a years Duty, the Compryser Alledged, that he ought to pay no greater Duty to the Superior, for

receiving of him, but only the quantity of the Feu-Duty, as the Vassals Right bears, his Holding being a Feu, *for paying of fourteen Bolls of Victual yearly*, which he is content to pay, being Liquidat, and no further. The *Lords* Repelled the Alledgance, and Found that the Compryser ought to pay for his years Duty to the Superior, an years Avail of the Lands, as the same is commonly worth to be payed by a Tennent, and that the offer of a years Duty of the Feu-Duty is not enough. Actor. *Cunninghame*. Alter. *Stuart*. *Scot* Clerk.

Maxwell contra *Maxwell*, *June* 28. 1636.

Maxwell of *Orchardtoun*, being Infeft in the Miln of *Drumdenan*, with the Astricted Multures thereof, pursues another *Maxwell* for payment of the quantity of dry Multures, used to be payed yearly, before the Cropts and years 1634. and 1635. now acclaimed by this Pursuit; and the other Defending, with a prior Infeftment of his Lands *cum Molendinis*, anterior to the Pursuers *Right*, by vertue whereof he Alledged himself, and his Lands to be free of that Servitude, and Astriction; and the Pursuer Replying, that he ought not now to be put to Disput upon priority, or posteriority of his *Right*, in respect that conform to his Infeftment foresaid, of the Milns *cum astrictis Multuris* of the Lands of *Drumdenan*, *per expressum*, he has been in use thir 40 years by-past, to up-lift from thir Defenders, and they have been in use to pay to him, the dry Multure now acclaimed, as Astricted to his Milns; so that in this Possessor Judgement he ought to be continued in his Possession, and when the Defender shall pursue by any ordinar Pursuit, for exeeming of him from that Servitude, he shall Answer thereto, as accords. And 2°. *He* Replyed, that he had recovered Sentences against thir same *Defenders*, for payment of these Duties of other years, preceeding the years lybelled, and payment conform thereto. The *Lords* Found both these Replyes, and ilk one of them *separatim* Relevant in this Judgment Possessor, being proven, or any of the same, to make the Defenders subject in thir Duties lybelled, without prejudice to the *Defender*, to Pursue by Reduction or Declarator, or any other Legal manner, any Action whereby to free himself of this Servitude, as accords of the Law. Actor. *Gilmor*. Alter. *Hay* Clerk. *Vid. infra E. Errol.*

E. *Errol* contra Tacksmen Teind sheaves, *Eodem die*.

THe Earl of *Errol*, as Tacksman of the Teind-sheaves of Pursuing Spuilzie against *Gordon* of and he Defending with a Right of a Tack, Set to *Gordon* of *Pitlurg* long anterior to the Pursuers Tack, and by vertue thereof, Alledging that the Right of that Tack, which was now Assigned to the Excipient, and by vertue whereof he was in Possession, ought to Defend him against the Spuilzie Intented upon a Tack, long posterior to the Excipients Authors Tack. And the Pursuer Replying, that he by vertue of his Tack, was in Possession of the Teinds Lybelled, diverse years preceeding the years Lybelled; Likeas he has recovered Sentence against the Defenders Author, for *S*poliation of the saids Teinds, diverse years preceeding the saids years Lybelled, and payment conform thereto; *S*o that in this Possessor Judgement, the Defender cannot Obtrude the said Anterior Tack to this Pursuers Tack, which is clothed with 20 years continual Possession. The *Lords* Repelled the Exception, in respect of the foresaid Reply and Possession, which they Admitted in this Judgement Possessor, without prejudice to the Defender, to Reduce upon his Anteriority, *prout de Jure*. Actor. *Stuart* & *Hay*. Alter. *Burnet*. *Hay* Clerk. *Vid. supra L. Orchardtoun.*

Nicolson contra *Burnet*, *July* 7. 1636.

ONe *Nicolson* being Charged by *Burnet*, to Enter Heir to his umquhile Father, to the Effect that the said *Nicolson* might pay the Debt, owing

owing by his said umquhile Father to *Burnet*; and as use is, Compriſing being thereafter Deduced by the ſaid *Burnet*, of certain Lands againſt him, as lawfully Charged, *&c.* Which Compriſing being deſired to be Reduced at the ſaid *Nicolſons* Inſtance, againſt the Heir of the Compriſer, upon thir Three Reaſons, *viz.* That the Purſuer, the time when he was Charged to enter Heir to his Father, had an Elder Brother then living, ſo that the Charge could not be Execut againſt him; and conſequently the Compriſing following thereon, behoved to fall. Againſt which it was Excepted, that the *Defender* offered to prove in fortification of his Charge, that his Elder Brother was then dead; which Alledgance the *Lords* admitted, for ſuſtaining of the Compriſing, albeit Regularly the Alledgance of Life uſed to be preferred, to the Alledgeance of Death; But here it was admitted, to maintain the Compriſing, *ut Actus valeat.* The Second Reaſon of Reduction was, that the Lands Compriſed, were never Denunced lawfully to be Compriſed; and if any ſuch Execution to that effect preceeded the Compriſing, which if it can be Produced, the Purſuer offered to Improve the ſame, and therefore craved, that the ſame might be Produced, or elſe that Certification might be granted againſt the ſame. And the Defender Alledging, that after ſo long a time he cannot be holden to keep his Executions, and the Warrands of his Compriſing, and ought not to be Compelled, *poſt tanti temporis intervallum*, to produce the ſame, ſeing he produces the Compriſing, which ought to ſatisfie the Production now, there being 28 years run ſince the date of his Compriſing, which was Deduced in *anno* 1608. during the which whole ſpace, it was never quarrelled, when the Executions were all extant, which now are loſt or neglected, and are not to be *Found*. And the Purſuer Anſwering, that there is no time of Preſcription, or Law, or Practique, that may exeem the Defender from the neceſſity of keeping of theſe Warrands; and ſeing the Compriſer came never to ſeek the Benefit thereof all this time, ſince the Deducing thereof, his Reaſon ought the more favourably to be received now, when he is purſued thereon, never being Purſued while now; And the Defender Anſwering, that the Reaſon wherefore he could not do any Diligence, upon his Compriſing, before this time was; Becauſe there was a Liferenter of the Lands living, who had the Right before his Compriſing, during whoſe Lifetime his Compriſing could not take effect, and who has died but within this year, or thereby. The *Lords* Found the Alledgance Relevant againſt this Second Reaſon, and in reſpect thereof in this caſe Found, the Defender ought not to be compelled to produce theſe Executions, which are called for, as warrands of the Compriſing controverted; and therefore Found, that no Certification ſhould be granted, for not Production of the ſame, againſt the ſaid Compriſing. The Third Reaſon of Reduction was, that the Compriſers ſelf upon his Death-Bed granted the Sum, for which the Compriſing was Deduced, to be all payed to him, except 40. pounds, and deſired that his Heirs and Executors ſhould ſeek no more from the Purſuer but 40 pounds, which he offered to prove by Witneſſes, preſent at the time, Perſons without all Suſpition. The *Lords* Aſſoilzied from this Reaſon, becauſe it was not *Found* probable by Witneſſes. Actor. *Nicolſon* younger. Alter. *Burnet*. *Gibſon* Clerk. *Vid.* for this Reaſon, *Feb. Ult.* 1628. Earl *Nithiſdale* and the Caſes there. *March* 24. 1632. *Ruſſel*, *Feb.* 4. 1630. & *July* 19. 1631. Earl *Kinghorn*.

Cleghorn contra *Ferguſon*, *July* 8. 1636.

ONe *Cleghorn* in *Cramond*, having borrowed from *Ferguſon* in *Muirhouſe* 500 Merks, he Diſpones to the Creditor his Lands in *Cramond*, which Creditor, *viz.* *Ferguſon* gives at that ſame time a Back-Bond to *Cleghorn*, that if at the *Whitſunday* thereafter, which was in *anno* 1634. or within 15. dayes thereafter, he

ſhould repay his Money, with the Profite thereof to the Term, then to Repone him, otherwiſe the Back-Bond to become null; after which Term *Fergusson* obtained Decreet of Removing, upon his ſaid Infeftment: Thereafter *Cleghorn*, and his Aſſigney *Broun*, Charges upon the Back-Bond, to Repone the ſaid *Cleghorn*, in and to his own Right, and offers to Repay the Money, which being Suſpended upon the Tenor of the Back-Bond, and Clauſe thereof, appointing the Back-Bond to be null, if the Sum were not preciſely payed within 15 days after *Whitſunday*, 1634. and ſo after ſo long a time, that day being expired, there was no place to offer the Money, and purge the Failzie; ſpecially whereas he had Reformed the Lands, and beſtowed more Expenſes in Repairing thereof, than the Land was worth; And the other Party offering to pay the Money *cum omni cauſa*, and all his Charges, at the *Lords* Modification, he Alledged, he ought to be Reponed, ſeing theſe Clauſes are not allowable in Law, being *pacta Legis Commiſſoriæ*, which in Law are always Reprobat *in pignoribus*, as this is, eſpecially there being no Declarator ever ſought upon the Failzie, which if the Party had ſought, he would ever have been ſuffered to purge the ſame, and would ſo have done. And the other Alledging, that after ſo long time, no Reaſon could permit him to purge the Failzie, and the Decreet of Removing is in place of a Declarator. The *Lords* Found, that notwithſtanding of the Intercourſe of this time of two years, ſince the Failzie was incurred, that the Party might be heard to purge the Failzie, the Creditor being ſatisfied of his Sum, and Annualrent, and all the Charges beſtowed upon the Beiting of the Houſe; for this being *Pactum Legis Commiſſoriæ in pignore*, they would not allow it; and being adjected as a Penalty for Failzie, to pay the principal Sum at the time appointed, they thought it not reaſonable, to allow ſo great a Penalty, ſo far tranſcending the Ordinar Annualrent; and therefore they Ordained the Parties to compt upon the Annualrents, and the Charges Deburſed by the Creditor, upon Beiting of the Houſes. Actor. *Gilmor.* Alter. *Gibſon* Clerk: *Vid. March* 19. 1631. *Scot.*

L. *Colſtoun* contra Lo. *Cranſtoun*, *Eodem die.*

IN a Suſpenſion of a Decreet of Removing, obtained by the Lo. *Cranſton* againſt *Colſtoun*, wherein a Sentence of Excommunication being pronounced and Extracted againſt *Colſtoun* for Inceſt, in reſpect whereof the Charger Alledged, that he had no Perſon to ſtand in Judgment. The *Lords* Found, that the Suſpender ought to be heard to inſiſt in his Suſpenſion, notwithſtanding that he was ſo Excommunicat, ſeing he was not at the Kings Horn; for they Found, that Excommunication could not prejudge the Party of theſe things, *quæ ſunt Juris Naturalis vel Juris Gentium*, as was to Defend themſelves with their lawful Rights; But I think, and then was of the mind, that a Perſon Excommunicat, for ſo vile a Crime, as horrible Inceſt, which was fearfully related, and aggravate in the Sentence, bearing *The Party to have layen in double Inceſt* (for ſo were the Words of the Sentence) *and that for no admonition, he could forbear*, ought not to be admitted, to have any favour in any civil Judicatory, which was not granted to a Rebel at the King's Horn, except that he had ſatisfied the Kirk, and made Repentance, and the Sentence had been Suſpended ſome way; for any at Gods Horn, ſhould be refuſed in all things, which are refuſed to a Rebel to the King; But the *Lords* Ordained him to find Caution to ſatisfie the Kirk, and this was Repelled; for he might Defend notwithſtanding thereof, as a Suſpender is Compted; But the Cannon Law permits not any excomunicat Perſon to Purſue. Actor. *Craig.* Alter. *Belſhes.* *Gibſon* Clerk.

Tennents of *Hyndwood* contra the Miniſter of *Coldinghame*, *July* 9. 1636.

THE Tennents of *Hyndwood* Suſpending in a Double-Poynding againſt the Miniſter of *Coldinghame*, claiming their Viccarage-Teinds as a part of his Sti-

Stipend on the one part, and against the Lady *Aitoun*, and Laird of *Blakader* her Spouse, on the other part, the Lady claiming the same as a Tacks-woman, by vertue of a Tack of the same Viccarage-Teinds, Set to her by Mr. *William Douglas* of *Stany-path*, Minister at the said Kirk for the time, who then had Right to the said Viccarage-Teinds, Set to her during all the dayes of his Lifetime, who yet lives; And the present Minister Replying, that Mr. *William Douglas* was never provided by any Presentation to the Viccarage, as a distinct Benefice, but was only a Stipendary Minister, and had the Viccarage-Teinds assigned to him, as a part of his Stipend, so that he could Set no Tack of these Viccarage-Teinds, which could endure longer space, than during the time of his Service at the said Kirk, in prejudice of the succeeding Minister, who was to be provided to the Charge, no more than he could Set any Tack of the rest of his Stipend, which could have no longer endurance; for otherways the Intrant Ministers might be sensibly wracked, and their Stipends Reduced to such a small proportion, whereupon they could not live. The *Lords* Found, that this Tack could not Defend the Lady, the Setter being removed, and Serving the Cure at another Kirk, albeit he be yet on Life; seing the Viccarage-Teinds are Assigned to the Minister, Serving the Cure at the Kirk Lybelled, as a part of his Stipend, wherein he cannot be prejudged by the Minister his Predecessor; these Teinds not being bruiked by any person provided to the Viccarage, as a distinct Benefice by any distinct or several Presentation, but being Annexed to the Minister, and allotted for a part of his Stipend; So that he being a Stipendary Minister, he could not Set any Tack, which could last longer than he remained actual Minister at that Kirk, of any part of these Teinds, nor any other part of his Stipend, thereby to prejudge his Successor, or the Kirk, and therefore they Found the Tack null, and that the present Minister had best Right to the Teinds, and Decerned him to be Answered thereof. Actor. *Mowat*. Alter. *Craig*. *Gibson* Clerk.

Burrel contra *Gilgower*, *July* 12. 1636.

ONe *Burrel* obtains Decreet of Removing against *Kilgower*, before the Baillies of *Edinburgh*, *in foro contradictorio*, which being desired to be Suspended upon a Reason founded upon a Tack of the Land controverted, and the other Opponing his Decreet, given against him compearing. The *Lords* Found the Letters orderly proceeded, notwithstanding of the Reason, in respect of the said Decreet given against the Suspender compearing; at which time the said Defence of the Tack was competent, and being omitted to be proponed, they Found it should neither be received by Suspension nor Reduction, except that it were Libelled by way of Reduction, that it was proponed and unjustly Repelled, *quo casu* he might Intent ordinar Reduction thereon, and no otherways; seing it must be presumed to have been *dolosè* omitted, being competent to him before the Sentence. Actor. *Primrose* & *Dunlop*. Alter. *Gilmore*. *Hay* Clerk. *Vid. Decemb.* 20. 1632. *Knox* and the Cases there.

Lawmond contra *Bennet*, *July* 13. 1636.

MR. *Andrew Lawmond* Minister at *Merkinsh*, having Charged upon his Designation of his Gleib *Robert Bennet* Heretor thereof, who Suspending, that the Lands Designed are not Arrable Lands, but the greatest part thereof was Meadow and Mire, and unfit for Tilling or Labouring, and the rest thereof was Houses and Yards Set out to Feuars; The *Lords* respected not this Reason, because that Clause in the *Acts* of *Parliament*, bearing *Arrable Land*, if any such Clause were (as there is none I think) is conceived in the Ministers Favours, and he may seek other Lands, such as there are, where there is no better to be had; and sicklike Found, that the Minister ought not to be Debarred from his Gleib, although it were Laboured in Yards, and Houses builded thereupon, there be-

being no other Kirk-Lands in the Paroch. *Gibson* Clerk. *Vid. July* 24. 1629. *Nairn.*

The Bishop of *Edinburgh* contra *Brown*, *Eodem die.*

THe Bishop of *Edinburgh* Pursuing Spuilzie against *Gilbert Brown*, and an other Defender for the several Teinds of their Lands, and the said *Gilbert Brown* Alledging a Tack Set to him by Mr. *Gilbert Gordon* of *Shirms*, as Abbot of *New Abbay*, by vertue whereof he had been in Possession these fourty years bygone, for payment of his Tack-Duty allanerly: And the Bishop Replying, that the Tack could not Defend him, except he should Alledge, that the Setter was lawfully provided to the Abbacy. The *Lords* Found the Alledgance Relevant to Defend the Excipient in this Judgment Possessor, without prejudice to Reduce thereon *prout de jure*; seing it was not probable, that the Tacksman could have the Setters Provision in his Hands, and keeping; but whensoever he should be Pursued therefore, for anulling of his Tack in an ordinary Pursuit, he might then do his Diligence to recover that Provision, after what Legal manner he best might, and upon his own peril; And sicklike it being Alledged for another Defender, that he had a Feu-Infeftment from another lawful Titular of his Lands, *cum decimis inclusis*, by vertue whereof he and his Predecessors has been past memory of Man, in peaceable immemorial Possession of these Teinds, for payment of the Duty contained in his Feu, and produced his Feu to prove the same; against which the B. Alledging that the Feu could not extend to the Teinds, because the Teinds were not Disponed by the Dispositive words of the Charter, and albeit in the Clause of *Tenendas*, the word (*cum decimis*) was casten in among the words of that Clause, yet being done either negligently by the Writer, or Cautelously put in with other words in the common Stile, & so slipped into the Clause *cum aucupationibus & venationibus &c.* and albeit the same be also insert in the *Reddendo*, which bore *Reddendo pro dictis terris, molendinis & decimis*, such a particular Sum, yet whatever is in any of these Clauses, not being expresly contained in the Dispositive words, as the Teinds are not, nor yet the Milns, therefore the Feu cannot extend thereto: And the Excipient Opponing his Feu, Clothed with Possession, past memory of man, contended that the same was sufficient to defend him in this Possessory Judgment, ay and while it were Reduced; specially these Teinds being of the Viccars Lands, which Teinds were never in use to be led, but goes ever with the Lands, and Possessors thereof, and no other person ever pretended Right thereto. The *Lords* Found the Exception Relevant, to Defend the Excipient in this Possessory Judgment, and would not annul the Feu in this place upon that Alledgance, in respect the *Reddendo* bore clearly, *the Duty to be paid for the Teinds*, which words *pro Decimis* were expresly insert in that Clause of the *Reddendo*. *Item*, In this Process it being Alledged for the L. *Lochnivar*, that he had a Tack Set to him by the President, being then Abbot of *New-Abbay*, for Terms yet to run: And it being Replyed, that the Tack is null, as Set in Diminution of the Rental, against the *Act* of *Parliament* 1581. seing it was Set for conversion of Victual into Silver, at a small price: The *Lords* Found this Nullity ought not to be received by way of Exception, but ought to abide Reduction, wherein it behoved to be Libelled, that the Teinds payed Victual of Old to the Titular, and were so Rentalled, against which the Defender would be heard, and would have time to come Instructed to Defend himself, which in this place cannot be done. Actor. *Nisbet*, Alter. *Gilmore* & *Mcgil*. *Gibson* Clerk.

Halyburton contra *Paterson*, *Eodem die.*

MR. *Thomas Halyburton* Minister at *Kinoul* his Charges upon his Designation being Suspended by Mr. *John Paterson*, Alledging, the Lands Designed to pertain to him, and are holden of a Chaplainry within the Kirk of *Kinoul*,

oul, and that there being both Prior's and Biſhop's Lands within the Paroch, theſe ought to be firſt Diſcuſſed, and Deſigned before his Chaplains Lands could be Deſigned, conform to the Order ſet down in the 161 *Act* 13 *Parl. Ja.* 6. And the Miniſter Anſwering, that the moſt eweſt Kirk-lands ought to be alloted to him for his Gleib, which is the Land now controverted; whereas the other Biſhops, or Abbots Lands, are three miles diſtant from the Kirk-Manſe and Gleib, and it were no reaſon to put the Miniſter to ſo ſeen an Inconveniency, as to force him to take & Labour a Gleib three miles diſtant from his Service & Kirk. The *Lords* notwithſtanding of the Anſwer, Found the Reaſon Relevant, & that the Abbot, Prior, or Biſhops Lands, ought to be firſt Deſigned before the Chaplain-Lands could be claimed; albeit the ſaid Chaplain-Lands were eweſt, and the other was three miles diſtant, as ſaid is, which was not reſpected: For the *Lords* Found, that where the *Acts* of *Parliament* ſpoke of Contiguity, or eweſtneſs, it ought to be underſtood, that the moſt eweſt of ſuch Lands ſhould be Deſigned in their own kind, as the moſt eweſt of Parſon-Lands, and the moſt eweſt of Priors Lands, and ſo of Biſhops Lands, and *Succeßivè* in order, but not *Comparativè* among themſelves; ſo as if the Biſhops Lands were nearer than the Abbots, or Parſons, that the neareſt ſhould be firſt, but that the neareſt of its own ſort ſhould be Deſigned before the more remote in that ſame kind, and no otherwayes. *Hay* Clerk.

Drummond contra *Drummond*, *July* 15. 1636.

BY Decreet Arbitral, Pronounced in *anno* 1614. by the Earl of *Perth*, betwixt *James Drummond* of *Drumdoue* on the one part, and Mr. *David* and *Malcolm Drummonds* on the other part, the ſaid *James* is Decerned for the onerous Cauſes contained in the ſaid Decreet, to Tailzie his Lands of *Drumdoue*, to the ſaid Mr. *David* and *Malcolms* Heirs-male, failzying of Heirs-male gotten of his Body; whereupon Action being Intented by the ſaid Mr. *David*, The ſaid Defender Alledged, that he had ſatisfied the ſaid Decreet, in ſo far as he had perfected a Charter of Tailzie under the Great-Seal to Mr. *David* and *Malcolm*, and their Heirs-male, *&c.* which Charter he produced, and Seaſin conform thereto: And the Purſuer Replying, that the Charter was Ineffectual, in reſpect ſince the Date thereof, the Defender had Sold the Lands to the Earl of *Perth*, whereby he had rendered the profite of the Tailzie void, and made the Right of Succeſſion by the Tailzie to evaniſh, and therefore at leaſt he ought to have his own Money again, which was given for the making of the Tailzie. The *Lords* Found the Exception Relevant, and Proven by the Charter of Tailzie, and Seaſin produced, and Found, that the Defender ought not in Law to be compelled, to render again the Money, alledged payed for the making of the Tailzie, as being made unuſeful to the Purſuer, by the Alienation of the Lands, made by the Defender; For it was Found, that notwithſtanding of the Tailzie, the Party obliged to Tailzie might Sell the Lands; and the Alienation, however it took away from the Purſuer, the Hope and Benefite of Succeſſion any wayes, by vertue of that Tailzie; yet it was Found not to impede the Party obliged to Sell upon urgent and juſt Cauſes the Lands; and there was no Fraud or Guile qualified, upon the part of the Seller againſt him, which might make it appear, that it was done to fruſtrat the Tailzie directly (which if it had been Alledged, might have had its own conſideration) neither bears the Decreet any ſuch Clauſe, Prohibiting the Party to Sell the Lands, nor has the Party obliged himſelf not to Sell them, nor to contract Debt in his urgent Affairs, nor is Inhibition Served thereon, neither is the Defender obliged, nor Decerned in the Decreet to refound the Money, nor is it reaſonable that he ſhould refound it, he having done all that he was Decerned to do, *viz. To make the Tailzie*, which although it ſhould be unprofitable, yet that is upon hazard, *quia emit quaſi ſpem & Factum retis*, Therefore

the *Lords* Assoilzied *ut supra*. Actor. *Gilmore*. Alter. *Nicolson*. *Gibson* Clerk *Vid. January* 14. 1631, *Sharp* and the Cases there Cited. This Cause being Called again upon the last of *February* 1637, it was so Decided as it is here.

Hackstoun contra *Rutherford*, *July* 16. 1636.

MR. *David Kinloch* being Cautioner for *David Hackstoun*, that he should adhere to *Rutherford* his Spouse, and after that Caution, they adhering together, and Bairns thereafter Procreat betwixt them, thereafter they Diverted; The Wife after the Death of the Cautioner, desired the Bond to be Transferred in the Cautioners Heirs, and he Alledging, that the Bond of Cautionry was expyred, seing thereafter they had Cohabit, and Children since gotten betwixt them, whereby the Effect of the Bond was fulfilled, and the Cautioner and his Heirs were freed of the Bond; And it being Opponed, that the Tenor of the Bond bore, *That they should adhere during their lifetime*; and now seing he had Diverted, she had reason to seek the Bond to be Transferred. The *Lords* in respect of the Tenor of the Bond, which bore, *That the Cautioner was bound that they should adhere during their Lifetime*, Found that the Cautioner and his Heirs were obliged for the Husbands adherence during that time. And it being Alledged, that he was content to adhere, and for that effect had a Process before the Commissars against her for Adherence. And she Answering, that the Commissars had Assoilzied her from that Pursuit, because the Husband would not find Caution, for her Indemnity and Intertainment, so that except the Caution already Found should be obliged to that, she could not adhere. The *Lords* Found, that the Caution foresaid, found for the Husband for his adherence, was only obliged that he should adhere, and was not obliged for her Indemnity and Intertainment, that Clause not being expressed in the Act of Caution; and the Husband being but a poor man, Indigent of Means, and a Servant who could not get such a particular Cautioner for these particulars desired by the Wife, they Found, that they could not astrict the Cautioner to such things as he had not bound himself to.

Keith contra *Johnston*'s Tennents, *Eodem die*.

IN a Pursuit to Labour the Ground, conform to a five years Tack thereof, Set by *Alexander Keith* to the Tennent, and accepted by the Tennent, and according whereto he had Laboured the Roum two years of the five, which was referred to his Oath, it being questioned, if the Tennent might, after he had bruiked the Room two years of the five, the Tack not being perfected by Writ, but only offered to be proven by the Defenders Oath, thereafter give over the Room to the Master, and that thereby he was freed of the Tack, the Master contending, that he ought to bruik it out, during the space agreed upon. The *Lords* were of the mind, that albeit the Party had by his Oath granted the condition, and also that he had confest, that he had Laboured the Land two years, yet that thereafter he might repent, & that it was lawful to him to quite the Room at any year thereafter, before the *Whitsunday*, and that he was not bound to keep the said Tack, it not being perfected by Writ, albe it he had bruiked the Lands two years of five, so that these sorts of pactions were not Found Obligatory, except Writ had been made thereon; & because Mr. *Alex. Keith* was Debarred by Horning, and that Mr *Robert Mowat*, who was Donatar to *Alexander Keith*'s Escheat and Liferent, assisted the Pursuit, *Alexander* himself being Debarred as said is, although the *Lords* Found *ut supra*, yet the Decision run on this Ground, that the singular Successor might be Repelled by this Exception, and that the Defender had competent place of Repentance against him, there being no Writ to make the Security real, whereby either Party Contracter, & their Successors might be equally bound to others. Actor. *Stuart* & *Mowat*. Alter. *Nicolson* & *Forbes*. *Gibson* Clerk. *Vid. July* 15. 1637. *Skeen*.

Sin-

Sinclar contra *Murray*, *Eodem die.*

AN Assignation being made by *Murray* one of the Kings Butry-men in *England*, to an other *Murray*, in & to some Bonds and Debts, owing to him by his Debitors, which after his Decease were used for the Ground & Title of a Pursuit, made by the Assigney, which being quarrelled by the Defender, *viz.* the Person who would have been Heir to the Cedent, that it was null, because it Designed not the Writer of the Body of the Assignation. And it being Answered, that it was Written in *England*, and so was sufficient, although wanting that Solemnity, which could not extend to a Writ done outwith the Kingdom, where the Law was made: And it being Duplyed, that this Assignation being made by one *Scots-man* to another, & of Debts in *Scotland*, it ought to be ruled by the *Scots* Laws. The *Lords* Repelled the Alledgance, and Sustained the Assignation, being made in *England*, where they Found that there was no necessity, that the Writ should Design the Writer, neither yet would the Party offer to Design his Name, the Cedent being dead, and it being Written by an *English* Man, who might be unknown to the Assigney; neither was it respected that the Parties were *Scots* Men, & of a *Scottish* Subject, being done out of the Countrey, & by the Cedent, who was then an actual Residenter in *England*, and Servant to the King. Actor, *Gibson*. Alter. *Gibson* Clerk. *Vid. March* 7. 1629. *Wilkie* and the Cases there. *February* 25. 1637. *French*.

Lo. *Frendraught* contra L. *Bamff*, *July* 19. 1636.

IN an Action for proving the Tenor of a Back-bond, granted by the L. *Bamff* to the Lo. *Frendraught*, whereby L. *Bamff* granted, that albeit the Lo. *Frendraught* was obliged as Principal, and *Bamff* only as Cautioner for *Frendraught*, in a Bond of 3000 merks, borrowed from *Alexander Forbes*; yet that Sum was truly a Debt owing by *Bamff*, and that therefore he should relieve him thereof; and which Back-bond being Libelled to have been burnt, when the House of *Frendraught* was burnt, and therefore the Tenor thereof being desired to be proven, it was Alledged, that there was no Adminicle in Writ Libelled, to sustain the Back-bond, and Summons, and that it were of a dangerous preparative and consequence, to sustain this or the like Actions, to prove Tenors of Bonds, or Back-bonds, for payment of Sums of Money; & might disturb greatly the Liedges, & tended to a dangerous example, seing it is the universal case of the whole Nation, & inviolable Custom, that when Parties payes Sums owing by Bond, only to destroy the Bond, & there is no other Record thereof made; and it were great iniquity in such cases (the Question Libelled not being of a different nature) to admit Parties to prove the Tenor of such Bonds, and so to restore the same against the Debitor; especially in this case, where there is no Adminicle in Writ extant to sustain this Action. And the Pursuer Replying, that he offered to prove, that the L. of *Bamff* was before Debitor to *Alexander Forbes* in the like Sum, for payment whereof he being Charged, the L. *Bamff* dealt with the Lo. *Frendraught*, to borrow that Sum, and which he did, and became principally bound, as is Libelled (the Lord *Frendraught* being of before under Oath not to be Caution for any person) whereby he was moved to be principal Debitor, at which time the Back-bond Libelled was made to him. Likeas he thereafter having payed the Sum to *Alexander Forbes*, *Alexander Forbes* made the Laird *Bamff* Assigney to the Bond first made by *Bamff* and the Sheriff of *Cromartie*, for satisfaction whereof *Frendraught* became Debitor, as said is; upon which Assignation the Laird of *Bamff* recovered payment of a great part of the Sum from *Cromartie* his Con-Cautioner; all which he offered to prove by the Laird *Bamffs* own Oath, in fortification of his Summons, the Tenor whereof, *viz.* of the Back-bond, he offered to prove by the Witnesses insert, and Writer, and these he Alledged to be sufficient Adminicles. The

Lords, although they Found that it was of dangerous consequence to sustain such Actions, for proving the Tenor of the Bonds for Sums of Money, and that they would not regularly allow the same, but upon necessar and good considerations, which might have moved them; yet in this case the *Lords* sustained this Action, in respect of the *Reply*, and Circumstances therein contained, which they Found Relevant, to be proven by the Defenders Oath, and als sufficient as any other *Adminicle* in Law required to concur in an Action, for proving the Tenor; for albeit there must be Libelled Adminicles, in proving of Tenors of real Rights, such as Charters, *&c.* yet to prove the Tenor of a Bond for a Sum of Money, there is no likelihood that there can be any other Adminicle in Writ: And in this case the Circumstances contained in the Reply were sustained, as sufficient to be proven by the Parties Oath, as said is. Actor. *Advocatus & Mowat.* Alter. *Nicolson, Baird & Gibson.* *Gibson* Clerk.

Gairdner contra *Chalmers*, *Eodem die.*

UMquhile *William Gairdner* being adebted to *Chalmers* in the Sum of 600 merks by his Bond, whereupon *John Gairdner* being Decerned as lawfully Charged to pay, *&c.* and being Charged, and for obedience thereof having given a new Bond to the Creditor, upon which he being Charged, he Suspends, and Intented Reduction upon this Reason, *viz.* his Minority when he Subscribed the last Bond: Whereto it being Answered by the Charger, that he could neither Suspend nor Reduce upon that Reason of Minority, seing the time when he Subscribed the Bond he was a Nottar, which being a Publick Charge, presumes Majority; and in fortification thereof, he offered to prove that since he was Major, he payed Annualrent for this same Sum to the Charger. Thir Exceptions *conjunctim* were Found Relevant, and the payment was Found probable by Witnesses, albeit the Suspender and Reducer Alledged, that it was only probable by Writ, or Oath of Party, tending to make a null Bond good, which was alike, as if he were to prove the Debt by Witnesses; which the *Lords* Repelled, and Found the same probable by Witnesses, as said is, it being conjoyned, that the Bond was made by a Nottar. Actor. *Gibson.* Alter. *Heriot.*

E. *Queensberry* contra the L. *Torthorwold*, *July* 20. 1636.

THe L. *Torthorwold*, being Summoned to insist in a Reduction of the Right of *Torthorwold*, moved at his instance against the Earl; after Protestation, as use is in such Cases, and a Term being Assigned to the L. *Torthorwold*, Compearing then by his Procurator to insist, with Certification. At the day whereof Assigned by the Act, the Procurators declared that they would not Compear, and it being questioned, if the Certification of the Summons should be granted against him, as compearing, or as absent, in respect of his Procurators Declaration, that he would be absent; and who Alledged, that he might be lawfully absent, sicklike as in Improbations, after Terms Assign'd to Defenders Compearing, and taking days to produce, they might thereafter, nevertheless of their Compearance to take days to produce, lawfully be absent, and it is permitted to them in form, to pass from their Compearance, so ought the like in this case. The *Lords* Found, that after Protestation granted in the Principal Cause, and after Citation by an ordinary Action, by two Summons to insist, and after a Term given and taken by the Party, then Compearing to insist, he could not thereafter pass from his Compearance, and be absent; But the *Lords* Found, that the Certification ought to be granted against him, as Compearing, and Decerned so against him, he having taken a day to pursue his own Action, and not doing the same, being his own Pursuit: And the *Lords* were of the mind, that although such Certifications were granted in absence, yet that such Sentences and Certifications should be Irreduceable. Actor. *Advocatus & Nicolson.* Alter. *Stuart & Johnston.* *Scot* Clerk.

Greir

Greir of *Barrarge* contra L. *Closburn*, *July* 21. 1636.

CErtain Lands being Adjudged to a Creditor, whereupon the L. *Closburn*, who was Superior to the Lands Adjudged, being Charged to receive the Creditor in the Vassals place, who Suspending, that he ought not to do it, while he got a years Duty payed him, according to the Order kept in Compriſings, seing Adjudications are of the same nature, and in every thing alike and equal, in so far as concerns the Superiors receiving and changing of his Vassals. The *Lords* Found the Letters orderly proceeded, notwithstanding of the Reason, & that they could not compel the Creditor to pay a years Duty to the Superior, as is used in Compriſings: For albeit there may be alike & the same Reason for Adjudications in this case, as for Compriſings, yet seing there are expres Laws and Acts of Parliament for Compriſings, which are not for Adjudications, the *Lords* Found, that they could not extend the Acts, which made only mention of Compriſings, that the Superior should have a years Duty, for Entry of the Compriser, and doth not make any such mention of Adjudications: It being also clear, that the Act which makes mention of Adjudications, is done in the same Parliament, wherein the Act of Compriſing was done, *viz.* the one the sixth *Act*, & the other the seventh *Act*. *Par.* 1621. And that the said *Act* of Adjudication in sundry parts has Relation to the preceeding immediat Act of Compriſings, and makes them alike in sundry other points, and has no Ordinance in this Point; and the *Lords* thought, that their Power reached not safely to them to make any new Law, where there was no Practique thereanent before; but the *Lords* Ordained the Parties to travel, to see if they could agree amongst themselves, for a Compoſition to be payed: which may appear very Considerable, seing the Superior ought not to be compelled to change his Vassal, not being satisfied therefore, no more than he can be Compelled to receive a Stranger, or a Singular Successor, upon his Vassals Resignation unsatisfied; otherways the Creditor, and the Vassal Debitor, may ever collude to the Superiors prejudice. Actor. *Maxwel.* Alter. *Cunninghame.* *Vid. January* 20. 1637. betwixt the same Parties.

L. *Ramornay* contra *Law*, *Eodem die.*

THe young Laird of *Ramornay* being Married upon the Bishop of *Glasgows* Daughter, and he dying without Bairns, his Brother succeeding to his Fie, Pursues his *Father*, and the Brothers Relict, who had all the Liferent of the whole Lands, for a Modification; And the Relict Alledging, that no part could come off her, for Modification, because she having payed a competent Tocher of 8000 merks; for her Liferent of Ten Chalders Victual, granted to her in Conjunct-fee, and Contracted to her by the Pursuers *Father*, by her Contract of Marriage, which the said Pursuers *Father* is obliged to warrand to her, and the Pursuer being bred up with a Writer, and now a Man of Perfect Age; he ought to do for himself, at the least he ought to seek his *Father*, who in nature is bound for Aliment to his Son. The *Lords*, in respect of the Alledgance, assoilzied the Relict, and Found no Modification ought to be granted, of her Part of the Lands Liferented by her, for which they *Found*, That the Acts of *Parliament*, which were the grounds of this Pursuit, could be no Warrand to sustain this Action against her; And as to the *Father*, albeit the *Father* by the Law of nature is obliged to nourish his Son *quoad Alimentum*, yet they *Found*, that this *Act* of *Parliament* could not be any ground to maintain this Action against the *Father*, to compel him to pay any thing out of that Part of his Liferent Lands, for his Sons Intertainment, except that he might shew some other Reason to Induce it, as that the *Father* had kythed some un-natural and Inhumane dealing to the Son, and had refused him his Ordinary Maintainance. *Actor.* *Alter.* *Murray.* *Vid. July* 7. 1629. *Hamilton* of *Blair*. *Feb.* 12. 1635. *Hepburn*. *Feb.* 11. 1636. *Sibbald.*

King contra *Douglas*, *Eodem die.*

ONe *Janet Douglas* Relict of *James King*, being Life-renter of a certain Sum, whereof her Son had the Right of Fee, which *Janet* Dispones to her said Son the Liserent thereof, and at the very time of the *Dispositon*, the same day before the same Writer, and Witnesses, receives a Bond from her Son, by the which he obliges him to relieve his Mother of her Husbands, his Fathers whole Debts; and if he did not, that he should Repone her to her own place against that Disposition, and in that *Case*, declares her Disposition to be void: after which the said Son makes *Janet King* his Sister Assigney to a part of the said Sum, who pursuing the Debitor therefore, the said Mother Compeared, and Alledged, that she ought to have her Liferent, the Sum being provided to her during her Lifetime; and the Daughter opponing the foresaid Disposition of her Liferent to her Son, and the Mother Duplying upon the said Bond granted by her Son, done at the same time, as said is, which being *pactum incontinenti adjectum* must be of *Force*, as if it had been insert in the Body of the Disposition; Likeas she has *Action* of Declarator Intented upon the Back-Bond, and her said Son knowing, that he has Failzied in the condition of the Back-Bond, has Reponed her; and the Daughter Answering, that the Bond could not work against her, who was a Singular Successor, and saw a Disposition pure and simple, not affected with any such condition, as the Back-Bond bears; And for the Declarator, it is Posterior to the Right made by her Brother to her, and sicklike the Reposition is Posterior. The *Lords* Found the Pursuers Summons, and the Answers in Fortification thereof Relevant, and *Repelled* the Alledgance proponed upon the Back-Bond, which albeit done at the time of the Disposition, they Found, could not prejudge this Pursuer, who is a Singular Successor; but only should work against the Granters self, and the Action and Reposition being after the *Right* made to the *Pursuer*, and Intimation thereof, were rejected, seing the Condition expreſt in the Back-Bond, was not insert in the Disposition *in corpore primi Juris*. Actor. Alter. *Heriot. Vid. Feb.* 15. 1637. *Lauder.*

Corser contra *Durie*, *Eodem die.*

ONe *Robert Corser* in *Dysert* pursues *Andrew Durie*, as *gerens se pro Hærede* to his umquhile Father *William Dury* of *Newton*, for payment of some Money adebted by his Father to him; wherein it being qualified, that the said Defender had behaved himself as Heir by this qualification. *viz.* That his said Father had Set the Lands of *Newton*, Stock and Teinds for five years to a Tennent, whereof there being diverse years yet to run, the time of his Fathers decease, he Intrometted with the said Tack Duty, after his said Fathers decease, by himself and his Tutor, which makes him Heir: and the *Defender* Excepting, that his said Father was never Infeft in the Lands, neither was he ever Tacksman of the Teinds, and no such Right ever was, nor can be shown; but by the contrair, whatever Intromission he had after his Fathers decease, either with the Duties of the Lands, or with the Teinds, the same was not by vertue of any Right, either Heretable, or of a Tack in his Fathers *Person*, which never was; nor by vertue of that Alledged Tack Set by his Father, which he never acknowledged, but that the same was as Appearand Heir to his Goodame, who died Heretably Infeft in the Lands, and no other Infeft since: and as to the Teinds he medled also with them, as Appearand Heir to His Goodsir, who was Tacksman, without any respect had by him to his Fathers Possession. The *Lords* Found this Exception *Relevant*, to purge that Member foresaid of the Summons, that he could not be conveened, as behaving himself as Heir to his Father, it never being offered to be proven, that his umquhile Father had any Right; and the Entry to that Possession, which subsisted in his *Fathers Person* the time of his decease

deceaſe, made him not to be reput as Heir to him, the ſame being done by vertue of another Title, which he derived from his Goodſir, in whoſe Perſon the ſame ſtood, and which he claimed as *Appearand* Heir to him, there being no Interveening, nor midd Impediment to hinder or prejudge him therein: for the Interveening of his Fathers Poſſeſſion, and his continuing and dying therein, and the Defenders Immediat Entry thereafter, to that Poſſeſſion had by his Father, was not ſuſtained to make him as Heir, lyable to his Fathers Debts, for the Reaſon foreſaid. Actor. *Advocatus*. Alter. *Nicolſon* & *Dunlop*. *Gibſon* Clerk. *Vid. December* 19. 1638. betwixt theſe Parties.

Stuart contra *Gedd*, *November* 16. 1636.

ONe *William Stuart* having *Action* againſt one *Gedd* Skipper in *Burnt-Iſland*, and *Edward Little*, Cuſtomer in *Edinburgh*, before the Admiral Deputs in *Leith*, for delivery to him of a Trunk, with certain Abulziements being therein, which he received from in *London* in the Purſuers name, to be brought home, & delivered to him; in which Court the Defender *Gedd* having found Caution, not only *Judicio ſiſti* but *Judicatum ſolvi*, which Cauſe being Advocat to the *Lords*, and being agitat after Advocation, and Diſput before the *Lords*, it was queſtioned by the Defender, that in reſpect of the Advocation, his Caution found in the Admiral Court ſhould be freed. And the Purſuer Anſwering in the contrair, that ſeing Caution was found in that Court to him *Judicatum ſolvi*, it was no Reaſon to louſe his Cautioner by the *Advocation*, ſeing the *Advocation* is not raiſed, nor granted upon any Reaſon of Incompetency of Judgment, as that the *Admiral* was not proper Judge to the Parties, or that the matter controverted was not a Subject falling within his Juriſdiction, or that the *Admiral* had done any wrong to the Parties in that Proceſs, or upon any ſuch Reaſons, which might be *Declinatoria fori*, or exeem the Parties as not lyable to that Court, *quo caſu* if it had been ſo, with more probability might the Cautioner in this Judgment before the *Lords* be Found to be freed; but the *Advocation* being upon no ſuch Ground, no Reaſon the Cautioner ſhould be *Found* freed. The *Lords* in reſpect of the Purſuers *Anſwer*, which they acknowledged to be Good and Relevant, and that the Cautioner *Found* before the *Admiral* was *per expreſſum* Bound, and bore *Judicatum ſolvi*, and that thereafter the *Lords* had tryed, and *Found*, having called Mr. *James Robertſon* before them, who was *Admiral* Deput, by whoſe Declaration, they *Found* it has been the conſtant cuſtom of the *Admiral* Court to take ſuch Caution not only *de Judicio ſiſti*, but alſo *Judicatum ſolvi*, and which cuſtom the *Lords* thought not unreaſonable, nor unjuſt, in reſpect Matters handled in that Court, are frequently either betwixt Strangers, or Skippers, or mean Seafaring men and Paſſengers, or ſuch others, who if they were not urged to find ſuch Caution, might & uſually ſo do go out of the Countrey, and ſometime never return, or after a long ſpace ſome may return, whereby Purſuers are fruſtrat of the juſt effects of their Purſuits, if ſuch Caution were not taken; Therefore the *Lords Found*, that the Cautioner ought not to be louſed by the *Advocation*, but Declared that he remained ſtill Cautioner: but in other matters, where Caution is found, in other inferior Courts, than the *Admirals*, as before the Baillies of Burghs, or ſuch like, the *Lords Found* they would take it to their conſideration, as the like queſtion occurred, if the Caution ſhould be louſed after *Advocation*, or not, *quo caſu* if the Cautioner was only *de Judicio ſiſti*, he might be looſed; but if it was alſo *Judicatum ſolvi ut ſupra*, if it was *Advocat* for Incompetency of the prior Judge, the Caution might be found free, otherwiſe to ſtand. In this Proceſs, it was alſo queſtioned, if the Purſuers Claim ſhould be ſuſtained in that Part, where it bore the quantity of the Clothes put in the foreſaid locked Cheſt, was offered to be liquidat by the Purſuers own Oath, as the Purſuer *Alledged*

was admissable in Law, *Titulo. Nauta Caupones, Stabularii, &c.* But this was referred to be considered in the end of the Process, after the Pursuer had Deduced all his other Probation, upon the Receipt of the Trunk, to which time the *Lords* Superceeded to give Answer as to that Part. Actor. *Advocatus* & *Stuart.* Alter. *Nicolson* & *Mowat. Hay* Clerk. *Vid. Jan.* 31. 1633. *Stevenson* in St. *Andrews. Vid. Fol.* 6. *Notarum mearum, ubi quæritur an cautio Judicio sisti efficiat competentem Judicem.*

Courty contra *Weyms, January* 14. 1637.

ONe Mr. *David Courtie* Minister, to whom umquhile Mr. *John Weyms* of *Lothaker*, was adebted 1000 merks, Pursuing *Weyms* his Son *hoc nomine*, as successor to him, *Titulo lucrativo post contractum Debitum*, to pay the Debt foresaid; and for Instructing him to be Successor, producing a Seasin of the Lands of *Lothaker*, proceeding upon his Fathers Resignation. And the Defender Alledging, that he could not be found Successor by that Seasin, because the same was granted to him for satisfying of a Contract of Marriage, made betwixt the Defender and his Spouse, and the Defenders Father, and *Ronald Murray*, Father to his said Spouse, on the one and other Parts; by the which Contract it was appointed, that the Sum of 8000 merks Contracted to be payed to him in Tocher, should be payed to Mr. *James Weyms* Commissar of St. *Andrews*, for lousing from him of the Lands of *Lothaker*, contained in the said Seasin, whereby he was Alledged to be Successor to his Father, as said is; which Lands were Impignorat by his Father to the said Mr. *James*, Redeemable upon the said Sum; and which Tocher being payed accordingly to the said Mr. *James*, and he Renouncing the Lands, and the Defender being thereafter Infeft therein, albeit the Infestment proceeded upon his Fathers Resignation, yet flowing from a Cause onerous, he cannot be thereby Found to be Successor, to pay all his Fathers Debts. And the Pursuer Replying, that the Defender being Infeft in the saids Lands upon his Fathers Resignation, must be found Successor, and cannot Defend himself with Mr. *James Weyms* Wodset; seing by this Infestment flowing upon Resignation, he acquired more than the Wodset, *viz.* Both the Superiority, and the Right of Reversion, the Lands being more worth than the Wodset; and he, by the Right produced, acquiring both the Conjunct-fie to his Wife, and the Heretable Right of Propriety, to himself and his Heirs; and the Defender Duplying, that he restricted his Right only to the Wodset, which was before competent to Mr. *James Weyms*, and which is now acquired by the Defender, for the onerous Cause, as said is; and he Renounces all other Right, which he may claim any wayes by that Infestment, or any other manner of way, to the saids Lands, except the said Wodset, which he is content should be Redeemable from him, by any of his Fathers Creditors, by payment of that Sum; And further, Mr. *David Prymrose*, in name of *Ronald Murray*, Father to the Defenders Spouse Compeared, and Alledged, that seing by the Contract of Marriage, the saids Lands were provided to her in Conjunct-fie, and that for the payment of the Tocher-Good, which was payed, as said is, of no Reason ought she to be prejudged of that Benefit of her Contract of Marriage, neither ought his Son in Law to be found Successor to his Father thereby, and burdened with the heavy and un-supportable Burden of his Fathers Debt, by that Infestment; the preparative whereof was very dangerous to Elude thereby Conditions of Contracts of Marriage, specially seing the Defender, who is yet Minor *rebus integris* Renounces all Benefit by the said Infestment, except the said Wodset, as said is, which he has acquired *ex causa maxime onerosa*. The *Lords* in respect of the foresaid Exception, and Duply, which they Found Relevant, Found, that the said Infestment made not the Defender, to be holden as Successor to his Father, in respect that the Defender Retinshed

ed the Infeftment to the ſaid Wodſet, and that he had not made any other Benefit thereby, but *rebus integris* Renounced all further Benefit thereof, and was content, that the Lands ſhould be Redeemable from him, and alſo from his Wife, by the Creditors upon payment of 8000 merks, and which being payed, and the ſame ſecured to his Wife during her Lifetime, the *Lords* Found to be equivalent to that Part of the Contract, whereby ſhe was appointed to be provided to her Liferent of the ſaids Lands; and Found, that the Proviſion to her of the ſaid Liferent of 8000 merks, to be in ſatisfaction thereof to her *pro tanto*, and that ſhe being ſecured of her Liferent of the ſaid Sum, that ſhe and her Huſband ought to grant the Lands lawfully Redeemed, and ſhould Renounce all Right ſhe or he could pretend thereto; and ſo the *Defender* was not found Succeſſor by the ſaid Infeftment, although it bore more nor the Wodſet, and that the Heretable Right of the Lands, whereto he was Provided by that Seaſin, was far more worth than the Sum of the Wodſet. Actor. *Gilmor & Craig.* Alter. *Stuart. & Prymroſe. Gibſon* Clerk. *Vid. March* 23. 1636. and *Feb.* 23. 1637. L. *Kinnaber, Feb.* 28. 1637. *Weyms* contra his Creditors.

E. *Hume* contra La. *Hume* and others, *January* 18. 1637.

IN a Reduction of Bonds particularly made by the umquhile E. *Hume* to the Lady his Mother and other Defenders, as being done *in lecto agritudinis*; in the which Action there was a general Clauſe, for Production of all and whatſoever other Bonds made to them in that time, beſide the particular Bonds libelled, which were produced, ſpecially called for; and Certification being ſought againſt the ſaids other Bonds upon the ſaid general Clauſe, deſiring the ſame to be Reduced for not Production. The *Lords* Found, that they would not Reduce for Non-production upon this general Clauſe, in reſpect ſuch general Clauſes are not Suſtained in Actions of Reduction, albeit they be uſually Suſtained in Improbations, and the *Lords* declared, that they would not break the ordinary Forms here. Actor. *Nicolſon & Craig.* Alter, Advocatus & *Stuart. Gibſon* Clerk. *Vid.* 12 *Dec.* 1634, *Roſs.*

Wolf contra *Scot, Eodem die.*

ONe *Wolf* Relict of umquhile *Scot* Chamberlain of *Innerweik* having Purſued one *Scot*, Brother to her ſaid umquhile Husband, as lawfully charged to enter Heir to him, to imploy to her in Liferent the Sum of 3500 merks, contained in her Contract of Marriage, and which her ſaid umquhile Huſband was obliged to do in the ſaid Contract; for therein her Father was obliged to pay to her ſaid umquhile Husband 1000 pounds in name of Tocher, whereto her Husband obliged him and his Heirs to add 2000 merks, making in the whole 3500 merks, and to imploy the ſame to himſelf and her, and the longeſt liver of them two in Liferent. And the Defender Alledging, that he could not imploy that 1000 pounds conditioned in Tocher, except that the ſame were exhibited and payed to him, that therewith he might imploy alſo both the ſaid Sums, and the 2000 merks, whereto he was obliged beſide it; And the other Anſwering, that the Relict was not obliged to pay that Sum, and if the Sum be not payed, ſhe ought not to be poſtponed thereby, for the Defender or the Defuncts ſelf might have ſought it, and if they have not done it, it were no reaſon therefore that ſhe ſhould want the benefite of the ſaid Contract: And it being further Alledged, that this Contract, which is the ground of the Purſuit, is but an imperfect Minut, and wants the Date, and deſigns not the Writer, therefore until it be extended, it ought not to produce Action. The *Lords* Repelled both the Alledgances, in reſpect the Party had the perſon obliged to pay the Sum by the Contract extant to Purſue therefore, and if he did not the ſame, the Purſuer, who was not obliged to pay the Sum, ought not to be prejudged thereby, but they

superceded the Execution upon this Sentence till *Whitsunday*, that the Defender might use his diligence, to recover the Sum from the Party obliged in payment thereof: and if he should never recover it, They Found that the Defender was not the less obliged, to imploy the like Sum to this Relict, he being obliged thereto by his Contract, and the Party being responsable, who was obliged to pay at the Term of payment appointed thereto: And the second Alledgance was Repelled, because it was a Minut of a Contract of Marriage to have been perfected, whereupon Marriage had followed thereafter, and that the Pursuer condescended the said Minut was the Hand-writ of her deceast Husband. Actor. *Nicolson* & *Craig*. Alter. Advocatus, *Hepburn* & *Gilmor*. *Gibson* Clerk. The like done betwixt *Malcolm Crawfurd* and L. *Murdistoun*.

Robertson contra *Seton*, *January* 19. 1637.

Thomas Robertson and *Janet Seton* contracting Marriage together, in their Contract *Seton* Father to his future Spouse, is obliged to pay to *Robertson* the future Husband in name of Tocher 2000 merks at the Term appointed, to be imployed as follows, and the Husband is obliged to imploy the same and other 4000 merks therewith of his own, *to himself and his said future Spouse in Liferent, and to the Heirs to be begotten betwixt them Heretably, which failzieing to the Husbands Heirs whatsoever*; the Husband dying without Bairns, his Brother is Served Heir to him, and Charges the Father, who was obliged to pay the 2000 merks in Tocher as said is to him as Heir, Alledging the Sum was only due to the Heir in respect of the said Destination, whereupon the Father of the Relict Suspending, as being distrest for that Sum by the Heir on the one part, and by the Executor of the deceast Brother on the other part, Claiming the same as a Movable Sum, and so pertaining to the Executor; and it being Confirmed by the Executor, and the Heir and the Executor contending therefore, The *Lords* Found, that seing this Sum was appointed by the Contract to be payed for that end, to be imployed, and that the Creditor, *viz.* the Son in Law, to whom it should have been payed, was obliged to imploy the same *ut supra*, whereby both Parties had agreed upon this Destination of Imployment of this particular Sum *in hoc individuo*, *viz.* of the 2000 merks obliged to be payed in Tocher, therefore that the Sum did pertain to the Heir of the deceast Husband, and not to his Executor; and that albeit the Executor had recovered the same from the Father in Law, as a Movable Sum *quoad Debitorem*, which his Executors might have been lyable to have payed, if himself were dead, yet the Executors of the Creditor would ever have been subject to repay the same to the Heir as due to him, and to whom the Fee thereof pertained after the death of the Relict, who had the Right of the Liferent thereof, conform to the Contract foresaid; and because the Heir would be subject to pay Annualrent for this Sum to the Relict, of all Terms since her Husbands decease. The *Lords* Found, that the Father of the Relict who was Debitor of the Tocher, albeit he was not oblig'd to pay Annualrent by the Contract, and albeit he was not, nor could not be charged to pay Annualrent, and notwithstanding that he was never interpelled for payment, until lately since *Martinmass* last by the Heir of the Defunct, there being two other Terms to run since the Term of payment and since the Husbands decease, whereby she might seek payment from the Heir of the Annualrent of these Terms, The *Lords* Found that albeit the Father was not obliged in Annualrent as said is, yet seing he retained the Money after the Term all this time in his own hand, that he ought to pay as much Expenses to his Heir, who is lyable in the Annualrent to the Relict, conform to the Contract, as effeirs to the quantity of the said Annualrent for the saids Terms, according to the *Lords* modification, which they modified to 100 pounds for the samen, being three Terms of all, for which the *Lords* De-

Decerned. Actor. *Mowat*, the Heir by the Kings Advocat, and *Gilmor*, the Executor Per *Nicolson*. *Hay* Clerk.

Grier of *Barargе* contra L. *Closburn*, *January* 20. 1637.

Grier of *Barargе* having Charged the Laird of *Closburn* to receive him in the Lands of upon a Sentence of Adjudication against his Debitor, *viz.* the Chargers own Brother, who Held the saids Lands of *Closburn*, as his Superior; And the Superior Suspending, that he ought to have a years Duty, as in Compryfings. The *Lords* Found the Letters orderly proceeded, without respect to this Reason, for they Found that the Act of Parliament, which was a Warrand to the Superior to take a years Duty from the Compryser, before he could be compelled to Enter him, could not be extended to Adjudication, in respect of the Act of Parliament, which is the ground of Adjudication, and which is subjoyned to the Act anent Compryfings immediatly, done both in one Parliament 1621. beats no such Warrand, and the *Lords* could not inlarge the Act without a Warrand, albeit they Found there was alike reason of equity for the Adjudication as for Compryfings, and that the Superior was alike prejudged in the one, as in the other, by the change of his Vassal against his will, which the Superior Alledged that by no Law or Reason he ought to do against his own will, without satisfaction therefore, which the *Lords* could not regard, for the Reason foresaid, *viz.*, that there was no Act to warrand the same. Actor. *Max-wel.* Alter. *Scot* Clerk. *Vid. June* 21. 1636. betwixt the same parties.

Veitch contra *Horsburgh*, *January* 31. 1637.

BY a Contract betwixt one *Horsburgh* and the Relict of *Veitch* of *Dawick*, the Lands of were set to her in Tack, for the Duty therein contained, for the payment of the which Duty, she being Conveened for payment of divers years posseſt by her, and the said Contract being Subscribed by two Nottars for her, and produced for the ground of the Pursuit; She Alledged the Contract to be null, and not to be obligator against her, seing it bears only *to be Subscribed by two Nottars, before four Witnesses*, which although it be lawful by Act of Parliament, where the Party cannot Write, yet ought not to be authorized in this case, where the Party can Write her self, as she can do, and as ever has been in use to be done by her in all matters, which had necessity of her Subscription; for she was very skill'd in Writing, and she Alledged that it was a preparative of an evil example, to bind her by the Deed of Nottars, who might wrong her against her own will, & to omit the Right and ordinary Means, which was by her own proper hand Writ and Subscription. The *Lords* Repelled the Alledgance, and Sustained the Contract; for it might be that the Party, although she could Write, might have affirmed to the Nottars, that she could not Write, or might possibly be at that time in some Distemper or Sickness, or might have had some impediment in her hand, which justly might have hindred her self to Subscribe, or some such other casual accident, which letted her then to Write; So that the *Lords* Found, the Subscribing of a Writ by a Party, by two Nottars, before four Witnesses, albeit for a Party who could Writ, was not a ground to take away the Contract, the same being truly done by the Nottars, the Writ never being quarrelled by the Party upon falsit, nor denyed by her; And the *Lords* Found it not necessary, that the Pursuer should be urged to refer to the Defenders Oath, that she gave Command to the Nottars to Subscribe the Contract for her, it not being impunged by her upon that ground, as said is; nor to alledge, or prove any of the impediments foresaids, which might excuse her not Subscription. Actor. *Burnet* & Alter. *Craig*. *Gibson* Clerk.

Hume contra *Hepburn*, *February* 14. 1637.

IN a Double Poynding, umquhile *George Hume* and *Margaret Hepburn* his Spouse, Sets a Tack of the Lands of to his Tennent, for pay-

ment of certain Bolls of Victual yearly, during the years of the Tack, which Tack being Set by the Husband with consent of his Wife, and Subscribed by her, albeit she had no Right to the Lands, neither then nor thereafter, the Tacksman is obliged to pay the Duty yearly, during the years of the Tack, *to the longest liver of them two, and thereafter to their Heirs and Assigneys*; The Husband dying before the expyring of the years of the Tack, and this Duty being thereafter in a Double-poynding questioned, if it pertained to the Wife after her Husbands Decease, in respect of the Conception foresaid of the words of the Tack, or to the Son of the Marriage, Heir to his Father, who Alledged the same to be due to him, and not to his Mother: for albeit she had Subscribed the Tack, and that the Duty was obliged to be payed to the Husband and her, and the longest liver of them two, during the space of the Tack, and thereafter to their Heirs, yet that Conception ought not to prejudge him, seing she had never Right to the Lands; *And* albeit she had Subscribed that Tack, yet that ought not to be respected, seing the ignorance of Tennents, who are in Custom usually to take the Wifes Consent to such Tacks of Lands Set by their Husbands, for the Tennents either Security or Ignorance, who will not Contract otherwayes, ought not to prejudge the Heir; and that Conception to pay to the longest liver of them two, cannot give her Right, who otherwayes had no Right to the Lands, and ought to be understood only to be meaned, and to have effect, that it should be payed to them, during their lifetimes together; specially seing the Relict his Mother is sufficiently and well provided to a Liferent of 1700 merks, attour and beside this Tack-duty controverted. The *Lords* not the less preferred the Relict, in respect of the Conception of the Tack, whereby the Duty was ordained to be payed to her Husband and her yearly, during the space of the Tack, and to the longest liver of them; For the *Lords* Found, that the Clause should worke something, & it could worke nothing, if it should receive the Construction alledged by the Son, *viz.* that it should be understood only during their lifetimes together; for as the Husband might have appointed the Tack-duty to have been payed to a stranger, so he might have agreed, that it should be payed to his Wife, and so the Relict was preferred, notwithstanding of her Provision, beside the Tack-duty. The Relict *per Mowat. Craig* for the Son. *Gibson* Clerk. *Vid. Nov.* 28. 1635. L. *Moristoun. February* 18. 1637. *Mungal. March* 15. 1639. *Hamilton.*

Lawder contra Goodwife of *White-kirk*, *February* 15. 1637.

James Howie having made the Goodwife of *White-kirk* Assigney to the Sum of 300 merks, which he had upon a Tenement of Land in *Northberwick*, pertaining to *John Lawder*, which Tenement the said *John Lawder* thereafter Dispones to *John Hepburn* of *East-Craig*, who uses Redemption, and Configns the 300 Merks, which the said *James Howie* had thereupon Assigned, as said is, to the Goodwife of *White-kirk*; the said *John Lawder* Arrests that 300 Merks Consigned, and Pursues the same to be made forthcoming to him, for satisfaction of 100 pounds, which he acclaimed, as being made Assigney *pro tanto* by the said *James Howie*, wherein the Goodwife claiming preference for the whole 300 merks, by vertue of her Assignation, which she Alledged to be prior to *John Lawder's* Assignation, in so far as *John Lawder's* Assignation, albeit it was made upon that same day, wherein her Assignation was; yet the same bore, and made mention in the Body thereof, that *he had Assigned that Sum of before to her, and willed that her Assignation should be effectual for the one half, and his Assignation for the other half of the Sum*, which he could not do, being Denuded of before in her favours, and so confessed in his own Assignation, which was as sufficient as an Intimation *quoad eum*, who so knew the same; And *John Lawder* Alledging, that his Assignation ought to take effect, albeit of the Tenor foresaid, because the Goodwife of *Whitekirk* by her Back-Bond, at that same time of

of the acquiring of the said Assignation by her, obliged her to make Compt, Reckoning, and payment to the said *James Howie*, at his home-coming from *London*, whensoever he then pleased: and he having Declared his Will by this Assignation, made of the half of the Sum to him, it ought to be Found sufficient; and this Will he might lawfully make, and effectually, in respect of the Back-Bond, which evidently Declared, that the Assignation made to her, should be respected only as *Donatio mortis causa*, which was changeable by the Maker, and changed by him, as said is. The *Lords* preferred the first Assigney for the whole Sum, in respect that the Assignation made to her was pure and simple, and was related to be *Lawders* own Assignation, which could not therefore be miskened by him; and the said first *Assignation* being *simplex Donatio*, could not be Revocked by the Cedent thereafter, notwithstanding of the Back-Bond, given to him by the Assigney, which the *Lords* Found, made not the Assignation to be of the nature of *Donatio mortis causa*; and which Back-Bond being of the Tenor, *That she should Compt and Reckon, and pay to the Cedent at his Home-coming from* London, and that he Died before he came Home, the said Back-Bond being Restricted to that one Condition, the same was Found could not receive any further Extention, than as she had Bound her self by her said Back-Bond, so what he had done before his Home-coming, ought not to derogat to the said Assignation, for the condition of her Compting and Paying, being referred to his Home-coming, and he never coming Home, that behoved to be esteemed as a Condition, that if he come not home, she was not holden to Compt; for in Law *dies incertus pro conditione est*, & therefore she was preferred *in totum*. Actor. *Sibbald*. Alter. *Forbes*. *Vid. July* 21. 1636. *King. November* 28. 1635. L. *Moriston. February* 18. 1637. *Mungal*, where, a Bond to pay a Sum to the Husband and Wife, and their Heirs, gave the Wife no more Right than she would have had, albeit her Name had not been insert therein, and no mention made of her, or her Heirs *ut infra hic*.

Mungal contra *Steil*, *February* 18. 1637.

John Steil being obliged by his Bond to pay to umquhile *Mungal*, and one *Steil* his Spouse, and to their Heirs, *a Sum of Money*, (this was the Tenor of the Bond) and it bore not, *to be payed to the longest liver of them two, nor to the Heirs gotten betwixt them*, nor no word of the Husbands Heirs, nor no Substitution contained in the Bond, but only proporting Payment as said is, to the Husband, and his said Spouse, and their Heirs; the Husband dying without Bairns, and his Sisters being Confirmed Executors, and Charging for payment of this Sum, the Relict Compeared & Alledged, that she ought to have her Liferent of the whole Sum, in respect of the Tenor foresaid of the Bond, appointing payment to be made to her Husband, and her, & their Heirs, which words must worke something, and cannot be thought to be unusefully adjected: Likeas she behoved to have Right to the equal half of the principal Sum, to be Disponed upon at her pleasure, in respect by the Laws of the Countrey, she being Relict, and there being no Bairns procreat betwixt her and her Husband, as Relict she has Right to the half of that Sum, the same being moveable, and the other Partys contending, that seing in the same Bond, the Husband had appointed another Sum, owing by the same Debitor to him, to pertain after his Decease to his said Spouse, and which was acknowledged properly to pertain to her by her Husbands said Gift; therefore that the same ought to be Found to appertain to her, for satisfaction of any other of the Sums belonging to her Husband, and that should be found to agree with his Intention: For the Truth was, for the price of certain Lands sold by umquhile *Mungal* the Husband to *John Steil*, who became obliged to pay the said price, which extended to 2900 merks, the said *Mungal* took the said *John Steil* obliged to pay 900 merks thereof to his Wife, who was Sister

to the said *John*, after his own Decease, and other 900 merks he Disponed to *John Steils* self, after his own Decease, and the rest of the whole Sum, *viz.* 1100 merks, which was the Sum now controverted, the said *John Steil* was by the said Bond obliged to pay it to the Husband and his Wife, and their Heirs; In respect of the which Destination, the Sisters of the Defunct his Executors Alledged, that it appeared thereby that the Husbands intention was, that his Wife should have no more of the whole Sum contained in the Bond, but only the 900 merks, which he had Disponed to her after his own Decease: The *Lords* Found, that by vertue of the Clause foresaid, whereby the Debitor was obliged to pay to the Man and Wife, and their Heirs, the foresaid Sum, the Relict could not claim Right to her Liferent of that Sum; but Found, that as Relict she had Right to the half of that 1100 merks controverted, and that the said equal half properly pertained to her, there being no Bairns procreat betwixt them; from the which half, the *Lords* Found, the Relict was not excluded by that Donation to her by her Husband of the 900 merks, contained in the same Bond, seing he had expressed no such intention in the Bond, to exclude her therefrom, for there was no such Clause therein, that he had given it in satisfaction of all, which she might claim through his Decease, nor any word which might seem to import that construction; so that seing it was due to her in Law, The *Lords* would not Seclude her from the same, whatsoever the Husband did to her beside, as that Bond bore. Actor. *Gilmore*. Alter. *Craig*. *Hay* Clerk. *Vid.* 15. *February* 1637 *Lawder. Feb.* 14. 1637. *Hume.* & *March* 11. 1637. This Decision was that day changed, and the Relict was Found to have no part of the 1100 merks questioned, seing by a prior Bond of the Husbands, he had shown once that that was his Will.

Muir of *Annistoun* contra *Calder*, *February* 22. 1637.

John Muir of *Annistoun* Pursuing Registration of a Bond against *Janet Calder*, as she who behaved her self as Heir to the Granter of the Bond, in so far as she had Served and Retoured her self Heir to him, by which Retour she had behaved her self as Heir: And the Defender Alledging, that if the Pursuer Insisted against her, as Heir Served and Retoured, she was content that Sentence should pass against her *eo nomine*: But where he insisted against her, as behaving her self as Heir *hoc medio*, seing she had Retoured her self Heir to him, that cannot be Found lawful, in respect the Pursuer will not acknowledge the Retour to be lawful, but quarrels the same, and it being so quarrelled, and Alledged by the Pursuer to be unlawful, no reason that thereby she should be Found to behave her self as Heir, The *Lords* Found, in respect that the Pursuer insisted not against the Defender as Heir Retoured (which he might prove by the Retour produced) but that thereby he would insist against her, as behaving her self as Heir, therefore they Found that they would not Sustain Process against her *eo nomine*, upon that Member and Alternative, without prejudice to him to insist against her as Heir by the Retour produced, wherein he might protest, that by the said Insisting and Production of the Retour, he did not approve the lawfulness thereof, but that he might be heard to quarrel the same upon any ground of Nullity, or other thing competent to him in Law against the same. Actor. *Nicolson*. Alter. *Gibson* Clerk.

Lighton contra L. *Kinaber*, *Feb.* 23. 1637.

Old *Kinaber* the Goodsir having given a Bond to one *Grahame* in *Monross*, to pay certain Barrels of Salmond, whereto *Grahame* having made this *Lighton* Pursuer Assigney, who Pursuing this old L. *Kinaber* now living, and his Son as Successor *titulolucrativo post contractum debitum* to the Granter of the Bond, who was Father to this old *Kinaber*, and Goodsir to his Son, now Defenders, for Registration of the Bond: And the Defenders Alledging, that they could

could not be conveened as Succeſſors, *titulo lucrativo poſt contractum debitum*, in the Lands and Barony of *Kinaber*, which were the Lands whereupon the Purſuer had condeſcended that they had ſucceeded, becauſe by a Minut of Contract, made before the Contracting of this Debt Libelled, and by a Decreet Arbitral following on the Minut, and whereupon Inhibition was Served againſt old *Kinaber*; and by a poſterior Contract, enlarged upon the ſaid Contract and Minute; and for fulfilling thereof, all which (*viz.* Minute, Decreet Arbitral, Inhibition, and Extended Contract) did preceed the date of this Obligation Libelled; In which Writs the Goodſir was obliged to Inſeft his Son, (now old Laird of *Kinaber*) in Liferent, and his Oye the other Defender in Fee in the ſaids Lands of *Kinaber*; In which Contract there is contained a Procuratory of Reſignation, in reſpect of which Procuratory and Writs, all preceeding this Bond Libelled, and depending upon a preceeding onerous Cauſe of a Minut of a Contract of Marriage, and whereupon Inhibition was Served, as ſaid is; Albeit the Seaſin, which followed after the ſaid Procuratory and Writs be after the date of the Bond Libelled; yet thereby, *viz.* by the poſterior Seaſin, he cannot be found Succeſſor *titulo lucrativo*, the ſaid Seaſin depending upon a preceeding Cauſe, neceſſar and onerous, and the ſaid Seaſin muſt be drawn back *ad ſuam cauſam*, which proceeded, as ſaid is. The *Lords* Found this Exception Relevant to purge that Member, whereby the Defenders were Conveened, as Succeſſors *titulo lucrativo*, and had no reſpect to that, whereby the Purſuer Replyed, that the Seaſin was after his Debt, and conſequently that they were thereby Succeſſors; for nothing could Eleid the ſame but a preceeding Seaſin before the Debt, which not being taken till after the Debt, as a Seaſin before only, would have purged this Member, ſo the Seaſin after the Debt muſt make him Succeſſor, the other Rights being only perſonal, and the Writs a year before the Debt, and the Seaſin after the Debt. And it being further Alledged, that the conſtitution of a Liferent by the Goodſir to his own Son, Father to the young Laird, could not make him Conveenable as Succeſſor, ſeing that Right was tranſmiſſable by Aſſignation, and needed no Seaſin, and conſequently could not prove him Succeſſor. The *Lords* Repelled this Exception, in reſpect by the Writs produced by the Excipients ſelf, to inſtruct the foreſaid other Exception, the Goodſir had not Diſponed his Liferent to his Son that way, in manner of Aſſignation, but in a Body of a Writ, obliged himſelf to Inſeft his Son in Liferent, and his Oye in Fee of the ſaids Lands, and had Subſcribed a Procuratory of Reſignation of that Tenor, whereupon Infeftment followed, as ſaid is; which Writ containing the Liferent to himſelf, and the Fee to his Son, ſo conſtitute by Infeftment, made the Father to be repute alſo Succeſſor, who had contented himſelf with the Liferent, having acquired the Heretable Fee to his own Son, Oye to the Goodſir, Granter of the Bond, as ſaid is; but this was Eleided by the foreſaid other Exception, admitted as ſaid is. This Cauſe was thereafter Diſpute over again, and ſtands yet in Suſpence Undecided. *Actor. Nicolſon, Baird & Alexander Nicolſon.* Alter. *Advocatus & Stuart. Scot* Clerk. *Vid.* 14 *January* 1637. *Courtie.* 23 *March* 1636. L. *Kinaber.* 21 *May* 1634. *Ore.* 8 *July* 1625. *Gray.* 29 *January* 1639. La. *Smeitoun.*

Eliot contra E. *Buccleugh*, *Feb.* 24. 1637.

CAution being found by the Earl of *Buccleugh*, to deſiſt and ceaſe *ſimpliciter*, in obedience of a Decreet of Removing, recovered againſt him by the ſaid *Robert Eliot*, under the pain of 50 pounds *toties quoties*, and thereupon the Charge upon the Decreet being Suſpended ſimply thereafter, the ſaid *Robert Eliot*, upon the Extract of the ſaid Decreet Suſpending the Letters, whereupon Caution was found, Charges the ſaid Earl by Letters of Horning, raiſed upon the ſaid Act of Cautionry, to pay the ſaid Sum; which being Suſpend-

ed as an unlawful Charge, so summarly to use Horning, for payment of that Sum, except that there had been ordinary Actions Intented; first, to have heard it been tryed, that the Defender had contraveened the Act of Caution, and so had thereby incurred the pain; which not being done, such Charges could not be sustained, to Charge by Letters of Horning first and then to try, which in effect is to raise Execution before the Debt be constitute, for the which Execution is used; for if upon thir Letters of Horning he had been Denounced, that Horning could not have been sustained, to make his Escheat fall, and consequently the Letters & Charges could not been so summarly Execute: The *Lords*, although they Found, that in Form, and by rigor of Law, no such Charges of Horning could be direct, except it had been first tryed in an ordinary Pursuit, that the Party had Contraveened (which they Found ought to have preceeded) yet in respect of the distress of this Party, who was a mean Gentle-man, and heavily prejudged by sundry occasions, which had made his Estate weak, They Found, that they would sustain this Charge as a Pursuit, for trying of the Contravention; for the Party offered in this place to prove, that the Earl possest the Land continually since the Caution was found, and therefore they Assigned to the Earls Procurators a competent day to answer to this Contravention, which they Found, they would try and discuss in this place, without any further Pursuit to be Intented thereanent. Actor. *Nicolson* & *Scot.* Alter. *Mowat* & *Hart.* *Gibson* Clerk.

Pilmuir contra L. *Gagie*, *Eodem die.*

ONe being at the Horn, who was Debitor to *Pilmuir* his Creditor, for satisfying of which Debt, the Creditor Arrests some Moneys owing to his said Debitor; which Arrestment was made after the Horning, but before the Escheat of the Rebel was Gifted by the *E. Angus*, Lord of the Regality, within which the Rebel dwelt; and the Laird of *Gagie* acquiring the Gift of Escheat from the Earl after the Arrestment, and contending that he should be answered as Donatar, because he Alledged, that his Gift should be drawn back *ad suam causam*, and the Rebels Goods *hoc ipso momento*, that he was Rebel, pertained to the Fisk, who pays none of the Rebels Debts: And albeit it was not declared the time of the Arrestment, yet that could not be respected, seing the Declarator finds that the Rebel was then at the Horn, and that all the Goods and Gear pertaining to him at that time of his Denounciation, pertained to the Lord of the Regality, *Ergo* there was no place to any, either Creditor or other to claim any of that Rebels Goods thereafter, which by the Rebellion pertained to the Fisk. The *Lords* preferred the Arrestment made before the Gift, albeit after the Horning, to the Donatar, who had acquired the Escheat after the Arrestment; which Gift so acquired, the *Lords* Found, did not derogat to the preceeding Diligence done by the Creditor, Arresting as said is. *Vid.* 3 *Feb.* 1635. *Innes*, and the Cases there. 19 *Feb.* 1635. *Cunninghame.* 6 *Decemb.* 1638. *Cochran.*

Hepburn contra *Barclay*, *February* 25. 1637.

ONe *Hepburn* being Creditor to *Barclay*, and *Barclay* being Bankrupt, the said Creditor Pursues *Barclay's* Mother, as haver of certain Bonds and Writs pertaining to her Son, for production thereof, that he may know and consider, what Execution he might lawfully seek thereupon, after sight thereof, in which Lybel there was no special Writs particularly Libelled, being unknown to him, whereby he could Compryse or Arrest the same; In which Process it being questioned, if such a general Summons could be Sustained, or if the Defender could in Law be holden to answer to such a Libel, or to produce for founding of any, either Action or Execution to the Creditor. The *Lords* Sustained this Action, in respect that the Pursuer had a probable and excusable ignorance of his

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Debitors Writs, as an appearand Heir might call for production of his Predecessors Writs, that he might Advise, if he could Enter Heir or not to his Predecessor. *Gibson* Clerk. *Vid. March* 2. 1637. betwixt these Parties. *July* 19. 1643. L. *Samuelstouns* Daughters.

Rob contra *French*, *Eodem die.*

UMquhile *Thomas French*, being Servitor to the King's Majesty in *England*, makes his Testament in *Scotland*, and takes it with him to *England*, where he dies, and leaves to the Pursuer, called *John Rob*, and to some other Pursuers, certain Legacies, and this Testament being Confirmed in the Prerogative Court of *Canterburry*, and *Robert French* Clerk of *Kiraldie*, his Executor nominat by him, being Confirmed there his Executor, but no Inventary given up, nor contained therein, upon this Testament so Confirmed in *England*, the Legatars Pursuing the said Executor for payment, The *Lords* would not Sustain Process upon this Testament Confirmed in *England*, until the time the Legatars should Confirm a Testament in *Scotland*, seing the Executor was here Compearing, and Renuncing to be Executor. Actor. Alter. *Sibbald. Vid. July* 16. 1636. *Sinclar.*

Duncan contra *Frazer*, *Eodem die.*

ONe *Frazer* having Wodset his Lands to one *Duncan*, Redeemable upon 5000 merks, and Alledging that at the time of the Wodset, *Duncan* promised that what the Prices of the Victual, according to the Feirs of the year, extended to further than would pay the Ordinar Profits of his Sum, he should repay the same, according whereto he Alledged he had received payment two years together, after the Wodset, and that sensine there was eight years owing to him, Pursues for the payment of the superplus, and referrs the Promise to the Parties Oath, who was holden as Confest and Decerned; which Decreet being Suspended, and the Party offering to give his Oath, excusing his Contumacy by Simplicity and Ignorance, and that he came within a day or two after the Sentence, to have given his Oath, but was not heard, because the Sentence was Extracted before the *Lords*, albeit it was not verified, that he came within so few dayes after the Sentence, and without respect to this, Reponed him to the giving of his Oath, but Ordained him to pay 100 merks for the Parties Expenses, in purchasing his Decreet; and the *Lords* would not sustain the Decreet, by the Parties offering to prove the Verity of the Promise by Witnesses, which the *Lords* Found not probable by Witnesses, tending in effect to take away his Wodset by Witnesses, and to pay his Principal Sum by this Cautelous Action. Actor. *Baird.* Alter. *Mowat*, *Gibson* Clerk.

Weyms contra Creditors, *February ultimo*, 1637.

UMquhile Mr *John Weyms* Minister, and his Son *John Weyms* as Cautioner for him, being obliged to diverse Persons in certain Sums of Money, the Son Conveened all these Creditors, to hear and see him Restored *super capite Minoritatis & Lasionis*; And some of the Creditors Defending, Alledged, that the Pursuer could not quarrel the Bonds given to them, because at the time of the Subscribing of the Bonds, the said Pursuer confest and affirmed himself to be Major, & as the Law provides, that Minors should be reponed, so the Law provides, that Minors should not deceive Majors, *quia jura minoribus deceptis non decipientibus subveniunt.* The *Lords* Found this Exception Relevant for these Bonds, seing the Pursuer Replyed upon no Fraud nor Circumvention upon the Defenders part, whereby they induced him to make that Confession; But Found the Alledgance ought only to be proven by Oath of the Pursuer, or by Writ, and not by Witnesses: And it being Alledged by some other Defenders for their Bonds, that at the Subscribing thereof, the Pursuer Swore, that he was then

Major, this was also Found Relevant to Sustain these Bonds to be sicklike Proven *scripto vel juramento*, and no otherways: And other Defenders Alledging, that the Pursuer promised never to Revock these Bonds granted to them. This Alledgance was Repelled, for as he had wronged himself in the Act of Subscribing these Bonds, against which the Law Restored him; so of like Reason he ought to be Restored against that naked Promise, neither being judicially made, nor Sworn in Judgment, nor out of Judgment. *Item*, Some others of the Defenders Alledging, that their Bonds were granted upon Moneys furnished to the Pursuer *quæ erant in rem ejus versæ*, in so far as they offered to prove, that they were given to his Merchant from whom he bought Stuffs, which were imployed to be Brydel Clothes to him, and which were worn by him at his Marriage, and keeped thereafter in his Possession. This Alledgance was also Found Relevant, to Eleid the Restitution craved against these Bonds. And lastly, some others of the Creditors Alledging these Bonds were made for Clothes, Meat and Drink, necessarly furnished by their Creditors to this Pursuers Brethren and Sisters, and which they did at his special Command and Direction, and without which Direction, they would never have made this Furnishing. This Alledgance was Repelled, because the Direction, being given, (if any had been, which was not granted) was given while his Father lived, and the said Furnishing also made during his lifetime, and the Pursuer not being holden in Law to furnish them, he cannot be conveenable therefore, and notwithstanding of any Alledged Direction, The *Lords* Found he ought to be restored. Actor. *Stuart*. Alter. *Gilmore* & *Craig*. *Gibson* Clerk. *Vid. Fannary* 14. 1637. *Courtie*.

Hume contra *Craw*, *Eodem die*.

ONe *Craw* having Set a Tack of his Lands of to another *Craw* during his lifetime, not bearing, *to be Set to his Heirs and Assigneys*, nor yet bearing any Clause, *excluding Assigneys*; which Tack being Assigned by the Tacksman to one *Hume*, who Pursuing the Setter of the Tack, and another called *Craw* (who had Acquired after the Tack, and after Inhibition Served thereon, an Heretable Right of the Lands from *Craw* Setter of the Tack, and by vertue whereof they retained among them the Possession of the Lands) for payment of the Mails and Duties of the Lands, as was provided by the Tack, if the Tacksman was not Entred thereto; And it being Alledged, that this Tack was personally Set to the Tacksman, and so could not be Transmitted in an Assigney, there being no power in the Tack to make Assigneys, The *Lords* Repelled this Alledgance, and Found that this Tack being Set to the Tacksman during his lifetime, he might lawfully and valiably make an Assigney thereto, and so Sustained the Assignation, seing the Cedent was on life. Actor. *Craig*. Alter: *Mowat* & *Hog*. *Gibson* Clerk.

Lockhart contra *Simpson*, *Eodem die*.

BY Contract of Marriage betwixt umquhile *Helen Johnston* and *Laurence Simpson* her Son, taking burden for *Margaret Simpson*, Daughter to the said *Helen*, and Sister to the said *Laurence* on the one part, and *Archibald Hamilton* on the other part, the said *Helen* and *Laurence* are bound to pay 2000 merks to the said *Archibald* in Tocher-good, to which Sum *Jean Hamilton* only Daughter of that Marriage, having made *Steven Lockhart* Assigney, with consent of the said *Archibald* her Father, which Assignation is Subscribed by the Father, and consented to by him, whereupon the Assigney Pursuing the Heir of *Laurence Simson* for payment, It was Alledged, that the Contract was null, being only Subscribed for the Mother and her Daughter by one Nottar, against the Tenor of the *Act of Parliament*, 16. *Parl*. 1579. This Alledgance was Repelled, because it was a Contract of Marriage, whereupon Marriage had followed, and that it was Subscribed

scribed by *Laurence Simsons* own hand, whose Son is conveened: And it being further Alledged, that this Assignation ought not to be Sustained, being made only by the Daughter, with consent of the Father, to whom the Right of the Sum did only justly belong, & who cannot be Denuded of his Right, so established in his person, except he had been formally Denuded by an Assignation thereof, principally made by himself; so that this Assignation, which is only a naked Consent, cannot be found *habilis modus* to Transmit the full Right in the Assigney, specially where the Father is now dead. This Alledgance was Repelled, seing no Party having Interest to propone this Alledgance, did oppone the same, and it was not competent to the Debitor to propone it; But the *Lords* Ordained the Pursuer to find Caution to Warrand the Defender at all hands, who might pretend Interest to the Sum Lybelled.

Mr. *Arch. Moncreiff* and *Mkenzie* contra *Ross*, *March* 1. 1637.

MEntion is made of this Cause *Jan.* 29. 1635. where it being *Alledged*, that these Sub-Vassals who were Conveened for payment of the Mails and Duties of these Lands, could not be further Conveened but for the Feu-Duty, contained in their Infeftments, wherein they were obliged to the Laird of *Balnagoun*, the King's immediat Vassal, and their Superior, and which they had payed to him these many years by-past; so that for bygones their Infeftments and Possession had *bona fide*, ought to liberat them from all Pursuits, for any greater Duty acclaimed for these Lands; specially seing neither the Sentence, which is the ground of the Compryfing, nor the Compryfing it self, are Deduced or given against them, nor they ever called thereto. This *Alledgance* was Found Relevant, for all the years preceeding the Citation, by vertue of this Summons; and this same Alledgance being proponed by the Defenders, who *Alledged*, that they ought to be liberat from this *Pursuit* for the whole Mails and Duties acclaimed, except the said Feu-Duty contained in their Infeftments, as said is, because they ought to bruik continually, for payment of the said Feu-Duty, ay and while they be Interrupted by a Warning to Remove from the Lands. And where it was *Replyed*, that the Citation by this Summons, was a sufficient Interruption to make them lyable for the Duties of the Lands ay sensine. He Answers, that that ought not to be Found a lawful Interruption, no more than if he had been Possessor, after an expired Tack, *per tacitam Relocationem*, *quo casu* a *Pursuit* for the Mails and *Duties* of the Lands would ever have been excluded for any greater quantity, except for the old Duty accustomed to be payed, unto the time Warning had been made to Remove, and such a Summons would never have been found a lawful Interruption; far less in this Case ought this Summons to be sustained for an Intimation against them, who had Heretable Rights, for a Feu-Duty, which they have ever been in use only to pay, and which ought to maintain them, without Payment of any greater Duty, ay and while they be Warned: for there is nothing before Warning, that can constitute them *Debitors* of a greater Duty, seing they cannot be found in a worse Case by their Heretable *Rights*, than if they had bruiked it without any Right, *per tacitam Relocationem*, as said is, specially where there is neither Sentence against them, nor Compriſing from them. This *Alledgance* was Repelled for all years, since the Citation in this *Pursuit*, which was found a sufficient Interruption, and no necessity was found of a Warning. *Further* it was Alledged, that this Compriſing, without either Infeftment, or Seasin, or Diligence to obtain Seasin, ought not to produce this Action against them for Mails and Duties. This *Alledgance* was also Repelled. Attour it was Alledged, that this Pursuer had received from the other Vassals, als many Feu-*Duties*, as would pay the Blensch Duties of the by-gone years, in so far as the Legal *Reversion* was expired, of certain of

the Lands Compriſed, againſt diverſe of theſe Feuars, by the which Expiring the Property pertained to the Penſioner, which Property was of a far greater worth, by a Triple or Quadruple more than all the bygone Duties, for which the Penſioner had Deduced the Compriſing. This Alledgance was alſo Repelled, in reſpect the Purſuers Procurators were content, that they being payed of all the bygones of the ſaid Penſion, that the Compriſing ſhould expire, and be Found as Redeemed; Likeas all theſe Alledgances were ſpecially Repelled, becauſe this Purſuit was Deduced by the King's Right, for payment of the Feu, or Blenſch Duties, adebted by his own immediat Vaſſals, who could not make any ſubaltern Right, which could prejudge the King, or his Penſioner, to Poynd or Compriſe the Lands for the ſaid Feu-Duty, and which he might ſeek from his own Vaſſal, without neceſſity to take notice of any Right flowing from him to his Sub-Vaſſals. Actor. *Nicolſon* & *Mowat*. Alter. *Advocatus*, *Stuart* & *Gibſon*. *Hay* Clerk. *Vid. Jan:* 29. 1635. betwixt theſe Parties. & *March* 15. 1637. *Guthrie*. *Item Vid.* for this Part anent a Compriſing without Infeſtment, *&c. March* 29. 1636. Earl *Galloway*.

Smith contra *Hepburn* and *Barclay*, *March* 2. 1637.

ONe *Barclay* having made *Geills Smith* Aſſigney to a Bond of Money Adebted to him, after which Aſſignation, one *Hepburn* Creditor to *Barclay*, having Denounced this Bond to be Compriſed; after which *D*enounciation the prior Aſſigney intents Summons againſt the Debitor of the Sum Aſſigned for the payment thereof to him as Aſſigney, which he Alledged to be a ſufficient Intimation, and whereby he craved Preference to the Compriſer, who although he had Denounced, before his ſaid Intimation, yet ſeing he was Aſſigned long before, and had Summoned the Debitor aſſigned, which was his Intimation, before the Compleating of the Compriſing, his prior Intimation, before the Compriſing, and prior Aſſignation, before the Denounciation ought to give him Preference, even as if one had acquired an Heretable Diſpoſition of his Debitors Lands, if any other Creditor had thereafter Denounced theſe Lands to be Compriſed, before he had perfected Charter and Seaſin upon that Prior Diſpoſition, the ſaid Denounciation and Compriſing following thereon, would never have preferred him to the ſaid prior Diſpoſition, and Charter and Seaſin perfected thereafter. The *Lords* Preferred the *P*rior Aſſigney, being a lawful Creditor, albeit a Conjunct Perſon, to the ſaid Poſterior Compriſer; And Found the Denounciation made by the Compriſer before the Intimation of the Aſſignation, was no Juſt Cauſe to give the Compriſer *P*reference to the Aſſigney, but ſuſtained the ſaid Aſſignation, although Intimat after the Denounciation, which *D*enounciation the *Lords* Found, did not affect the Sum to the Denouncer, nor made it to be ſo Real, But that notwithſtanding thereof, the Aſſigney might perfect his Intimation effectually thereafter; and yet an Arreſtment after Aſſignation will be preferred to that Aſſignation, if not Intimate before. *Vid. Feb.* 25. 1637. betwixt theſe Parties. & *July* 11. 1637. *Robiſon*.

Keith contra *Simſon*, *Eodem die*.

ONe *Geills Keith* being Infeft, with her Huſband in Conjunct-fie of the Lands of and after his deceaſe Purſuing *Simſon* to pay the Ordinar Duties of the Lands, Two or Three years by-paſt, ſince the time of her Husbands deceaſe; and he Alledging, that he was Heretably Infeft in the Lands by the L. *Dalgity*, who was Heretably Infeft therein by her Huſband, and by vertue whereof he had been all the years lybelled, and many other years of before *bona fide* Poſſeſſor; Therefore he ought to be Aſſoilzied from all payment of any by-gone Duties, in reſpect of his *R*ight ſtanding, which has never been interrupted

rupted by Warning, nor no other wayes. The *Lords* repelled the Exception, in respect of the Relicts Infestment of Liferent produced, and that she could not be prejudged therein, by any Disposition, flowing from her Husband, which the Pursuer had no necessity to know, or to pursue, to be Suspended, during her Lifetime, albeit the Defender had acquired his Right immediately from *Dalgity*; and Found, that the Defenders *bona fides* could not Defend him from paying of the Duties, since the Husbands decease, the Relict having done Diligence by this Pursuit, so shortly after his decease, *viz.* within two or three years, for the which the Pursuit was Sustained, for a quantity modified by the *Lords* yearly, the years lybelled, and the said Alledgance was Repelled. And it being further Alledged, that the Defender cannot be conveened for the Duties of the Lands lybelled the cropt and year which was one of the years pursued for; because the Pursuer having Warned him to Remove before the Term, he for Obedience of the Warning Removed, and left the Ground void: And the Pursuer Replying, that that was not enough, except he had come, or sent to the Pursuer, and had Renounced the Right and Possession of the Lands before Notars, and Witnesses, and had taken Instruments thereupon; otherwayes upon the Defenders Alledged naked leaving of the Ground, the Pursuer could never have been *intuto* to have entered to the Possession of the Land without danger, specially where the Defender was clothed, and clothes himself, as he does, with a Title; so that without Renouncing by Writ, she could never have been freed of danger of Ejection: This Alledgance was Found Relevant, notwithstanding of the Answer. And the *Lords* Found no necessity, that the Defender should have Renounced his Possession to the Pursuer; But Found it sufficient to Alledge and Prove by Witnesses, that for obedience to the Warning, he left the Ground waist. *Actor. Dunlop.* Alter. *Hay. Vid. March* 21. 1637. La. *Manderston. January* 26. 1636. La. *Borthwick. Vid.* For this Part. *November* 26. 1628. *Bruce.*

L. *Corsbie* contra *Hume, March* 3. 1637.

THe umqhile L. *Corsbie* having Intented and Pursued Removing against *Hume*, and he dying *pendente lite*, his Son being served Heir to him, craving this *Action* to be Transferred in him *Activè*, and it being *Alledged*, that he could not seek Transferring in himself, by vertue of this Title produced, whereby he was only Retoured General Heir, seing none could seek this Transferring, nor prosecut that Removing, but only he who was Infeft particularly in the Lands lybelled; for without a special Seasin of these Lands he could not desire any to be Removed therefrom, and consequently none without such a special Seasin, which might be a ground to insist in that *Removing*, could seek Transferring thereof; the *Lords* Repelled this *Alledgance*, against the Transferring, and reserved this to be proponed and Discust, when ever this Pursuer should insist in the Process of Removing, which I think a little uncouth, that a Transferring of a Process of Removing should be granted to one not Seased. *Actor. Craig. Alter. Belshes. Gibson* Clerk.

Vernock contra *Hamilton, March* 7. 1637.

ONe *Katharin Vernock*, Sister and *Appearand* Heir to *Vernock* her Brother, Pursues one *Hamilton* for Production and Reduction of a Disposition of Land made by her said Brother, he being Minor, and albeit done with consent of his Curators, yet being done to his Enorm Hurt and Lesion, and in his Minority, she desired the same to be Reduced; and likewise desired another Disposition, made by her self to the same Defender of the same Land, to be *Reduced super eodem Capite, viz.* That she was Minor, and Enormly Hurt; And it being *Alledged*, that no Process ought to be granted in this Cause, because the Lybel bore, *That the Minors were Induced to these Alienations, by the Induce-*

ment of their Curators, and therefore no Process ought to be found in this Pursuit, while they were Cited to Defend, specially seing they were obliged in the *Alienation*, made to the Defenders, to Warrand the Land to them. The *Lords* Repelled the *Alledgance*, and *Found* no necessity to Summon the Minors Curators to any such Pursuit, seing there was nothing concluded in this Process against them; and any Clause of Circumvention done by them, which was Lybelled in this Summons, the Pursuer past from the same, and insisted only upon this *Reason* of Minority and Lesion: and the *Lords* had no respect to that part of the *Alledgance*, bearing, *That the Curators were obliged to warrand the Alienations*, for that was no cause why the Pursuer ought to be compelled to Summon them; and albeit the Minor had *Actionem Curatelæ* against them, yet that debarred her not from this Pursuit. *Actor. Craig. Alter.* *Vid. March* 5. 1630. E. *Wigton.*

Broun contra *Atchison*, *March* 9. 1637.

ONe *Gilbert Atchison* being made *Assigney* by *Isobel Marshel* to some Heretable Bonds made in her favours, and Mr. *Robert Broun* being made *Assigney* by *George Marshel*, who was Retoured Heir to the said *Isobel*, Pursues Reduction of the said *Assignation*, made by the said *Isobel* to *Gilbert Atchison*, as done *in lecto ægritudinis*. And the Defender *Alledging*, that the Pursuers *Assignation* made to him by the said Heir, was also made *in lecto ægritudinis*, and who died immediately after making thereof; and therefore seing *labor at eodem vitio*, it ought not to be *Found* a Title to Pursue this Action. The *Lords* Repelled the *Alledgance*, for as it was competent to the Excipient to quarrel the same *super hoc medio*, so they Found it could not be taken away *ope exceptionis* so summarily, but the same ought to abide Reduction. *Actor. Gilmore.*

Fuird contra *Stevenson*, *March* 13. 1637.

ONe *John Fuird* Pursuing Removing against *John Stevenson*, from an House in *Kilrenny*, who *Alledging*, that he was Infeft upon a Compriſing of that Land in *anno* 1630. and was Seased in *October* that year, and by vertue thereof had obtained Decreet against the Tennents, and continually possessed since, which should defend him in this Judgment Possessor. And the Pursuer Replying, that he had an anterior Heretable Right made to him by that person, from whom the Defender Compriſed, before the Defenders Compriſing, and which was granted to him for a preceeding just Debt, and had also thereupon obtained Decreet against the Tennent of the Land, so that he ought to be preferred, notwithstanding of the Excipients Decreet, whereby he ought not to be prejudged, who was not Warned thereto, albeit he was standing Infeft the time of the Warning. The *Lords* Found the Exception founded upon the Defenders Heretable Right, and six years Possession, Relevant in this Judgment Possessory, notwithstanding of the Reply, without prejudice to the Pursuer to Reduce upon the Reason of Anteriority of his Right, or upon any other Ground competent to him, *prout de Jure*. *Vid.* 11 *July* 1637. *Robertson* contra *Brown* for five years Possession, and 16 *March* 1637. Lo. *Johnstoun.*

Guthrie contra E. *Galloway*, *March* 15. 1637.

RIchard *Guthrie* being made Assigney by Doctor *Lindsay* and *Christian Heriot* his Spouse, to the bygones of an Annualrent of 300 merks yearly, wherein they were Infeft by *John Achanay* of *Sorbie*, and for which they had obtained Sentence, to Poynd the Ground of the Lands of *Sorbie*, which were affected with the said Annualrent, Pursues the Earl of *Galloway* and his Sons, as Heretors of the said Lands, and as they who uplifts the Maills and Duties of the said Lands from the Tennents, occupyers thereof, to make payment to him of the said Annualrent, for certain years bygone owing to them, during the which years the said Defenders were in Possession of the Duties, as said is; wherein the

the Defenders Alledging, that this *Action* ought not to be sustained for a personal Pursuit against the Defenders, who are not Authors of the Pursuers Right of the Annualrent Libelled, nor Heirs, nor Appearand Heirs to him; but the most the Pursuer can obtain by the Custom and Practick of the Countrey, is only Action and Execution against the Ground, and against the Tennents Possessors thereof, for Poynding of the Ground, and of the Tennents Goods being thereupon; and it is a Novelty to grant personal Execution against a stranger, or any who is a singular Successor: the *Lords* Repelled the Alledgance, and sustained this personal Pursuit, for payment personally against the Defenders, the Pursuer proving, that they intromitted with the Duties of the Lands, and that the quantity of their Intromission extended to as much as should satisfie yearly the Annualrent aoclaimed; for the *Lords* held the Defenders in no better case, than if naked Tennents had been personally conveened to pay this *Annualrent*, *quo casu* they would have sustained the Process; and with the like Reason it was Found, Process ought to be sustained against the Defenders: And the *Lords* declared, that they would keep this Decision thereafter in all the like Cases, whensoever any should occur. *Actor. Heriot. Alter. Stuart* & *Nicolson. Gibson* Clerk. *Vid.* 15 *July* 1629. *Hamilton* and the Cases there. 29 *January* 1635. *Hamilton* of *Broomhill*. 1 *March* 1637. *Moncrieff*.

Brown contra *Lands*, *Eodem die.*

James Brown, Son to umquhile Mr. *Nicol Brown*, being Interdicted by *Alexander Brown* his Uncle, whereupon Publication was lawfully Execute, and thereafter having given some Bonds to *James Lands* Vintner in *Leith*, one for payment of 200 pounds, and another as Cautioner for the Taverner-woman of the said *James*, for payment to him as Cautioner for her of 300 pounds. Thir Bonds were craved to be Reduced at the instance of the said *Alexander*, upon the Ground of the foresaid preceeding Interdiction, which extended as well in the Conception of the same to Moveables, as to Immoveables. The *Lords* Found the Reasons no ways Relevant, to Reduce these two Bonds Libelled, which were two Moveable Bonds; against which the *Lords* Found, that Interdictions ought not to Militat, of whatsoever Tenor they were; for the *Lords* thought, that notwithstanding thereof, the Creditors Contracting after Interdiction with the Interdyted person, might have all lawful Execution both against his Person, and his Moveable Goods, as if he had not been Interdyted, and therefore sustained the Bonds. *Gibson* Clerk. *Vid.* 11 *July* 1634. *Bruce*, and the Cases there.

Lo. *Johnstoun* contra E. *Nithisdale*, *March* 16. 1637.

THe Lo. *Johnstoun* pursuing Removing from the Lands of *Knock*, against the E. *Nithisdale*, who Alledging, that no Process ought to be granted in that Removing against him, or any others of the Defenders; because he neither was Warned, nor the Lo. *Cranstoun* his Author, nor any to represent him, albeit his said Author was Heretably Infeft in the Lands Libelled, by a publick Infeftment, Holden of the King, proceeding upon the Forfaultry of the umquhile Lo. *Maxwell* his Brother, and that the Excipient stands sicklike Infeft in the same Lands, and by vertue of their Infeftments they have been these 27 years in Possession of thir Lands Libelled, by receiving of Duty therefore yearly from the Tennents, Possessors of the Ground. And it being Replyed, that he hath Summoned by his Summons of Removing the E. of *Nithisdale*, so that there was no necessity to Warn him, and so much the rather because he was not Infeft the time of his Warning, which was Execute in *anno* 1621. Neither was there necessity to Warn any to represent his Author the Lord *Cranstoun*, because he needed not to take notice of him, nor of no other, having to do with his own

Tennents; Likeas he offered to prove, that thir Tennents Defenders were ever Tennents to him, and to his Father, and to his Fathers Author, past memory of *Man*; neither can the Defender be ever able to shew, that ever any of the Lord *Maxwels* Predecessors were Infeft in thir Lands, so that the Lord *Cranstoun's* Infestment upon the Lord *Maxwel's* Forefaultry ought not to be respected; and if it could be respected, yet he had no necessity to Warn him, because before the Warning he was denuded of his Right in favours of the Earl of *Nithsdale* the Defender, wherethrough he needed never to know him, especially seing the most and longest Possession which he could Alledge to have, by vertue of this Right of the Lord *Cranstoun*, which was in *anno* 1610. And whereof by Contract he was denuded in *anno* 1617. is thereby only for the space of seven years, which is not of that sufficiency, that it laid any necessity on him to Warn the Lord *Cranstoun's* Heir; and the Earl of *Nithisdale* was not Infeft upon that Contract made in his favours, while after his Warning, *viz.* in *anno* 1621. so that he could not Warn him; and what-ever Possession he had since the Warning and Intenting of this Cause, it cannot be repute to have the force of a Possessory Judgment, but must be esteemed vicious and violent; Notwithstanding of the which Reply, the *Lords* Found the Exception upon the not Warning Relevant, albeit the Lord *Cranstoun's* Possession before the Warning was only for the space of 7 years; and albeit the Earl of *Nithisdale* was Summoned, and that he Compeared, and proponed this Exception, of not Warning of himself, or his Author, which the *Lords* Found he might propone, notwithstanding of his Compearance; and albeit the Pursuer offered to prove his retaining of the Possession, being *in libello*, and thereby craving preference to the Defender; and albeit the Defender never offered to prove, conform to the Act of Parl. 1584. that the Forefaulted Person was five years in Possession of the Lands before the Forefaulture; none of which were respected, but the Exception found Relevant *ut supra*, and necessity found that he should have been Warned. Actor. *Stuart* & *Johnstoun*. Alter. *Advocatus* & *Nicolson*. *Scot* Clerk. *Vid.* For the first point of seven years Possession 13 *March* 1637. *Fuird.*

Hume contra L. *Blaickader*, *Eodem die.*

ONe *Hume* Son to *George Hume* of *Eccles*, Pursues the Laird of *Blaickader*, to make Compt and Reckoning of the Estate, intrusted to him by his umquhile Father, for defraying of his Debts, that he might Advise therewith, and Consider if he should Enter Heir to his umquhile Father, or not, who Alledging, that this Process for Compt and Reckoning, ought not to be Sustained at the Instance of an Appearand Heir, being only proper to one Served Heir, and that it was a Novelty to Sustain it otherwayes. The *Lords* Repelled the Alledgance, and Sustained Process at the Appearand Heirs instance, for the effect foresaid. Actor. *Craig*. Alter. *Belshes*. *Gibson* Clerk. *Vid. July* 19. 1643. *Samuelstones* Daughter.

L. *Edmonston* contra *Edmonstons*, *Eodem die.*

THe Laird of *Edmonston* having a Feu of the Lands of given to himself, and to the Heirs-Male gotten of his Body, which failzying, to his eldest Heir Female without Division; The first Feuers Son Dying without Heirs-male gotten of his Body, and leaving behind him three Sisters, and having before his Decease Disponed the Heretable Right of the Lands to his two youngest Sisters, the eldest Sister as Appearand Heir of Provision, by the condition of the said Feu, Pursues Reduction of the said Right, made to the other Sisters, as done *in lecto ægritudinis*, and to her prejudice; wherein the Defenders Alledging, that this Action of Reduction cannot be Sustained at the Instance of an Appearand Heir, except she were Served and Retoured Heir of Provision to these Lands, according to the condition of the Infestment, without which were done, she can never be heard to Reduce as Appearand Heir, especially seing she cannot be general

ral Heir, being but one of three Sisters: As also, this Right is competent only to the Heir of Provision, and not to an Appearand Heir of Provision, the Condition of the Security being so conceived; And the Pursuer *Answering*, that the Process ought to be Sustained at her Instance as Appearand Heir, in respect of the great hazard she runs if she should Enter Heir; for then *eo casu* she behoved to be lyable to all the Defuncts Debts, how great soever they were, and she has but an uncertain Action wherein she may Succumb; and it were against all Conscience and Reason, that if she win not this Cause, yet she should be lyable to the Defuncts whole Debts, seing she is content, if she prevail here, to Serve her self Heir. The *Lords* Found the Alledgance Relevant, in respect of the Tenor of the Infeftment, the benefit whereof could not be acclaimed by any, but by an Heir Retoured; and Found that the Appearand Heir, specially an Appearand Heir of Provision, could not be heard to Pursue this Reduction, before she were Retoured Heir of Provision. Actor. *Johnston*. Alter. *Hay* Clerk.

Stuart contra *Stuart* and *Inglis*, *March* 17. 1637.

CAptain *Stuart* having obtained Sentence against Lieutennent Collonel *Stuart*, Decerning him to pay him some Moneys, for payment whereof having arrested in *John Inglis* Merchant Burgess of *Edinburgh* his hands, some Moneys pertaining to the Collonel, he Pursues the Collonel and the said *John Inglis*, for making of the said Moneys forthcoming; and having Cited the Collonel to this Pursuit, at the Day of Compearance he referrs the Verity of the Debt owing by *John Inglis* to the Lieutennent Collonel, to the said *John Inglis*'s Oath, & Summoned the said *John Inglis* to a Day for that effect, to which Day the Debitor to the Pursuer, *viz*, the Lieutennent Collonel was not Summoned, and it being Alledged, that no Process could be granted therefore in this Cause, because the said Lieutennent Collonel was not Summoned to that Dyet of the Process, without which had been done, the Process could not be Sustained: And the Pursuer contending in the contrary, that there was no necessity to Summon him over again to this Dyet of the Process, seing he was Summoned by the first Summons in this Cause, and there was no necessity to Summon him to this Term, seing the Debt was referred to *John Inglis*'s Oath, whom he could not hinder to Depone upon his Conscience what he pleased. The *Lords* Found no Process, because the principal Debitor was not Summoned to this Dyet, as he ought to be to all the Dyets of the Process (he not Compearing therein) but the *Lords* Ordained in the mean time, *John Inglis* his Oath to be taken, seing the Pursuer had no other Probation of the Debt, owing by *John Inglis* to the Lieutennent Collonel, but his Oath, and if the said *John Inglis* die, before the Lieutennent Collonel, who is not within this Realm, could be Summoned, it were Iniquity that the Pursuer should be prejudged in his Probation, therefore Ordained his Oath to be taken, as said is, and to be retained and keeped, to be extant while the event of the Process. Actor. *Johnston*. Alter. *Gilmore*. *Hay* Clerk. *Vid. March* 13. 1628. *Somervel* and the Cases there.

Wood contra *Stuart*, *March* 21. 1637.

Elizabeth Wood as being Infeft by umquhile *Ninian Stuart* her Husband, in some Lands in *Glasgow*, Pursues Mr. *Robert Stuart* her Husbands eldest Son, for the Mails & Duties of the saids Lands, and produces for her Title, a Charter granted by her Husband to her thereof, which was Sustained without a Seasin, for a Title to her in this Pursuit, moved against the Defender, whom she offered to prove to be Heir to the Granter; And it being Alledged, that the Pursuer accepted of a Seasin, which was given to her by her Husband *propriis manibus*, she being then present, conform to a Charter to be made thereupon, in which Seasin there was expres Provision of a Reversion introduced in the Hus-

bands favours, and this Charter following after the Seasin, must be esteemed that same whereto the Seasin had respect; and although it bore no Clause of Reversion, yet the same must be limited with that Clause of the Seasin; seing the Pursuer can neither shew any other Charter or Seasin, conform to the which Clause of Reversion, the Husband in his own lifetime Redeemed the saids Lands. Likeas she accepted the Sum of ten Merks at that time, whereupon it was Redeemable, as Instruments taken upon the Redemption, Subscribed by two Nottars before four Witnesses, proports, which four Witnesses are all Subscribers of the Instrument, which ought to be Sustained, to take away this Right from the Pursuer, who is otherwayes lawfully provided by her Husband, specially where this Right Controverted, depends not upon any Contract of Marriage, and so was Revockable, albeit there had been no such Provision of Reversion; And the Pursuer Answering, that the Charter produced being after the Alledged Seasin, and containing no such Clause of Reversion, it must be Sustained; seing Charters ought to rule Seasins, and not *è contra*, specially the posterior Charter to the Seasin ought to be Found to take away the Clause of Reversion, contained in the preceeding Seasin, if any were; neither ought that Seasin to be respected *quoad clausulam Reversionis*, it being only the assertion of a Nottar, which he could not do *extra officium*, not having the warrand of the Subscription of the Party; for albeit a Nottar may Testifie of a Seasin, which is an Act proper to his Office, yet it is not so *in actibus*, not proper to his Office, as are Reversions; and the Instrument of Redemption has the same effect, that by the assertion of Nottars her Liferent cannot be taken from her. The *Lords* Found the Alledgance Relevant, notwithstanding of the Reply, and admitted the same to Probation. Actor. *Maxwel.* Alter. *Gibson.* *Gibson* Clerk.

La. *Manderstoun* contra L. *Rentoun*, *Eodem die.*

LAdy *Manderstoun* being provided by her Husband in her Contract of Marriage, to her Liferent of some Teinds, whereof the Right was in her Husbands Person for long spaces to run, and being lawfully Divorced from him, she pursues the Laird of *Rentoun* for payment of the Duties of the saids Teinds, of all years since her Divorcement, *viz.* by the space of 3 or 4 years by-past, whereto she acclaimed Right, as if her Husband were naturally dead: And *Rentoun* Alledging, that he had lawfully Comprysed her Husbands Right of these Teinds, albeit after the Contract of Marriage, yet before the Divorcement, in respect whereof he bruiking by vertue of his publick Right, *bonafide fecit fructus preceptos & consumptos suos.* The *Lords* Found this Alledgance Relevant, to import Liberation to him from thir by-gone years acclaimed, notwithstanding that the Pursuers Right was by vertue of a preceeding Contract of Marriage. Actor. *Stuart.* Alter. *Nicolson* & *Craig.* *Scot* Clerk. *Vid. March* 2. 1637. *Keith. January* 26. 1636. La. *Borthwick. January* 22. 1633. *Gordon.*

Cuthbert contra Town of *Inverness*, *Eodem die.*

ONe *Cuthbert* having from the Town of *Inverness* a Feu of the Miln of *Inverness*, *cum astrictis multuris granorum crescentium & omnium invectorum & illatorum* &c. which should thole Fire and Water within their Territories; And it being questioned, if this Astriction of Corns in-brought, tholling Fire and Water, should extend to any Corns, but to these which the Inhabitants of their Town should happen to Grind at any other Milns than the Miln of the Astriction; for they Alledged that the Astriction should receive, of Law, Reason and Justice, no other Extension, but to cause them bring all the Corns which they should Grind any where in the Countrey, to the Miln Lybelled, to Grind them at the same; and it were great Iniquity, that if they should buy Victual in the Countrey, and bring the same within the Territory of the Town, that albeit they

they Kilned and Kobled the same, which is to thole Fire and Water, as if they should buy Oats, or Bear, and Kiln the one, and make the other in Malt, which must be done by Steeping in Water, that they might not Sell this again in the Countrey un-ground, or Transport the same out of the Countrey for other necessary Commodities, but that they should be compelled to pay Multures for such Corns Grund no where, which were to take away the liberty of buying and selling, common to all the Leidges, and to take away the Liberty of Burgesses in Burghs-royal, for *merces debetur pro opera*; and where no Grinding is, no payment ought to be. The *Lords* Found, that this Thirlage of in brought Corns, tholling Fire and Water, *&c.* ought to be Interpret of all Corns, which were Kilned and Kobled, albeit they should not be Grund any where, but were sold in the Countrey, and that all such Corns were subject to the Astriction, albeit they were no where Grund at any other Miln by the persons Astricted, and this was the rather done, because the Pursuer offered to prove, that the perpetual custom has been, that Multures has been payed by the whole Inhabitants, for all such Corns, tholling Fire and Water, albeit they were never Grund at any other Miln; Which Custom the *Lords* Sustained, being proven to induce a necessity to do the same in all time coming. And sick like for the Deductions, the *Lords* Found, that no Exception should be from the Astriction, except Teind and Seed allanerly, and that the Farm Bear payed by the Tennent to the Feuar of the Land Astricted, which Feuar was Vassal to the Town, who Feued the Miln to the Pursuer and his Author, ought not to be excepted from this Astriction, nor yet the light Corns given to the Beasts which Laboured the Ground, nor the Corns sold by the Labourer of the Ground, for buying of Cattel, and other necessars for Plenishing, or other necessities of the Ground; all which were Repelled, because the Pursuer offered to prove, that the Inhabitants have ever been in use to pay Multures for all Growing Corns, without any Deduction, or Defalcation at all of any particular, except allanerly Teind & Seed, and no other exception, which the *Lords* Sustained. Actor. *Advocatus, Nicolson & Johnston.* Alter. *Stuart & Gibson.* *Hay* Clerk. *Vid. July* 11. 1621. *Keith. July* 12 1621. *Earlesmiln. March* 23. 1624. *Mckenzie.*

Anderson contra *Gibson, March* 22. 1637.

IN a Double Poynding betwixt one *Anderson* and Mr. *Henry Gibson*, umquhile *George Reid* in *Glasgow*, having Acquired from *Marion Dorroch* her Liferent of some Lands in *Glasgow*, whereof himself was Heretor, for which, by that Security, he was obliged to do certain Deeds to the said *Marion*; after which Contract the said *George Reid* being Deceast, and the said *Marion Dorroch* being Married upon *John Anderson* Burges of *Glasgow*, the said *Marion* and her said Spouse, Dispones her said Liferent right to the said Mr. *Henry Gibson*, and obliges them to warrand the same from all preceeding Deeds; and the prior Disposition being Comprysed by *Gabriel Cunninghame*, for a Debt owing to him by the said *George Reid*, whereupon it being questioned, if the said *John Anderson* should be holden to warrand the Alienation, thereafter made to Mr. *Henry* of that same Liferent, from that prior Disposition: And sicklike, because there was an Action of Double Poynding against *Gabriel* and Mr. *Henry*, as both claiming the Right of the Mails and Duties of that Liferent, by vertue of their saids Rights, in which Action the *Lords* Found, that Mr. *Henry* had best Right to be Answered, and preferred him to *Gabriel Gunninghame*, because the Right made to umquhile *George Reid*, by the said *Marion*, and which was Comprysed, was Found not effectual to Denude her of her Liferent, or to make it valiable to the said *George*, to be Comprysed by his Creditor, seing the said umquhile *George* was obliged to do some Deeds to the said *Marion*, for the said Disposition, which was never yet fulfilled to her, but the said *George* died before the fulfilling thereof. Likeas, the same was

Consigned to remain in the hands of a third Person condescended upon, while it were fulfilled: and albeit the Compryser Alledged, that that ought not to stay the effect of his Comprysing, seing now he has the Right, and she has Action to seek performing of the Deeds, obliged by *George Reid* to her, against his Heirs, or Executors; Yet the *Lords* Found, that she was not prejudged by that Disposition, it not being fulfilled to her Reciprocally, and consequently that the Compryser had no Right; And albeit the Compryser offered now to perform the same things to her, which *George Reid* was obliged to: Yet the *Lords* respected not the same, in respect it was not fulfilled to her by himself, in his own Lifetime, seing she *bona fide* thereafter Disponed it to Mr. *Henry Gibson*, thinking the same to be extinct by his Decease, and by the Consignation thereof, while it had been fulfilled; neither was it respected that the Disposition was now in the Compryser's hands, seing the Relict and her Spouse offered to prove, that after *George Reids* Decease, Mr. *Henry Gibson* broke up the Coffer where the Writs were Consigned, and took out the same, and by what condition he knows not, the said *Gabriel Cunninghame* has Comprysed it; Which the *Lords* Found Relevant to prefer Mr. *Henry* to *Gabriel*, and to make his Comprysing to cease, as of a null Right, for the foresaid Reason received against the Comprysing and Disposition, *hoc ordine*, as said is. Actor. *Cunninghame*. Alter. *Maxwel. Scot* Clerk. *Vid. February* 22. 1627. L. *Aitkin* and the Cases there.

Finnie in *Peterhead*, contra *Gray*. *Eodem die*.

ONe *Finnie* by a Precept from the Earl of *Marshel*, as Admiral Deput, having caused Arrest a Ship in *Peterhead*, pertaining to *Andrew Gray*, for satisfying of a Debt owing to him by the said *Andrew*, and pursuing before the *Lords* upon that Arrestment, to make the Ship furth-coming, the Debitors Son, who Intromett with the Ship; wherein the *Lords* sustained this Action Pursued before themselves, upon an *Arrestment* direct, and Execut by Warrand of the Precept of an Inferior Judge, *viz.* The Admiral-Depur, and the said Arrestment so Execut was sustained, albeit it was quarreled as unlawfully Execut, not bearing, *to be Stampt*, and not bearing, *That the Officer took the Sails from the Bark, and the Ruther from her*, all which are necessar Formalities, in *Arresting* of any Ships, and ommitted, albeit the Warrand of the Precept directed the same. *Item*, no Copie delivered to the Party, nor left or affixt upon the Ship; which objections were Repelled, seing the Pursuer offered to prove, that the Officer intimat to the Debitors own Son, that he had *Arrested* the said Ship Immediately after the doing thereof, and which Intimation so made, The *Lords* Found probable by Witnesses, and the Officer, and that it was not necessar to prove it by Writ, or by Oath of Party. Actor. Alter. *Mowat. Vid. March* 8. 1634. *Smith*.

E. *Tullibarden* contra *Robison*, *March* 24. 1637.

PAtrick now Earl of *Tullibarden*, as having Right by Disposition of the Lands of from umquhile *William* Earl of *Tullibarden*, pursues *John Robison* Feuar of the saids Lands, for payment of the *Feu*-Duties contained in his Infeftment, of the years since the decease of the said umquhile Earl *William*, his *Author*; *And* the *Defender Alledging*, that no *Action* could be sustained at the Pursuers Instance, for payment of the saids Feu-duties, except it were Lybelled, and Instructed, that the Pursuers were Infeft in the saids Lands, and Superiority of the same; for whatever Disposition & Procuratory of Resignation therein contained, were made in the Pursuers favours, yet without Infeftment had followed thereupon, it cannot give *Action* to the Pursuer. *And* the Pursuer Answering, that Sir *Archibald Stuart* of *Fynnart*, Author of umquhile Earl *William*'s Right, stands yet Infeft, who will concur with the Pursuer, and none can quarrel this but the Heirs of Earl *William*, and they cannot be heard, being obliged

bliged to Warrand this Disposition made to the Pursuer. The *Lords* Repelled the Alledgance, the Pursuer finding Caution to Warrand the Defender, anent the payment to be made to this Pursuer, at all hands, and against all Parties pretending Interest thereto. Actor. Alter. *Johnston*. *Gibson* Clerk.

Hamilton contra Tennents, *March* 28. 1637.

John Hamilton Apothecary, being Confirmed Executor Creditor to umquhile *John Glendinning* of *Drumrash*, pursues the Tennents of the said *Drumrushe's* Lands, for payment of their Duties to him of certain years, resting unpayed before *Drumrashes* decease; wherein it being Alledged for *William Glendinning* of *Lagan*, that he had Intromitted with these Duties by tollerance of *John Glendinning* of *Perlan*, who was Donatar to the Escheat and Liferent of the said *John Glendinning* of *Drumrash*, and who had obtained General Declarator thereon. And it being Replyed, that that Gift of Escheat must be presumed to be simulat, in respect of the *Act* of *Parliament* 1592. whereby all such Gifts are Declared Simulat and null, where the Rebel remains in Possession of the Lands, and Goods, *&c.* And true it is, that this Rebel remained in Possession of his Lands and Goods peaceably, and continually all the years after the Gift and Declarator, by the space of diverse years, and ay and while this year controverted, and of which year the Duties are yet in the Tennents hands unuplifted. And the Defender Duplyed, that this Answer of Simulation cannot be found well qualified by this presumption, Alledg'd of the Rebels remaining in Possession, without some further qualification of a positive Act, which may infer Simulation; for although the Donatar suffer the Rebel to Possess, that is not enough to make his Gift null, where the same is not truly taken to the Rebels behove; but notwithstanding of that bruiking by the Rebel, the Donatar may, when he pleases claim the benefit of his Gift. Attour this *Act* of *Parliament* cannot be constructed to any other Sense; As also the same expresly appoints that Nullity to be in favours of the Creditor, at whose instance the Rebel was Denounced, & cannot Militat for every Creditor, as the words of the *Act* in themselves proports, which cannot be extended. The *Lords* Found this Alledgance not Relevant, in respect of the Answer, and Found the same Reply was competent to be Alledged for all Creditors, as well as for him, at whose Instance the Debitor was Denounced, and Found that there was no necessity to qualifie any other Circumstance of Simulation, except the said Retention of Possession. Actor. Alter. *Gilmore*. *Scot* Clerk.

Scot contra *Scot*, *Eodem die*.

ONe *James Scot*, Son to *Robert Scot* of *Satchels*, being Donatar to the Escheat and Liferent of the said *Robert* his Father, *Robert Scot* eldest Son to the said *Robert Scot* elder, and Brother of the said *James*, begotten upon a prior Wife, Pursues his said Brother, Donatar foresaid, for Reducing of the Horning, whereupon his Fathers Escheat was taken, to the effect that he might have access to his Fathers Liferent, conform to a Contract, whereby he had Disponed his Liferent to him; and of the effect whereof he was prejudged by the said Escheat, which the Second Son declared, he used for Maintainance of his Aged Father, who wanted all other Means whereby to live. The Reason of Reduction was, that the Horning proported not, that six knocks were given at the Rebels dwelling House, as in Custom is requisit; And that the Register of Hornings, wherein this Horning and Executions are insert, proported no such Record of adhibiting of Knocks. And the Defender producing his Horning, in the Margin of the Execution whereof were added these Words, *viz.* (After the Messinger had used six knocks at the Party Charged his dwelling Place,) as the verity, and truth of the doing whereof he abode, as it is now produced;

ed; for albeit he granted, that he had caused the Messenger Subscribe this Margin, since the Registration, yet it was truely done: and also the words foresaid in the Margin was extant so written, although then not Subscribed at the time, when the Horning was presented to be Registrat, and which the Clerk Keeper has not Insert in the Register, because it was not then Subscribed. And the Pursuer Replying, that seing it was not Registrat with that Clause, and is confest by the Party, was not then Subscribed, the same therefore ought not to subsist. The *Lords* sustained the Horning, notwithstanding of the Reason, the Defender proving by the Clerk, Keeper of the Register, and his Servants, that when the Horning was presented to be Registrat, the same had the foresaid Marginal Clause, standing then, as it now bears, and also proving by the Messenger and Witnesses, the truth of the Act, *viz.* that the Knocks were given, as the same proports; and this was the rather done, because the *Lords* Found, that this Reduction was pursued to the Fathers prejudice, whereas the Defender used the Gift to his Fathers Sustentation. Actor. Alter. *Sandilands.*

Paterson contra *Murray*, *March* 30. 1637.

Thomas Paterson having Charged *Walter Murray*, Superior of the Lands of *Crobelaw*, to receive him therein, upon his Comprising thereof, Deduced against *John Hoppringle*, as lawfully Charged to enter Heir to Sir *James Pringle* of *Gallosheills* his Father, for the Sum of 2300 merks, adebted by the said umquhile Sir *James* to him; which Charge being Suspended by *Walter Murray*, upon these Reasons, that Sir *James*, from whose Son as Charged to enter Heir *&c.* he had Comprised, was never Infeft himself in these Lands; and also that he ought to have a years Duty of the Lands: And it being Answered by the Compriser, that his Debitor had obtained Decreet against the said *Walter Murray*, Decerning him to Infeft the said Sir *James*, so that he now coming in Sir *James*'s place, by his Comprising from his Son, as Charged to enter Heir, he ought to be entered; and as to the years Duty acclaimed of the Lands, he ought to pay no more than the Annualrents of the Money, for which he has Comprised, for the Duty of the Land was Exorbitant. The *Lords* Found, that the Defender should Infeft the Compriser, as becoming in *Gallosheils* place, sicklike as if he might have been compelled to Infeft himself upon the foresaid Decreet, or *Gallosheils* Heir, if any had entered to him; and Found, that it was not enough to give the Superior the Annualrent of the Money for which he had Comprised, for an year, seing he had Comprised the Land, and not an Annualrent out of the Lands: But the *Lords* modified the Duty to be payed to the Superior to 300 merks, albeit the Lands were worth yearly 800 merks at least. *Vid.* 23 *March* 1622. *Ramsay.*

Veitch contra M^c*dougald*, *March* 31. 1637.

Katharine Veitch being Pursued by Sir *John* M^c*dougald*, to Remove from the Lands of and she Excepting upon her Infeftment of Terce, whereto it was Replyed, that she had Renounced the same; and she offering to Improve that Writ, The *Lords* Found that Improbation could not be received *hoc loco* by Exception or Duply, in respect the Writ was Registrat, and so ought to be Pursued in an ordinary Action of Improbation; neither was it respected, that the Defender Alledged, that it was but Registrat one day or two at the furthest, before the Intenting of this Pursuit against her, who was but a poor Woman, and who ought not to be put to Pursue and Intent a new Process, to Improve, where the Writ is but lately Registrat and done by the Party, of purpose to put her to further trouble. Likeas the Clerk in whose Books the Writ quarrelled is Registrat, hath the Principal ready to be produced, and likeways did produce the same before the *Lords*: notwithstanding whereof the *Lords* Found, that they could not receive the Improbation *hoc ordine*, but only *per viam actionis*,

nis, seing the Writ was Registrat a day before the Intenting of this Action of Removing. Actor. *Craig.* Alter. *Burnet. Gibson* Clerk. *Vid.* 16 *Feb.* 1633. *Ker.*

Scot contra *Drummond*, *June* 16. 1637.

SIr *John Scot* pursuing *Archibald Drummond* of *Gibliston*, for payment of the Back-Tack-Duties of the Lands of *Gibliston*, which were Wodset to him, and Set back again for payment of the said Duties yearly, and for that effect to find Caution for payment of the saids Duties bygone, and in time coming. And it being Alledged, that this Summons could not be sustained, it not being Execute upon 21 days Warning, and not being *Tabulat* in the common Table, seing the nature of this Action, and the like, (*viz.* for paying of Duties of Lands) ought to abide the common Table, and ought to be Execute upon 21 days warning, especially where the Summons contains no priviledge. The *Lords* Repelled the Alledgance, and sustained the Order and Summons, which was Execute upon the Citation of six days, the same being continued, and the Party of new Summoned by the Continuation, and Found no necessity of Table or Citation upon 21 days Warning. Actor. Præsens. Alter. *Gilmor. Scot* Clerk.

Anderson contra *Monteir*, *Eodem die.*

DOctor *Anderson* having obtained Decreet against *Margaret Monteir*, as Executrix to *Stevin Philp* her Husband, who was Cautioner for *Archibald Drummond*, for payment of 500 merks, adebted to him by the said *Archibald*, and by her said Husband, & as Cautioner for him; which being Suspended, that she was only answerable *secundum vires Inventarii*, which was all exhausted by Decreets, and payment made thereof before the obtaining of the Doctors Decreet: And the Articles of the payment being desired to be instructed amongst the Articles of Defalcation, she produced a Bond granted to a Creditor of her Husbands, which was not Registrat, nor no Sentence obtained thereupon, but only payed by the Relict (which she instructed) and the Bond retired by her. And the Doctor Answering, that that ought not to be allowed without a Sentence. The Relict Alledged, that there needed no Sentence, the payment being made to a true Creditor, before the Doctors Decreet, to whom her Husband was only a Cautioner, whereby she neither could, nor had necessity to know that her Husband was bound. The *Lords* Found, that this payment without a Sentence, ought not to be allowed in prejudice of a Creditor, who had done Diligence, and recovered Sentence; but Found, that the Doctor should come in with her *prorata*, and would not allow that payment as an Article, to exhaust the Testament *in totum*, and to prejudge totally the Doctor. Actor. *Anderson* & *Mowat.* Alter. *Paip. Hay* Clerk.

La. *Blairquhen* contra Tennents, *June* 22. 1637.

THe La. *Blairquhen* by a base Right, Holden of her Father in Law, who gave Infeftment to her, and her Husband, his eldest Son, of all his Lands (which were *distincta tenementa*, and lay discontigue in divers Sheriffdoms) and which were united to his Goodsir by the King, in a Barony called the Barony of *Blairquhen*, & whereby the King appointed one Seasin to be taken for all the Lands, at the place of to serve for all the Lands united, notwithstanding of the Discontiguity: The said Lady being Infeft, as said is, Base by her Father in Law, and being Seised at that same place of Union, which was contained and appointed in the Charter of Union, granted by the King to her said Husbands Goodsir, and Pursuing Removing against the Tennents, and the Viscount of *Kenmuire* Compearing, and Defending for certain of these Lands, wherein he was Infeft, and quarrelling her Seasin of Nullity, because it was taken at the place of which could not be effectual to her, but for these Lands whereat it was taken, & so many of the other Lands as lay contigue thereto, & could not be extended to these

Lands excepted upon, which lay discontigue, and were naturally in another Sheriffdom than that Sheriffdom, within the which these Lands whereat she was Infeft lay; and the Union granted to her Author, which designs that place for Seasin to Serve for all, cannot be effectual to her, and cannot grant power to her Author to grant a Base Right (albeit his Father had an Union himself,) to any other, with the Priviledge to take Seasin at that place, for these Lands lying discontigue, albeit the Seasin was given to her of all the Lands, united by the first Union by the King, except that Base Right so granted, had been Confirmed. And the Pursuer Replying, that her Authors Union behoved to be profitable to her, seing she was Infeft in the whole Lands, United by the King to her Authors Father, & she could take Seasin no otherwayes but at that place, which the King, in his Union made before her Right, had appointed for all the Lands; for if she had done otherwayes, it might have been quarrelled, as not lawfully taken, for she is Infeft in the whole Lands, and not in a part; whereas if she had been Infeft in some part of the Lands only, and not in the whole, the question had been greater, *viz.* If her Seasin taken for a part had been good, if the Lands had lyen discontigue from that place whereat she was Seased; but being in all the Lands united, and the Union once made and granted by the King, her Author might have given her such a Right, which albeit Base) is Lawful, without necessity of the King's Confirmation, the King having granted the same once of before to her Authors Father. The Alledgance in respect of this Reply, was Repelled, and in respect of the said Union preceeding, the Seasin being of all the Lands, albeit Base, was Sustained, without necessity of any new Confirmation. Actor. *Monat.* Alter. *Nicolson* & *Neilson*. *Gibson* Clerk. *Vid. July* 11 and 28. 1637. betwixt the same Parties.

Galbraith contra *Lennox* of *Blairshogel*, *June* 28. 1637.

BY Contract of Marriage betwixt *Andrew Galbraith* and *Janet Lennox* his future Spouse, *John Lennox* of *Blairshogel*, Father to the said *Janet*, is obliged to pay in Tocher, the Sum of Money to the said *Andrew Galbraith*, to be imployed upon Land by the said *Andrew*, to the behove of himself in Liferent, and his Spouse, and the longest liver of them two, and the Heirs to be gotten betwixt them, which failzying, the one half to pertain to *John Lennox* younger of *Blairshogel*, which Sum being Arrested by Mr. *John Galbraith* Minister, for satisfying of a Debt, owing to him by the said *Andrew Galbraith*, and upon the Arrestment having obtained Sentence before the Sheriff of *Striviling* against *Blairshogel* as holden as Confest; Which Decreet being Suspended upon this Reason, that the Sum was owing by Contract of Marriage foresaid, and was Destinat to be imployed upon Land, as is before related; in respect of which Destination, the Sum was Heretable, and so not subject to Arrestment: And also he Alledged, that seing he had conditioned these Sums in favours of his Daughter, for her Lifetime and her Husband's, and to their Heirs, with provision in case of Failzie of Heirs betwixt them, that *ex casu* the equal half thereof should return to his Son, in respect he was obliged to pay these Sums only with these Provisions, and in that manner, therefore with no reason can he be compelled, to pay the same to any use, otherwise than to that use, whereto he had provided and obliged himself particularly, and so ought not to be payed or made forthcoming, for satisfying the Debt, owing by his Son in Law to his Creditor, contrair to the mind of the Contract, and Provision of the Parties: And the Creditor Compearing and Opponing his Decreet recovered against him, and Alledging this Sum to be Arrestable, The *Lords* notwithstanding of the Destination foresaid, contained in the Contract of Marriage, Found the Sum was Arrestable, but Declared that the Creditor, who had obtained Sentence therefore, to make the same forthcoming, ought to fulfil the Conditions, with the which the Money was affected by the said

said Contract of Marriage, and that the Money ought to be payed to him, he finding Caution to make the same forthcoming to the Relict, in case she survive her Husband, and to the Heirs gotten betwixt them, in manner as the Contract proports; And Found, that he ought not to have the said Sum payed to him, except upon finding Caution, as said is, and Found it not Competent in this place to Dispute, if the Sum might be Evicted for the Husbands Debt, and thereby the Bairns (if any were gotten in the Marriage) prejudged of the Fee of the Money, or the Person Substitute, if there were no Heirs in the Marriage, but reserved that in its own time to be considered, when the Case should fall out: and in the mean time, the Husband living, who was provided to this Liferent, at least of the Money, it was Found, that the Creditor during his lifetime, ought to have the use of the Money, he finding Caution *ut supra*; for the Arresters Debt being far less than the Sum Arrested, the profit thereof might pay him before his Debitor died, and so the doubt anent the Heirs could not occur. *Gibson* Clerk. *Vid. November* 21. 1623. *Hamilton. January* 29. 1629. *Grahame.*

L. *Lamond* contra *Murray*, *June penult*, 1637.

THe Laird of *Lamond* Suspending the Charges given by *Donald Murray*, upon an Obligation granted him of 3000 merks, upon this Reason, that at the time of the Bond he was Minor, and was then *in familia paterna*, and done without his consent, who in Law is his Administrator, and therefore was null: Likeas, he has Intented Reduction upon this same Reason, which he produced in Process. And the Charger Answering, that when his Reduction is insisted upon, and ready for Reasoning, he shall Answer thereto; but by way of Suspension, it is against the Practick and Reason, to receive this Alledgance, it consisting *in facto*, to be tryed so summarly, where it cannot be instantly verified, but must receive Terms of Probation; specially seing he is content to find Caution, to resound the Money in case the Suspender prevail in this Reduction. The *Lords* Found, that they would receive this Reason of Minority to be Discussed, and Tryed in this same place, by way of Suspension, without necessity of further Process in Reduction, but Declared, that they would Assign only one Term to prove the same, without Prorogation of further Dyets, & therefore Assigned a Day to prove the Reasons, at the which Term the *Lords* Declared they would conclude the Process, and Advise the Cause, and would grant no more Terms to prove. Actor. *Gilmore.* Alter. *Scot* Clerk.

Lo. *Cranstoun Riddel* contra *Richardson*, *July* 1. 1637.

UMquhile Sir *Robert Richardson* of *Pencaitland*, having given a Bond in favours of his second Son, *Obliging him and his Heirs to pay to the said second Son* 8000 *merks for his Provision, and Portion Natural, and for help of his Living*, which Bond being made by him, he then being sick of a Palsey, whereof he lived a year and an half after the Date of the said Bond, which being desired to be Reduced at the Instance of the Heir of the Maker, *viz.* his eldest Son, and at the Instance of the Lord *Cranstoun Riddel*, to whom the said Heir had sold the Lands, whereto he succeeded by his Father, and so as he whose Lands might be Distressed upon some pretext, through the said Bond, upon this Reason, that the said Bond was null, being made by the Defunct upon his Death-bed, to the prejudice of his Heirs. And the Defender Alledging, that this Bond being granted by the Father to his lawful Bairn, who had no other Benefit provided to him by his Father, and who had no other thing to succeed to by his Decease, neither moveable, nor immoveable but this Bond, it ought not to be Found under the compass of this Reason, as a null Deed, specially where the Maker lived so long after the date thereof, and continued in this lent Sickness, which Sickness cannot be Found, and was not of it self of the nature of *Morbus Sonticus*,

and which is not *impedimentum rebus agendis*, and which cannot be an Impediment to hinder the Father, to provide his Children to their Natural Portions, according to his Estate; at least the quantity for which it may be Sustained against the Heir (there being no other Moveables pertaining to the Defunct, the time of his Decease) ought to be Modified & Determined by the *Lords*, for the which quantity so to be modified, the Bond ought to be Sustained, & ought not to be Reduced *in totum*; for albeit persons on Death-bed may not burden their Heirs, yet the mind of the Law is, that they cannot do such Deeds as may take away the Heretage from them, which ought to be understood to take it from them directly, and to give it to a stranger; but that they may not provide a *Legitime* to their own Bairns, they being then of sound Judgement, albeit in Sickness, and therewith to burden the Heir, where the Heretage is not thereby Evicted, albeit it may be thereby something burdened for so just a Cause, ought neither to be Found the meaning of the Law, nor Maxime adduced in this Reason: and it is against the Law of God, of Nature, and all Reason, to find that the Father, even on Death-bed may not do such a Deed, as to provide his Bairns, who were destitute of help, and that one should have all. The *Lords* Repelled the Alledgance, and Sustained the Reasons; for they Found that the Father on Death-bed could not make any Provision in favours of his Bairns, albeit unprovided, which might burden the Heir with payment thereof, and that he could do nothing, but in so far as he might do in his own part in Law belonging to him, in so far as concerned his Moveables, and that the Maxime was universal for all, concerning Bairns alike as any other persons whosoever: and Found that no Modification ought to be made. Actor, *Advocatus*. Alter, *Stuart*. *Hay* Clerk.

Tennent contra *Futhie*, *July* 4. 1637.

ONe *Tennent*, Wife to *James Futhie*, having received an Obligation of 100 merks yearly, to be payed to her by *James Futhie*, her Father in Law, for her Aliment, her Husband being then out of the Countrey a certain space, and she Charging for payment, and the Father in Law Suspending, that this Bond did pertain to his Son, her Husband, and was in *bonis ejus*: Likeas, his said Son being come to the Countrey, and living in Houshold, he and his Wife together, in Conjugal Duty, he had made payment to him of a part of the Sum, and had reported his Discharge thereupon, which ought to liberat him of this Charge, given to him at his Good-Daughters Instance, in the absence of her Husband, who was now out of the Country: And also he Alledged, that the said Son her Husband was adebted to in the Sum of whereto this Suspender had Right, and so he was content to compense *pro tanto*. The *Lords* Found none of these Reasons Relevant, for they refused to allow the payment made to the Husband, or to compense for the Debt owing by the Husband, albeit the Man and his Wife was in Family together, and that there was no separation betwixt them, but that the Woman was presently with Child to her Husband, in respect that the Bond was given to the Wife for her Aliment, and the Husband was Found to have no Right thereto; for the Husband being now absent, the Wife might seek a modification of her Husbands own Gear, if this Money had been properly his own, much more might she seek this, which was Destinat for her own Maintainance and Aliment. *Hay* Clerk. *Vid. March* 8. 1639. L. *Balgillo*.

M^c *Duff* contra M^c *Duff*, *July* 5. 1637.

ONe M^c *Duff* being Confirmed Executrix to her Brother *John* M^c *duff*, and pursuing the Executors of umquhile M^c *duff*, which umquhile M^c *duff* was neareſt of Kin to the said *John* M^c *duff*, the Pursuers Brother, and who Died Minor, and which umquhile M^c *duff* was that person who being neareſt of Kin, as said is, ought to have been Tutor to the Pupil, to pay to her the Sums and

and Goods Intrometted with by him, together with the Profits thereof since the time of his Intromission; In which Action it being controverted, if this Defender as Executor Conveened to the Defunct, or the Defuncts self, if he were living, could be Conveened as subject in Annualrent for the Moneys alledged intrometted with by him, seing it was Alledged he was never Tutor, and so not lyable in Annualrent. The *Lords* Found, that the Defunct being that person who might have been Tutor in Law to the Pupil, albeit he was not Tutor, yet having Intrometted with the Pupils Means, and so as Pro-Tutor behaving himself, was lyable in Annualrent to this Pursuer, for all years since his Intromission, for *Nomina Pupillorum non debent esse otiosa*, and so the *Lords* Repelled the Allegance, and Decerned for the Annualrents. Actor. *Nairn*. Alter.

La. *Balbegno* contra L. *Balbegno*, *July* 7. 1637.

THe La. *Balbegno* Pursuing after her Husbands Decease, the Heir of *Balbegno*, to warrand the Lands of her Conjunct-fee, from all Annuities, Teinds, and Feu-duties, whereto her Husband had Obliged himself and his Heirs to her in her Contract of Marriage, and whereby she might bruik the Conjunct-fee-Lands provided to her, *viz.* the Mains of *Balbegno*, and that the same might be made free and sure to her, worth 12 Chalder of Victual, conform to her Contract of Marriage; and in particular, she Pursuing for Relieving her of the Annuity, imposed by the Commission of Teinds, and of the Duty appointed to be payed for her Lands, to the Reader of the Kirk, and whereby she might bruik the Lands free without these Burthens, as said is: And the Defender Alledging, that the Burthen of the Annuity being laid on by vertue of an Law, he ought not to relieve her thereof; and the Readers Burthen should be born by the Lady Conjunctfiar, who bruiked the benefit of the Lands, during her Lifetime. The *Lords* in respect of the Words of the Contract, Found, that the Heir should relieve the Conjunct-fiar, both of the Annuity and of the Stent for the Reader, which they Found that the Lady ought not to pay, but the Heretor, seing she consented not thereto, in respect of the Clause foresaid of the Contract, whereby her umquhile Husband had Bound himself and his Heirs, to relieve the Lady of the Annuity, and Teind-Duties, and that the Lands should be worth 12 Chalders of free Victual; and that the Lady Lybelled, and Replyed, that the Lands were not worth that Duty, beside these Burthens. Actor. *Nicolson* younger. Alter. *Fletcher*, *Gibson* Clerk. *Vid. March* 10. 1636. Lady *Dunypace*, and the cases there.

Dickson contra L. *Orkhill*, *July* 8. 1637.

THe Laird of *Orkhill* being Debitor to umquhile *John Dickson* Flesher, in the Sum of 200 merks, by a Bond bearing *to pay Annualrent*, and the said Creditor living until the said Term of payment was by-past, whereby the Bond was of the nature of an Heretable Bond, and the said Laird of *Orkhil* Debitor, Suspending upon Double-Poynding, being Distrest by the Heir and Executor of the said umquhile *John*, who both claimed the Right of the Sum, *viz.* the Heir, as belonging to him, the Bond being Heretable, as said is, and the Executors claiming the same as due to them, in respect the Heir, who was eldest Brother to the Executors, was their Tutor, and that he had Confirmed the Defuncts Testament, wherein he as their Tutor had Confirmed the same Bond Controverted, as pertaining to them as Executors: Likeas, since he as their Tutor had recovered Decreet against the Laird of *Orkhill*, at his instance, as Tutor to them, for payment of the said Sum, as due to them. In respect whereof they Alledged, that the Heir could not pretend Right to this Sum, which he *sciens*, *prudens* & *Major*, had acknowledged to be their Moneys, and consequently that *Alexander Denniston*, who was made Assigney by the Heir to that Sum, could not seek the same, as pertaining to the Heir. The *Lords* notwithstanding of the Al-

Alledgance proponed for the Executors, preferred the Heir, and Found that the Sum belonged to the Heir, and consequently to his Assigney, seing the same was owing by an Heretable Bond, and Found, that the Error commited by the Heir in being Tutor to the Executors, and Confirming this Debt, and recovering Sentence for this Sum, at his Instance, as Tutor to the Bairns, did not prejudge him of the right to that Heretable Bond, and that by that Error the Right was not Acquired to the Executors, after such a manner, but that notwithstanding of that Error, he might return and Cloth himself with his own Right, and Consequently that the Heirs Assigney ought to be preferred, and that the Heir by the Deeds foresaid was not Denuded, as if it had been a Donation, except that the Executor will Alledge, that the Heir had done these Deeds of Confirming, and Pursuing as Tutor, after that he knew and understood that the Bond in Law did pertain to himself as Heir. *Actor. Craig. Alter.* *Vid. July* 25. 1634. *Matheson*, and the Cases there.

Robertson contra *Brown*, *July* 11 1637.

ONe *Robertson* being Infeft in a Tenement in *Perth*, in *March* 1637. by Resignation made by *James Brown*, which *James* was Infeft therein upon the 4. of *July* 1631. conform to a preceeding Disposition of that Land, made to him by *Gilbert Brown*, Heretor of the Land, dated *February* 1. 1631. Pursues Removing against *Patrick Brown*, who was Infeft in that same Tenement, upon the 5 of *July* 1631. a day or two after the Seasin taken by the said *James Brown*, the Pursuers Author, the Defenders Seasin Depending upon a Compryssing, Deduced against the said *Gilbert Brown* at his Instance, the Denunciation of which Compryssing was in *June* before the Seasin given, and taken by *James Brown*, upon his Right made to him by *Gilbert*, albeit the Compryssing and Seasin was not perfected, but within a day or two after *James Browns* Seasin, yet he contended he had sufficient Right to bruik the Lands, in respect of his foresaid exact Diligence done legally, and that he had Served Inhibition upon the 2 of *February* 1631. against the said *Gilbert*, whose voluntar Disposition, done only one day before his Inhibition, ought not to prejudge the Defender; seing the said *Gilbert Brown*, common Author, and *James Brown* Receiver of the Disposition, were, and are both Bankrupts, the Disponer still continuing in Possession, and there being nothing to qualifie any real Debt, owing to him by the said *James Brown*; so that he Alledged, that his Seasin upon his Compryssing, albeit a day or two expede only after the said *James* his Seasin, ought to be drawn back to the time of his Denunciation, and ought to Defend him in this possessory Judgment, seing he offered to prove, that the common Author retained Possession of the Land, notwithstanding of the Disposition made by him, continually while the Excipient Removed him by order of Law, *viz.* in *October* 1632. at which time the Excipient became in Possession, wherein he has continued ever since unto the time of this Plea. And the Pursuer Replying, that his Right ought to be preferred in respect of his Seasin, preceeding this Defenders Seasin; which prior Seasin of his depends upon a Disposition, preceeding the Excipients Denunciation; and albeit both Receiver and Disponer were Bankrupts, yet that ought not to prejudge this Pursuer, who for most onerous Causes had Acquired the Right, and knows nothing of what proceeded betwixt his saids Authors. The *Lords* Repelled the Exception, and preferred the Pursuer, in respect of his Authors first Seasin, and first Disposition, and Found the Denunciation of the Compryssing, was no impediment to the Acquirers of the Disposition, to take a Seasin conform to the said Disposition, which preceeded the Denunciation, and also the Inhibition, or even after the said Denunciation, the same depending upon a preceeding Cause; Neither respected the *Lords*, that both the Disponer and Acquirer were Bankrupts,

rupts, seing this Pursuer who had Acquired this Right, albeit lately, yet the same was for an onerous Cause, and he was never qualified, nor alledged to be partaker of any Fraud with his Authors: and the Possession was not respected, seing it was but a Possession of five years, which is not receivable to maintain any Right in it self, nor sufficient against the Pursuers Right, wherefore the Pursuer was preferred, as said is. Actor. *Hepburn*. Alter. *Oliphant*. *Hay* Clerk. *Vid.* for this of the Possession, *March* 13. 1637. *Fuird.* And for the Interveening Denunciation, *March* 2. 1637. *Smith.*

L. *Lesmore* contra the Lady, *Eodem die.*

OLd *Lesmore* Contracting with the Relict of his Oye, Dispones certain Lands to her in satisfaction of her Conjunct-fie, which she accepts, and in the same Contract she obliges her to relieve the Laird of the Teind-Duties, adebted and accustomed to be payed out of the saids Lands, whereupon she being Charged to relieve the Laird of these Teind-Duties, and for that effect to make payment of a particular Quantity condescended on, as has been in use thir diverse years, to be payed by the Tennents of these Lands, before this Contract; And she Suspending, that albeit the Tennents of these Lands has been accustomed to pay the Quantity Charged for, yet that is not sufficient, to make her obliged thereto; for that cannot be the mind of the Contract, that she should pay any further, for the Teind-Duties of the whole Barrony, whereof thir Lands contained in this Contract are but a Part, but only that she should pay a Proportion of the whole Duty, effeirand to the Proportion of her Lands, to the Quantity of the whole Barrony; for albeit the Laird, who was Heretor of the whole Barrony, might appoint a Tennent of any Part of the Lands of that Barrony, to pay the Teind-Duty adebted for the whole, and allow that payment in the first end of the Condition betwixt his Tennent and him, yet that was no Just Cause to astrict her to do the like; neither did her Obligation contained in the Contract bind her thereto, she being bound to pay the Teind Duty adebted, and accustomed; So that albeit the Tennents of these Lands had formally payed the whole, yet except the whole were adebted for these Lands, she cannot be subject thereto, but to her Proportional Part only. The *Lords* Found this Reason Relevant, and Found, that these Words in the Contract, *viz.* to Relieve the Laird of the Teind-Duties adebted and accustomed to be payed, could Import no further, but that she ought to relieve him of that proportion of the Duties effeirand to the Quantity, with the which the whole Barrony is affected, and as thir Lands answers to the quantity of the Barrony, and that the custom of payment of the whole Duties out of the Lands, cannot Burden her with the whole, except that the whole Duties acclaimed were due to be payed for the saids Lands alone, and Found, that these Words *Adebted* and *Accustomed*, ought not to be severally understood, but as Conjoyned. Actor. Alter. *Davidson*. *Scot* Clerk.

La. *Blairquhen* contra Tennents, *Eodem die.*

IN the Cause of the La. *Blairquhen*, mentioned before *June* 22. 1637. It being further Alledged, for *John Inglis*, and the Viscount of *Kenmuire*, whole Tennents were conveened in this Judgment of Removing, that they were Infeft in the particular Lands contained in their Rights, by publict Infestment, Holden of the King, and by vertue thereof thir 18 or 20 years in peaceable Possession; which Lands lay discontigue, from the Alledged Place of Union, 30 or 40 Miles at least. And the said Publict Infestment flowed from *Josias Stuart*, who was also publictly Infeft by the King; which *Josias Stuarts* Right flowed from a Right granted by this Pursuers Husband to the said *Josias*, which Husband was served Heir to his Goodsir, who was Infeft, Holden of the King,

and died last lawfully Infeft, whereas his Father, who was the *Author* of the Pursuer and her Husbands Conjunct Infeftment, was never Infeft in the Lands; so that the Pursuer, and her said Husbands Infeftment of Conjunct-fie being Base, granted to be Holden of his Father the Granter, and who was never Infeft himself, cannot be sustained as a valid *Right* to Remove these Excipients, who were Infeft by Publict Rights, clothed with so long Possession, specially in this Possessor Judgement, where the Pursuer and her Husband can never be able to *Alledge*, that their Base Infeftment proceeding as said is *a non habente potestatem*, was ever clothed with Possession of these Lands excepted upon. And the Pursuer *Answering*, that her Base Right ought to be preferred, in respect it flows from her Contract of Marriage, and the said *Right* granted to thir Excipients flowes from her Husbands Right, which, albeit it be publict, and flowes to him as Heir to his Goodsir, and has no respect to his Father, yet the same being so acquired by her Husband, after the date of her Conjunct-Infeftment, which the Defender quarrels, it must be profitable, & accresce to her, and make her Alledged Base *Right* become good to her, sicklike as if her Conjunct Infeftment had proceeded immediately from her Husband, *quo casu* his superveening Right, as Heir to his Goodsir, must accresce to her, *quia Jus superveniens authori prodest successori*. And this Ground holding, as in Law and Equity it ought, there is no necessity to *Alledge* Possession, but her *Right* is good without Possession. The *Lords* Repelled the Exception, and sustained the Pursuers Right, and preferred the same to the *Excipients* publict Right, seing they Found, that the acquiring of the Right by her Husband, as Heir to his Goodsir, behoved to be profitable to her who was Infeft, albeit Base before that acquisition, and the said Base Right was considered, as if it had flowed to her from her Husbands self. *Vid. June* 22. and *July* 28. 1637. Betwixt these Parties.

Skeen contra *July* 15. 1637.

MR. *Andrew Skeen* of *Halyards*, pursues for Entry to the Lands of which were Set by him to the said Tennent, conform to an Appointment, faithfully accorded, and conveened fully upon, betwixt them, whereby the said Mr. *Andrew* Set the Lands to the said Tennent, for the space of years, for payment of such a Duty condescended on in the Summons, at the which time the said Tennent promised, that if he Entered not to the Lands, conform to the said *Agreement*, that then he faithfully promised to pay a years *Duty* for the said Lands, & therefore Pursued him to enter and keep the bargain, which he referred to his Oath. *And* the Defender Alledging, that there was place of Repentance; Likeas, immediately after the conference, concerning the said Bargain, he gave it over, and declared that he could not stand to the same, which he did, and might have passed from that conference, seing nothing had followed further thereupon. *And* the Pursuer sustained no prejudice, the Conference being had about *Whitsunday* last, at which time the Ground was Laboured by the Tennent indweller therein, and before the Cropt be separat, he had, and has sufficient time to provide for another Tennent. The *Lords* Found that there was place for Repentance to the Tennent, to quit the Bargain *rebus integris*, and that he could not be compelled, to keep the Condition Lybelled, to have been agreed upon, for Entry to the Ground, and Labouring the same, during the Alledged space conveened upon; and they Found, that albeit the Pursuer had bigged Barns and Byres to the Tennent, for his use of Labouring, that yet there was no prejudice to the Master, seing they would Serve for any other Tennent that should Enter; neither was it a considerable Prejudice, that the Tennent Entered not at *Whitsunday* to the Grass, as the Defender would have inferred; But because the Pursuer restricted his Summons to the fulfilling

of

of that Part of the *Alternative*, Alledged condescended upon, *viz.* Either to Enter to the Land, and keep the Tack agreed upon, or else to pay him a years Duty of the Land, if he Entered not; The *Lords* sustained that Part, *viz.* for payment of the said years Duty, if he liked not to Enter to the Land, for the which the *Lords* Found, that the Defender could not be heard to Resile and Pass from that Promise, if the same was proven. *And* therefore the *Lords* sustained the *Action* therefore, to be proven by Defenders Oath, whereanent the *Lords* Found the Defender had no Place of Repentance. *Gibson* Clerk. *Vid. July* 16. 1636. *Mowat.* & *Jan.* 29. 1630. *Laurie.*

Viscount of *Belheaven* contra La. *Lusi*, *July* 18. 1637.

THe Viscount of *Belheaven* being Donatar to the Laird of *Lusi*'s Escheat, and obtaining Declarator thereupon, Pursues a special Declarator against the Lady *Lusi*, and certain others, wherein a Tennent being called for delivery of certain Steil-bow Goods, which were delivered to him by the L. of *Lusi*, the time when the Room was Set to him in Steil-bow, with the said Goods. *And* the *Defender Alledging*, that he could not be subject to deliver the same to the Donatar, he being Tennent of the Room, so Set in Steil-bow; for he could not deliver the Goods, and be Compelled to keep the Room, and to pay the yearly Duty therefore, wanting the Steil-bow, which he obliged him to pay for the same, together with the Steil-bow. The *Lords* Found, that the Defender ought to be Compelled by this Process, to deliver the Steil-bow Goods to the Donatar, betwixt and the Term of *Whitsunday* next to come 1638. Betwixt and which Term he might provide himself of another Room, and give over this Room to the Setter thereof to him, or to any other having *Right* to the same, and that in the meantime he might make use of his Corns, & provide for the delivery of the Steil-bow Goods. And it was not respected, that the Defender Alledged, that he being Tennent closed within Terms, as the Heretor could not Remove him before he were lawfully Warned, as use is, no more could he Pursue for the delivery of the Steil-bow Goods, before he were Warned, seing he could not deliver the Goods, which were the means by the which he Laboured, and which is *Pars fundi*, so conditioned to him, and consequently the Donatar, who could not be in a better Case than the Master, who Set the Room, could not pursue for the Goods, except he had been first Warned to Remove; which Alledgance was Repelled, for the *Lords* Found, that the Defender ought to deliver the Steil-bow Goods to the Donatar, as having *Right* thereto, at the next *Whitsunday*, after the separation of the Cropt, and that it was in the Tennents will still to retain the Possession of the Room, or to leave the same, if he liked, after that insuing *Whitsunday*, and ay and while he were Warned, by one having Right to the Land, which a naked Donatar to the simple Escheat could not do, albeit that Donatar would also had Right to the Steil-bow Goods. *And* this was *Found*, in respect that the Defender was but a naked Tennent without Tack, whereas, if he had obtained Tack of this Room in Writ, with the Steil-bow, the Donatar *eo casu* could not have pursued for delivery of the Goods, while the Tack was expired, albeit he might have sought *Declaratoriam Juris* thereupon, before the expiring of the Tack. *Actor. Advocatus* & *Nicolson.* Alter. *Mowat. Gibson* Clerk. *Vid. December* 4. 1638. La. *Westmur-land*, and the Cases there.

L. *Innerweik* contra La. *Smeitoun*, *July* 19. 1637.

UMquhile L. *Smeitoun* being obliged to pay to L. *Innerweik*, a yearly Annuity of 1700. Merks, during *Innerweik*'s Lifetime yearly, which Bond Registrat being Transferred in the Lady *Smeitoun*, as Executrix to her Husband, Granter of the Bond, reserving her Defences, and she Suspending, that she as Executrix, could not be subject to pay a yearly Duty, for Years and Terms to

come, after the decease of her Husband, who was the *Debitor*, for that was a Fact only prestable by the Heir, who ought to be conveened therefore, and not by the Executor, and the most that the Executor could be Lyable thereanent, was only for so many Terms bygone of that Annualrent Duty, as were owing the time of her Husbands decease, and that she ought not to be subject to payment in time coming. The *Lords* Repelled this Reason, and Found, that the Executor was subject to pay the yearly Duty in all time to come, during the Creditors Lifetime, *usque ad vires Inventarij*, wherein the *Lords* Found both the Heir and Executor Lyable to the Creditor, as he pleased; and Found, that there was no necessity to the Creditor, to Charge and *Discuss* the Heir *primo loco*, before the Executor could be Charged, as if it were proper to be first payed by the Heir, and that if any otherwise the Executor could be subject, the same was but *in subsidium*, after the Heir was first discussed; which was Repelled, seing they Found, that they were both obliged alike principally to the Creditor, as said is; & here the Charger insisted against her as Executrix, at the least Intromissatrix with the Defuncts Goods and Gear, but the Disput run upon this ground, as if she had been Executrix; for she Alledged, that the Intromissatrix could be Lyable no further than an Executrix, which Ground was holden as granted, and so Disputed, as said is. Actor. *Stuart.* Alter. *Advocatus. Vid. March* 29. 1626. *Cowston*, and the Cases there cited. *June* 13. 1629. *Inglis* *

L. *Lawers* contra *Dumbars*, *July* 26. 1637.

THe umquhile Countes of *Murray*, and the Earl of *Argyl* her Husband for his Interest, having obtained *Decreet* in *anno* 1583. against *Dumbars*, for the violent Profits of certain Lands in *Murray*, pertaining to the Countes in Conjunct-fie, by her Right thereof made to her by the umquhile Earl of *Murray* her first Husband, which Decreet was given against the Defenders therein Compearing; after which *Decreet* no other thing being done therein, while about the year 1597. at which time the Parties in the Sentence being all then dead, the Laird of *Lundie*, Son procreat betwixt the said Earl of *Argyl*, and the Countes of *Murray*, obtainer of this Sentence, obtains this Decreet Transferred in him, as Executor to the Lady his Mother, who was Conjunct-fiar of the Lands, and in some other *Dumbars* as Representing the Defenders in the first Sentence, (the Laird of *Lundy* not being then, nor at no time thereafter decerned Executor to the Earl of *Argyl*, Husband to the Lady, and to whom *Jure Mariti* the benefit of the Sentence behoved to pertain) and in this Case the matter so stands, while the year 1636. or 1637. That *Lundy* Dispones his Right of the said Sentence to the Laird of *Lawers*, for satisfying of a Debt payed by *Lawers* for *Lundy*, which *Lawers* obtains himself Executor Dative decerned to the Earl *Argyl*, Husband to the Lady, and upon these Rights now pursues the saids *Dumbars*, for payment of the Sums contained in the said Decreet of violent Profits. And it being Alledged, that the said Decreet was Prescribed, conform to the *Act* 28. *Par.* 5. *Ja.* 3. There being 40 years since the date thereof, and no Documents taken thereon since; Whereto it was Replyed, that Sentences *in foro contentioso* Prescribes not, as was Found by the *Lords*, in an *Action* betwixt *Currours*, and the *Act* of *Par.* which mentions not Decreets, cannot be extended to Decreets, seing *Acts* of *Par.* are *stricti Juris*, and cannot extend to any further than the same Bears, specially *in odiosis*, as all Prescriptions are, which are of this kind. 2o. That it was Interrupted, (*posito* that Sentences might Prescribe, which is denyed) in respect within the time of 40 years, the Laird of *Lundy* had obtained the said Decreet Transferred, the Parties being Cited thereto, which was a sufficient Interruption. And it being Duplyed, that that Pursuit at his Instance, as Executor to his Mother, could not be Sustained

as a valid Interruption in Law, seing the Benefit of this Sentence behoved to pertain to the Executors of her Husband, and so the other Title being Null, to claim the Right of the said Decreet thereby, which could not pertain to her Executor, the same cannot be *Found* an Interruption. And the Pursuer Triplying, that he was that same Person, who would have also been Executor to the Husband, and that the Interruption made, as is above-written, ought therefore to be Sustained to stay the Course of the Prescription, which was in it self odious, to take away a Decreet given against a Party Compearand, and holden as Confest, who could never be Found in *bona fide* to take away that *Decreet*, without a specifick Discharge. The *Lords* Found, that this Decreet, albeit given against a Party Compearing, was Prescribable, where no Diligence followed thereon, within the time required by the foresaid *Act* of *Parliament*. And Declared that they would observe this, and the like Decision in all time coming, when the like question of Prescription should be obtruded against Decreets, albeit *in foro contentioso*, and Found that the same comes under the *Act* of *Parliament* foresaid. And as to the Reply of Interruption, because the Sentence of violent Profits contained a great Sum, the Party being holden as confest upon the whole Lybel, not Compearing to Swear upon the Quantity. The *Lords* Found this Interruption sufficient to stay the course of Prescription against the *Decreet*, which Decreet the *Lords* Found should remain in force to have effect, for refounding to the Pursuer of the Just and True Interest, which the obtainer thereof can be qualified to have sustained, sicklike as when the same might have been tryed, and qualified by the Party obtainer, before the obtaining of the Sentence, but not to infer Execution for the whole quantity in the Decreet, which is the whole Lybel, in respect the Parties were holden as confest, as said is, which quantity the *Lords* Found, ought to be retrinshed to the Ladies True and Just Interest, and no further, and after the Tryal whereof they Found, that they would Modifie also that same quantity, and for which quantity so to be Modified, the *Lords* Found that the said Interruption ought to be sustained, to maintain the said Decreet, and Execution thereof, and no further. Actor. *Advocatus*, *Nicolson* & *Stuart*. Alter. *Burnet*, *Gilmore*, *Nicolson* younger, *Johnston* & *Gibson*. *Gibson* Clerk.

La. *Blairquhen* contra Tennents, *July* 28. 1637.

IN the Action of the La. *Blairquhen*, whereof mention is made, *July* 11 and *June* 22. 1637. It was further Liked by the Defenders to that Exception proponed before by them, that the Union ought not to be respected, the Lands United being distinct Baronies, Holden of divers Superiors, *viz.* the one of the King, and the other of the Prince, and the Union appointing the Seasin to be taken upon the Ground of the Lands, Holden of the Prince, to serve for the Lands also Holden of the King, whereas they lay 40 miles sundry, and in divers Sheriffdoms, and so against Nature, and which can never be Sustained, as a Warrand to the Father, to grant to his Son and his Wife, an Infeftment of a Base Holding, containing the like Union, that Base Right never being Confirmed, and neither the Wife nor the Husband, nor their Author ever being in Possession of the Lands, whereas the Defenders and their Authors are Publickly Infeft, and by vertue thereof these 18 years in Possession, which ought to Defend them from Removing in this Possessory Judgement, which Alledgance was Repelled by the Lords. *Vid. June* 22. and *July* 11. 1637. betwixt those Parties. and *March* 19 1636. L. *Lawriestoun*.

E. *Haddingtoun* contra his Tennents, *Eodem die*.

THE E. of *Haddingtoun* Pursuing Removing against his Tennents, as Heir Retoured to his Father, and Infeft so as Heir to him upon a Warning, made at his Fathers Instance, before *Whitsunday* last, and after which Warning, and some few

few days after the Term foresaid, the umquhile Earl maker of this Warning died. And it being Alledged that no Process could be Sustained at the Pursuers Instance upon that Warning, only Execute at his umquhile Fathers instance, which became extinct by his Decease, and this Pursuer could not be heard to do any Legal Deed thereupon by Removing, unto the time a new Warning was Execute lawfully at his own instance; And also Alledged, that the Pursuers Retour and Seasin were both after the Term, before which the Warning was made; so that albeit the Warning had been at his own Instance, yet the same cannot be Sustained, he neither being then nor yet at the Term, nor before it, either Retoured Heir, or Seased, far less can it be Sustained, to maintain the Warning at his Instance, which was Execute by the Defunct. The *Lords* Repelled both these Alledgances, and Found, that the Heir might prosecute the Warning, and intene Action thereupon, which was used by his Deceast Predecessor; albeit nothing had been further prosecute thereupon by the Defunct before his Decease, and which the *Lords* Found the Heir might competently do, as well where the Defunct dies before the Term, to which the Warning was made, as when he dies after the Term: Neither was it respected, that the Grass Profites of the first year, after the Warning, might be claimed by the Executors of the Defunct, who survived the Term, and that the Heir could not have Right thereto: And also, the *Lords* Repelled the other Alledgance, For they Found that the Retour and Seasin, albeit both after the Term, gave the Pursuer sufficient Title and Interest to Pursue this Removing, against a Party who had no Right to the Land himself, and that the Retour and Seasin should be drawn back. But I find a scruple in this Decision, and for the back-drawing of the Retour and Seasin, I conceive not how they can be drawn back to give the Pursuer Right to a personal Act as Warning, which then he could not make, or do, the Defunct who then had the only Right being living for the time. Actor, *Advocatus & Stuart*. Alter. *Craig & Gilmore*. *Scot* Clerk. *Vid. December* 11. 1638. *Finlason*.

Lo. *Dunipace* contra *Littles*, *Eodem die*.

MY Lord *Dunipace* President being made Assigney to a Bond of 2000 merks, granted to *Adam Bothwel*, by the Bairns of umquhile Mr. *William Little*, being Minors for the time, the Right of which Bond was Transmitted in the person of Mr. *James Aikenhead*, and who had made the President Assigney thereto, and who upon his Assignation Charging the said Minors, and they Suspending and Reducing upon a Co-incident Reason *viz.* Minority and Lesion. And the President Answering, that he offered to prove, that albeit the Bond bore, *for borrowed money*, yet the true Cause was for the Acquiring of the Teinds of his Lands in *Libbertoun*, from the Lord *Hally-rud-house*, whereby he could not be heard to Alledge Lesion, and this was offered to be proven by Witnesses, *viz.* the said Mr. *James Aikinhead* the Cedent, & his Servant, which he Alledged ought to be found sufficient in this Case, where *Alexander Spear*, who was Goodsir to the Bairns, and was their sole *Curator gerens*, and was only privy to the Bargain, is now dead, and also consideration being had, that the Bond, and the Tack of the Teinds granted to these Minors, were both done at one time, and are both of one and the same Date. And it being questioned, if this Alledgance was Relevant to be so proven by Witnesses, and if Mr. *James Aikinhead* and his Servant might be Witnesses to prove the same, the one of them being Cedent, and the other his Servant. The *Lords*, before they gave Answer thereto, Found, that they would Examine the saids two persons, and hear their Depositions, whom they Found the rather might be admitted to be Witnesses, seing the Cedent is not obliged to warrand this Assignation, and so could neither win nor lose in the Cause. Actor. *Pra-*

Præsens. Alter. *Hay* Clerk. *Vid. December* 11. 1632. E. *Haddingtoun.*

Cessation for near a year, in respect of the Troubles for Kirk business.

Supplication La. *Glenbervy* contra her Husband, *July* 13. 1638.

THis day Inhibition was Craved at the Instance of the Lady *Glenbervy* against her Husband, upon a Bond made by him in her *Favours*, whereby he was obliged to Infeft her in Liferent in certain Lands, contained in the Bond, in recompense of other Lands, wherein she was Infeft, and which were thereafter Sold by her Husband, to the Alienation whereof she consented, and which Lands wherein her Husband by his other Bond, was oblidged to give her Infeftment, she in her Supplication affirmed her Husband was of Intention, to Dispone and Annailzie, therefore she craved Inhibition thereupon, which the *Lords* granted at her Instance against her Husband, *Stante Matrimonio*, albeit there was neither Separation nor Action of Divorcement depending betwixt them, or Intented by any of them against the other; and albeit they Cohabited, and lived together as Man and Wife; and the said Inhibition was Found ought in Reason to pass. *Vid. July* 8 1642. *Inglis. January* 7. 1643. *Malcolme Crawfurd.*

Dumbar contra *Dumbar*, *July* 14. 1638.

IN an Improbation, which was Pursued at the Instance of *Dumbar* of *Asleisk*, against the Chanter of *Murray* and *Thomas Tulloch*, one *Spense* of *Alves*, and some others, for Improving a Charter, Alledged made by umquhile Mr. *James Dumbar*, in favours of his Daughters of certain of his Lands: In which Cause, after long Tryal, the Charter being Found false and Feinzied, and *William Forsyth*, who was Nottar and Writer of the Charter, and *Thomas Tulloch*, being Found Contrivers of the Falshood, they were Remitted to the *Justices* to be punished, as the Law Ordains in Fashoods; & the Sentence being so pronounced, and given out against these two Defenders, the *Justices* proceeded against them, and the Charter was Cancelled in presence of the *Lords*, by their Command; notwithstanding of the which Sentence so pronounced, and executed against the saids two of the Defenders, the rest of the Defenders, who were not fully Tryed, The *Lords* Found, seing there was some presumptions against them, which they Found gave occasion to make further search against them, so that they could neither altogether Assoilzie, nor Decern against them, while they were further Tryed, and seing they were not all present to be now Tryed, The *Lords* Ordained Letters to be Direct at the King's Advocats Instance, to Summon the saids Parties to compear to be further Tryed: And the *Lords* Found, that the giving of Sentence against the other two, and the *Justices* executing of Law against them, was no cause to hinder the prosecuting of the Process against the rest, who were neither Assoilzied, nor found Guilty of their proceeding, Wherein the *Lords* Found the said Sentence ought to make no Impediment, and therefore did so proceed therein: And because the great help of the Discovery of the Falshood proceeded from the Nottar, who confest his own Falshood, and Discovered the Actors, *viz. Thomas Tulloch*, Therefore the *Lords* Remitted *Thomas Tulloch* to be proceeded against, according to the Course of Law, which inflicts Death; and for *Forsyth*, they desired that the *Justices* should take such order to punish him, as his Life might be safe, & to inflict any other Punishment which in Law they might, his Life being preserved: seing they Found he ought to have more favour than the other, he being found to confess ingenuously at the first, and to have contributed greatly to the Tryal, by declaring all the Circumstances thereof, which *Tulloch* ever denyed, while in the end, by the force of Verity, and with great time and pains, the same was Extorted from him: And so in this Process, the *Lords* Found (as has been also done before of old) that in the Tryal of Falshood, the *Lords* may inflict the particular Punishment themselves, where they Found, that

it was within the pain of Death, without Remitting the Party, in that and sicklike Cases, to the *Justices*, where the Crime was found not to be punishable by Death, and where they Found the same deserved Death, they ought not to intermedle therewith, but committed the Party so Found guilty to the *Justices*, to be proceeded against by them in Law, conform to the Laws of the Kingdom; but because the *Lords* did doubt, if they might do this before the Sentence was pronounced (albeit truly they might do the same, & has done so of before, as said is) therefore they Remitted also the Nottar to the *Justices* Process, and signified to the Justice-General, that they Found, that the Nottar's Life ought to be spared, and Recommended to him to have a care thereof. Actor. *Advocatus & Baird.* Alter. *Nicolson & Gibson.* *Hay* Clerk.

Denholms contra *Denholms*, *July* 17. 1638.

THe three Daughters of umquhile *Andrew Denholm*, being his Heirs in a Tenement of Land in *Edinburgh*, which was by Decreet of the Town of *Edinburgh*, divided among them and their Husbands, *viz.* *George Ross* who Married the eldest, and *Andrew Oswald* who Married the youngest, and which *Andrew* also had Acquired the second Sister's part of the Land, and so thereby he had Right to the two part of the Land. This Decreet of Division being drawn in question by way of Suspension, wherein the Sisters and their Husbands controverted, whether the eldest Sister and her Husband should have the Principal Original Writs delivered to her, or if the same should be delivered to *Oswald*, which he Alledged it ought to be, seing he was Heretor of the two part, and that the Principal Writs should go with them, who had Right to the greatest part of the Lands, and that the Transumpt should only be delivered to the other Sister (although eldest) she having only Right to the third part of the Land. The *Lords* Found, that the Principal and Original Writs should be delivered to the eldest Sister, to be keeped by her, and that she ought to have the keeping of the same, which they ordained to be made forthcoming to the other Sisters at all occasions, when necessity and reason should require the same: for the Acquiring of the other Sisters Right by the third Sister (whereby the two part of the Lands were in the person of the one Sister) was Found not to derogat to the Priviledge of Primo-geniture, competent to the eldest, no more than if all the three Sisters had retained ilk one their own Portions, *quo casu* the eldest would have had ever the preference in the custody of the Principal Writs, and albeit the one Sister had sold her Right, either to her other Sister, or to a Stranger, no reason was therefore that that Deed should derogat to the priviledge of the eldest; And the *Lords* Found, that the Transumpts should only be Delivered to the other Sister, who had Right to the two Parts; And which Transumpts they Found, should make as great Faith as the Principals, and ordained thir Transumpts to be made upon the equal half-charges of thir Parties, the one half to be payed by the eldest Sister, and the other equal half by the other Sister, who had Right to the two parts of the Land. Actor. *Oswald & Primrose.* Alter. *Gibson* Clerk.

Rowan contra *Colvil*, *July* 21. 1638.

ONe *Rowan* being Infeft by the Abbot of *Dumfermling* in the Miln of *cum astrictis multuris*, and specially with the astricted Multures of the Lands of pertaining to the Defender, who was Conveened by this Heretor of the Miln, to hear it Found, that his saids Lands are Thirled to his said Miln. And the Defender Alledging, that his Author, *viz.* the Laird of *Dury* was Infeft by the same Abbot, in the same Lands (albeit after the Infeftment of the Miln) which Laird of *Dury* had Disponed the same Lands to the Defenders Father, who thereafter Resigned the Lands for new Infeftment to be given to him and his Heirs. Upon which Resignation he was Infeft, with a Clause in the *Tenendas cum mo-*

Molendinis & Multuris; By reason of which Clause he has Liberty and Freedom from being Astricted to the Miln Lybelled; And in respect of this his Right and Interest to claim Liberty, He Alledged, that the Pursuers Seasin of the Miln Lybelled, so far as he craves thereby the Defenders Lands to be Astricted, and to pay Multure, and to Grind at the Miln Libelled, is null, because the same is not Registrat in the Secretaries Register, conform to the Act of Parliament. And the Pursuer Replying, that this Nullity cannot be respected, unless it were proponed by any having better Right to the Miln than the Pursuer, which this Defender has not. And he Duplying, that albeit he had no Right to the Miln, yet he might propone that Nullity, so far as the Seasin may be Sustained, to give the Pursuer any pretence to the Multures of his Lands. The *Lords* Sustained the Seasin, albeit it was not Registrat, against this Defender, who had no Right to the Miln. And where it was proponed (*in quantum* it might affect the Defenders Multures of his Lands) The *Lords* Found, that the Seasin could not divide to be good for the Miln, and evil for the Multures; But Ordained the Defender to Propone his Defence upon his own Right, whereby he might claim Liberty, which was the only ground giving him Interest to quarrel the Pursuers Seasin, that thereby it might be Tryed, if he might justly Eleid the Pursuers Action: And the Defender Repeating the Alledgance upon his Right *cum Molendinis & Multuris*, and which he Alledged made him free from this Astriction, in respect his Infeftment, albeit after the Pursuers, yet is Confirmed before, and the first Confirmation of Kirk-lands is preferred by the Act of Parliament, to the prior Infeftment which is last Confirmed. And the Pursuer Replying, that his prior Right Confirmed at any time, ought to be preferred, in respect that the first Infeftment of the Dedenders Lands, given to his Author (which is after this Pursuers Right of the Miln) contains an expres Clause, that the Defenders Lands shall be Thirled to the said Miln, and no posterior Infeftment Acquired thereafter by the Defenders Predecessor, upon his own Resignation, containing the general Clause, *cum Molendinis*, &c. can derogat to his preceeding, lawfully Constitute Thirlage; specially, seing the Defender or his Father, in the Infeftment, which he has Acquired of the Lands *cum Molendinis*, from the umquhile Queen *Ann*, as Lady *Dumfermling*, has accepted the same Infeftment with this Clause, *Reddendo omnia alia servitia & divorias quascunque contenta in infeofamento concesso per Abbatem de Dumfermling, Domino de Durie & Lundie ejus Sponsæ*; which Clause being so Specifick, and making mention of the Duties contained in the first Infeftment, granted to the Laird of *Dury* and his Spouse, expressly thereinnamed, which contains the said Astriction, must be of that same force, as if *per expressum* the Thirlage had been also specially expressed therein, and must produce the same effect against the Defender, except he were able to show, and produce another Infeftment, granted to the same Laird of *Durie* and his said Spouse, without any such Clause of Astriction. This Reply was Found Relevant, and in respect thereof the Exception was Repelled. Actor, *Nicolson*. Alter. *Stuart* & *Nisbet*. *Hay* Clerk.

Brown contra *Blaickburn*, *July* 25. 1638.

ONe *Brown* Pursuing *Blaickburn* for Spuilzie of four Horses, The Defender Excepting upon a Poynding of the same, for Satisfying of a Decreet obtained by *Blaickburn* against this Pursuer, and this Poynding being quarreled, because it was Deduced at *Dumfermling*, being the Head-Burgh of the Regality of *Dumfermling*; whereas this Pursuer, whose Horses were Poynded then of before, and ever since has dwelt within the Royalty, *viz.* in the Town of *Innerkeithing*; so that his Goods could never have lawfully been Poynded or Appryses, except at the Mercat-Cross of the Head-Burgh of the Sheriffdom, which is *Couper*; and albeit the Goods were Found accidentally within the Bounds of the Regality,

in their bringing of Coals to the Pursuers House, yet that was no *Reason* to warrand the Poynding, except it had been Deduced at the Mercat Cross of *Couper*; Likeas, before the Poynding was fully Compleat, the Pursuer had obtained Suspension of that *Decreet*, which he that same day had sent to *Couper*, to have stopped the Poynding, thinking verily that no Poynding could be orderly Deduced, but at the Head Burgh of the Sheriffdom, within which he dwelt; and finding that the Defender had so circumveened him, upon the next day after the Poynding, he Intimats this Suspension, both to the Officer, and to the Party. Attour he Alledged, he could not lawfully Poynd upon that Sentence, because the same Decerned the Pursuer to deliver to this Defender some Obligations, that were Alledged to be in his Hands, or else to pay such Sums of Money contained therein; and this Sentence being alternative, the Pursuer, who was Decerned, had the Election to do any of them; and he never being Charged upon that *Decreet*, as he ought to have been, before he could have been Poynded for the Liquid Sum; therefore he Alledged, the Poynding could not be lawful, being so summarly Execut. The *Lords*, albeit they Found, that the Poynding should not fall because the same was *Deduced* at *Dumfermling*, the Head-Burgh of the Regality (for they thought, that albeit the Party, owner of the Goods, dwelt within the Royalty, where the same was not Execute, but that the Goods being Apprehended within the Regality, might lawfully be Poynded at the Head-Burgh of the Regality, and so the Poynding was sustained, notwithstanding of that Alledgance) yet in respect of the other above-written Poynts of the Reply, the same was sustained, and the Exception upon the Poynding was Repelled, to infer *Restitution* of the Horses, and Prices therefore, to be Modified by the *Lords*; And also for payment of such Expenses to the Pursuer, for satisfying of the Profits, and all that he could seek by this Pursuit, as the *Lords* should modifie. Actor. *Baird.* Alter.

Kenoway contra *Mowat*, *Eodem die.*

ONe *James Kenoway* being Donatar to the Liferent-Escheat of *Patrick Aitine*, Husband to *Agnes Boyd*, who was Liferenter of a Part of the Lands of *Gellets*, and which she and her Husband had Set in Tack, for payment of certain Victual Duty, to be payed therefore yearly to them, by the Tennent. And *Mr. Rodger Mowat* being Assigney by the Husband, and the Wife after the Rebellion to the same Tack-Duty of the years 1636. and 1637. For a Just Cause of Debt owing by them to him, contending which of them should have *Right* to the said Tack Duty, which the Donatar *Alledged* he must have, as said is, by vertue of his Gift, & whereupon he had intented Declarator presently depending, which is only Impeded by this same Assigney; Likeas the Tennent produced a Discharge, granted by the Donatar, of the Cropt 1636. which he Alledged it should liberat him, being payed before any Intimation or Knowledge of the Assigneys Right. And the Assigney Alledging, that this payment could not defend the Tennent, being only made Voluntarly, without any necessity of Law, and there being no Declarator, neither General nor Special, at the Donatars Instance, it cannot be Sustained, that the Tennent should without Sentence, or Legal Compulsion invert his Masters Possession. And the Donatar *Alledging*, that he ought to have the year already payed, allowed to the Tennent, and ought to be Answered of the other year controverted, in respect that his general Declarator was only stopped by the Assigneys Compearance. The *Lords*, in respect the payment was made for the first of the years controverted, by the Tennent, before he was Interrupted by the Assigney, allowed the same, notwithstanding that the Escheat was neither Generally nor Specially Declared; and for the other year, in respect Interruption was made by the Assigney,

Assigney, and that it was not payed to the Donatar before, and that there was Opposition made against the Declarator, therefore they Ordained the Assigney to be *Answered* of that Cropt, he finding Caution to refound the same to the Donatar, *cum omni causa*, in case he prevailed in his Declarator, seing the *Assignation* was made to a true Creditor. Actor. *Bruce*. Alter. *Mowat* for himself. *Gibson* Clerk.

Loch contra *Dick*, *July* 26. 1638.

ONe *Henry Nisbet* Burges in *Edinburgh*, being owing by Bond, to umquhile *Sara M'math* 3000 Merks, and the said *Sara M'math* having Assigned the Sum to *Janet M'math*, one of her Sisters; And the said *Janet* and *William Dick* her Spouse, having obtained Decreet upon this *Assignation* before the Sherif, against the said *Henry* for payment, and *James Loch* Burges of *Edinburgh*, who had married another Sister of the said umquhile *Sara*, and *Janet M'math* having intented Reduction of this Assignation, as done by her, after she became Furious and Fatuous, and during the time of her Furiousnes and Fatuity. And it being Alledged, that seing the Party, maker of the *Assignation* controverted is now dead, and no Declarator purchased of her desease of Madnes in her own Lifetime, before she died, that therefore no such Action ought to be sustained upon this Reason, now after her death, to have been proven by Witnesses, whereas it ought to have been tryed, while she lived, by a *Brief*, and a sworn Assyse, as is appointed by the 66. Act *Par.* 8. *Ja.* 3. And it were a dangerous preparative, to admit any such Action, after the Parties death, to be proven by Witnesses; for so none might be sure of their Estates, and thereby Heretable Rights may be Everted by the Depositions of Witnesses, The *Lords* Repelled the Alledgance, and notwithstanding thereof sustained the *Reason*; For the *Lords* Found, that the Tryal might be taken in this case now Controverted (being of a moveable Bond) after the Party makers death, and by Witnesses, seing it may fall out, that while the Maker lived, the Writ might remain obscure, and never come to light, and no other has power to quarrel such Deeds, nor Interest thereto, while they who make the same are living, for Furious Persons also may have *dilucida intervalla*; so that all such Deeds, except they be done the time of the Fury, are not quarrelable. Actor. *Alter*, *Stuart*, *Gibson* Clerk. *Vid. Feb.* 21. 1632. *Elizabeth Alexander*.

Farquhar contra *M'kain*, *July* 28. 1638.

ONe *Patrick Farquhar* having Charged *James M'kain*, for 700 pounds conform to his Bond of this Tenor, *viz.* bearing, *That the said James M'kain*, and *John Gordon binds and obliges them conjunctly and severally, to pay the said Sum at the Term contained in the Bond, ilk one of them for their own Part*, these were the very words, in respect of the which Clause, Terminating the prior Words of *conjunctly and severally*, and resolving in payment, ilk one of them of their own Parts. The *Lords* Suspended the Charges against *M'kain*, for the half of the Sum, and Found him only Debitor of the one half thereof, and not of the whole.

The Bairns of *Frazer* contra *Bishop*, *November* 17. 1638.

THe Bairns of one *Frazer* in *Currie*, having obtained Decreet against one *Bishop*, Relict of their Father, and Intromissatrix with his Goods, for payment of them, as Executors Confirmed to their Father, of a certain Sum; And the Suspender Alledging, that the Executors ought not to have payed the Sum of Alledged adebted to the Bairns of her said Husband, gotten in his first Marriage, by the which her Third, as Relict was prejudged, for that should not be respected, as a Debt to exhaust her Third, as other Debitors owing to lawful Creditors does; For that Debt owing to the Bairns is of another nature,

and should only affect the Bairns Part of Gear, and the Defuncts own Part, and the Relicts Third Part should be free thereof. This Alledgance was Repelled, and the *Lords* Found, that the Provision made in favours of the Bairns of the first Marriage, was a *Debt* which affected the *Defuncts* whole Goods, as any other Debt does, and that it ought not to be taken off the Two Part of the Defuncts Goods, so that the Relicts Third should be free thereof, but that it ought to be taken off both the Third, and Two Part *in cumulo*.

Provost of *Stirling* contra *Heir* of *Livingston*, *November* 20. 1638.

THe Provost of *Stirling*, as *Assigney* to *Bruce*, having obtained Decreet against the Heir of Line of *Livingston*, as being lawfully Charged to Enter Heir, in which Process the Heir of Tailzie being also conveened, as lawfully Charged to enter Heir, he *Renounced* to be Heir, whereupon he was Assoilzied, and the other Heir of Line was Decerned; The Pursuer thereupon Intents Process of Adjudication against the Heir of Tailzie, in respect of his said Renounciation, wherein he Compearing, Alledged that this *Process* of Adjudication should not proceed against him as Heir of Tailzie, while the Heir of Line be first Discussed, according to the Order in such Cases. The *Lords* Repelled the Alledgance, and Found the Process of *Adjudication* might Competently be prosecuted against the Heir of Tailzie, albeit the Heir of Line was Decerned and not Discussed, seing the Heir of Tailzie having Renounced to be Heir, he had no Interest to propone this Exception, after his Renounciation: And the *Lords* respected not, where the *Defender* Alledged, that this Defence was *in Jure*, and although no Party should propone it, yet it was in Law inherent in the nature of such Processes, to discuss the Heir of Line first; And the Judge ought to find so, by the Consuetude and Practique of the *Realm*, although it were not *Alledged*; and albeit the Heir of Tailzie had Renounced, yet it has ever that inherent with it, that *suo ordine* ilk Heir should be sought, and discust in his own Roum, by Priority and Posteriority, as use is, which was Repelled. Actor. Alter. *Nairn*.

Campbel contra *Baxter*, *November* 24. 1638.

ONe *Campbel* being made Assigney by the Creditors of umquhile *Thomas Baxter* Smith in *Edinburgh*, to the Debts owing to them by the said umquhile *Thomas*, Pursues *John Baxter*, his Appearand Heir, as Lawfully charged to enter Heir, who Renouncing to be Heir, is Assoilzied; and thereupon Adjudication being sought against the Debitors of the said umquhile *Thomas Baxter*, and Sentence of Adjudication being obtained against the *Debitors* Compearing, which being Suspended. The *Lords* Found, that the Particulars Adjudged, could not come under such a Process, and Sentence of Adjudication, seing the same were Moveables, which might be sought by Arrestment; whereas *Adjudication* is for Immoveables; this was Found, albeit there was a Sentence obtained, the Party Compearand, who might have opponed this; but the *Lords* Found the nature of the Debts Decerned, might permit this at any time to be opponed, specially where it was proponed by another Party than by them, against whom the Sentence was Pronounced.

Brown contra *Hamilton*, *November* 28. 1638.

Alexander Brown Burges of *Edinburgh* Pursuing *Alexander Hamilton* for payment of the price of 12 Bolls of Bear, as delivered by the Pursuer at the Defenders direction, to a certain person condescended upon, at least as received by the Defenders Servants from the Pursuer; And the Defender Alledging, that the Summons was not relevant, bearing, *that the Defender directed to receive the said* 12 *Bolls of Bear*, but only to be proven by Writ, or the Defenders Oath; & where the Lybel bore, *That the Pursuer delivered the Victual to the Defenders Servants, in the Defenders Name* he also Alledged that ought to be Proven by Writ, or Oath of

Party

Party. The *Lords* Found that Part of the Summons, anent the Deliverty of the Victual, at the *Defenders Direction*, ought to be proven in that Part, *viz. Anent the Defenders*, *Direction* only by Writ, or Oath of Party; and anent that Part, where it bore, *To be delivered to the Defenders Servants*, The *Lords* Ordained the Pursuer to condescend upon the particular Person, who it was that received the Victual, and it being condescended upon, and proven, that he was then the *Defenders* Servant, the *Lords* sustained the Summons to be proven by Witnesses. Actor. *Baird.* Alter. *Heriot.* *Hay* Clerk.

Stuart contra *Stuart*, *December* 1. 1638.

ONe *William Stuart* pursues Restitution, after he had past the Age of 21 years, but far within the time of *anni utiles*, against *Robert Stuart*, who was his Tutor, while he was a Pupil, and which Tutor had obtained a *Decreet* of Exoneration before the *Lords*, against his said Pupil, and his Curators, they Compearing after Compt and Reckoning, and Articles thereupon heard and allowed, and *Decerned* by the *Lords*; against the which Sentence, and Articles of the Compt, this Party desiring to be Reponed, as being thereby enormly prejudged, by sundry Ommissions left out by the Tutor, and by sundry Answers omitted to be given in to his Charge, by his Curators, and the said *Robert* Compearing, Alledged, that this Action ought not to be sustained, in respect of the Sentence given against him, *Authorized* with his Curators Compearing, who if they had done him any wrong, either in Commission, or Omission, they are Answerable to him therefore, and they are his direct Parties, who are in Law Comptable to him, and he cannot come back again upon him, to crave a new Accompt, as prejudged by the first, in respect of his Sentence *parte comparente*, whereby he is *in tuto*, otherwise there could never be an end of such Actions, which were a dangerous preparative, if Decreets of the Soveraign Judge *in Actione Tutelæ & Rationum reddendarum* could not secure Tutors. The *Lords* Repelled this Alledgance, and Ordained the Pursuer yet to be heard, to Alledge what he may say Justly against the foresaids Compts, given in by his Tutor, and so Ordained them to meet before one of their Number, whom the *Lords* Nominat to be their Auditor, and to give in the Articles of the Compts, and *Answers* thereto, notwithstanding of the prior Sentence. Actor. *Lawrence Oliphant.* Alter. *Hope.* *Gibson* Clerk.

La. *Westmuir-land* contra La. *Hume*, *December* 4. 1638.

LA. *Westmuir-land*, as Executrix Decerned to the umquhile Lady *Hume* her Daughter, who was the Spouse of umquhile *James* Earl of *Hume*, and who was his Relict, surviving him, Pursues the Lady *Hume*, Mother to the said umquhile Earl *James*, for payment of the Prices of certain Goods, such as Kine, Oxen and Sheep, which were upon the Lands of *Old-Cambus*, and pertained to the said umquhile *James* Earl of *Hume*, as his proper Goods, and consequently the just equal half whereof should pertain to his Relict, by the Laws of this Kingdom, and which being Sold and Disponed by this Lady Defender, the Earls Mother, she ought to pay the half of the Price thereof to the Pursuer, as having the Relicts Right. And the Defender Alledging, that the Lands of *Old-Cambus*, with the Steil-Bow Goods thereon, being Disponed by *John Arnot*, to umquhile *Alexander* Earl of *Hume*, Husband to the Defender, and Father to Earl *James*, and to this same Defender, and longest liver of them two, and to his Heirs. These Goods now Pursued for must be reput the same, and none other, which were Disponed in Steil-Bow, as said is, except the Pursuer will Lybel, and offer to prove, that Earl *James* had the Goods Lybelled upon the said Lands, by and besides the other foresaids Steil-Bow Goods, Disponed to Earl *Alexander*, and this Defender; and if the Pursuer will not Alledge the same, (as indeed it cannot be Alledged) then she has no Right to claim any Part of these Steil-Bow

Goods; Because the same pertaining to Earl *Alexander*, and the Defender for her Lifetime, as said is, the same must pertain, after her decease, to Earl *Alexanders* Executors; Likeas they are Confirmed in his Testament, conform whereto she must be Comptable therefore, to the Executors Confirmed to the said umquhile Earl *Alexander*, and the Heir of the said umquhile Earl *Alexander* could never have Right to the said Steil-bow Goods, and by consequence, neither the Pursuers Daughter, his Relict; specially also seing this Lady Defender, has the Liferentuse of these Goods, against whom, during her Lifetime, neither the Heir nor Executors of Earl *Alexander*, or Relict of *K. James*, could Move any Action against her for the same. The *Lords* Found this Exception Relevant, to purge the Defenders Intromission with the Goods Lybelled, except the Pursuers will Reply, that umquhile Earl *James* had these Goods Lybelled, now Pursued for, besides the Goods Disponed in Steil bow to Earl *Alexander*, and Confirmed in his Testament, and that the saids Goods Lybelled are other Goods distinct from the same; for if the Pursuer would not Reply the same, The *Lords* Found, that it behoved necessarily to be presumed, that the Goods Lybelled were the same, which were Steil-bow, or else the Brood coming of the same, which was all alike; and being Steil-bow, the same was Found by the *Lords* to pertain to the Executors of umquhile Earl *Alexander*, and that they could not belong to his Heir, which Heir could not have Right to the same, as the Pursuer *A*lledged, he ought to have, seing Steil-bow was *pars fundi & cedunt cum fundo Proprietario fundi*, as *Instrumenta Fundi*, which the *Lords* Repelled, and sustained the Exception; for the Steil-bow Goods were Found to pertain to the Executors of the Defunct, and not to his Heir, as they will fall under the Gift of the Defuncts simple Escheat. In this Process diverse other Sums being acclaimed by the Pursuer, as due to her for the Relicts Part of the same, and the Defender *A*lledging, that the Pursuer could have no Right, except that she would Lybel, that the Sums were owing to the Relicts Husband by moveable Bonds. The *Lords* Repelled the Exception, and Found it enough to the Pursuer to say, that they were owing to the Husband; for it was to be presumed, that they were adebted by moveable Bonds, except that the Defender should *positivè* offer to prove, that the same was owing by Heretable Bonds and Securities; As in Arrestments, it is enough to *A*rrest the Sums, except that the Party will say, it is not *A*rrestable, being Heretable. *Actor. Nicolson, Mowat* & *Hog.* Alter. *Advocatus* & *Stuart. Gibson* Clerk. *Vid.* July 18. 1637. Viscount of *Belheaven.* Jan. 28. 1642. *Patrick Dundas.*

Dowglass contra *Mitchel*, *Decemb.* 6. 1638.

MR. *Hugh Dowglass*, Cautioner for *Mr. Andrew Lermouth*, Minister at *Libertoun*, being Decerned to pay the Debt; the said Mr. *Hugh* receives for his Relief from Mr. *Andrew* an Assignation to certain Bolls of Victual, to be payed by certain Tennents, off the Lands of for his Stipend of the Crop 1638. which was not Sown on the Ground the time of the Assignation; and after the said Assignation, the said Mr. *Hugh* Arrests the said Victual in the Tennents hands, and thereupon Intents Action against them, to make the *A*rrested Corns forth-coming: In the which Action *William Mitchel*, another Creditor of the said Mr. *Andrew*, Compears, who had Arrested the same Corns, and Claimed to be preferred to *Dowglass*, in respect of his anterior Arrestment before the *A*rrestment Execute by *Dowglass*; and albeit the Assignation to *Dowglass* be prior, yet the same ought not to be respected, except it had been also Intimat before his, which was not done, and the Arrestment made by *Dowglass* is after his Arrestment. Attour, it cannot be respected as an Intimation of the Assignation, but in effect is a passing from the Assignation, seing he hath *A*rrested the Corns, as the Cedents Corns, and not as pertaining to him as Assigney, and no ways making mention of the Assignation; so that it cannot be respected as an In-

Intimation of the Assignation, but rather that it is a Confession that the Corns still pertained to the Cedent; and further, the Assignation can give him no Right, being of Corns, which were not then extant, neither being Sown, nor Growing, and of the Law *non entis nulla est obligatio*. The *Lords* Repelled the Alledgance, and sustained the Arrestment, as a sufficient Intimation of the Assignation, albeit of Corns not then Growing, but being for a Stipend of a year ensuing, seing the Minister lived while it became due to be payed to him; especially the Arrestment was sustained as a sufficient Intimation against this other Defender, who had not obtained as yet Sentence against Mr. *Andrew Lermonth*, constituting him his Debitor, and so who could not be a just Party, to claim Arrested Goods to be made forth-coming, before he had obtained Sentence for his Debt. Actor. *Hope*. Alter. *Ellies*. *Gibson* Clerk.

Cochran contra *Dawling*, *Eodem die*.

Robert Dawling, by Contract betwixt him and *Violet Dawling* his Sister, is obliged to pay to her yearly 200 pounds, during her Lifetime, for the Annualrent of 2000 pounds, which she gave to him; which being yearly payed while he lived, after his decease, his two Daughters, his Heirs, by Decreet of the *Lords*, were Decerned to pay the same, and according thereto, being payed by their Curators; thereafter one of the Daughters being Married upon one *Abercrombie* of *Pitelpie*, he and his Wife gives to the said *Violet* for her Security, an Infestment of 100 pounds of Annualrent, to be payed to *Violet* during her lifetime, out of a Tenement in *Edinburgh*, pertaining Heretably to the said Daughter, Spouse to *Pitelpie*; at which time of the said Infestment *Pitelpie* was at the Horn year and day, and his Escheat being gifted and declared to *William Cochran* Donatar, he in a special Declarator for the Maills of the Lands, claims to be answered thereof, by vertue of the Husbands Escheat; which Maills during their Marriage he claims, as pertaining to the Donatar, by the Husbands Rebellion; And the said Annualrenter Alledging, that she ought to be preferred to the Donatar in the Maills of the Land, in so far as concerned her Annualrent, in respect that the Wife, who was her Debitor, was never at the Horn, and the cause of her Debt was anterior to the Horning; Likeas the Wife and her Husband had given this Infestment of Annualrent for obedience of a preceding Sentence, given against the Wife before she was Married; which being done *ex necessitate*, and not *ex mera voluntate*, the falling of the Husbands Lifetent could in no reason extend to prefer the Fisk to the lawful Creditor *ex anteriore causa*, who had done such lawful Diligence, as said is; and the superinducing of a Husband, who was the time of the Marriage Rebel, cannot prejudge her of that which was justly done to her by her lawful Debitor, who had not failzied, and was never at the Horn, and who was but a Conserter to that Deed, done by his Wife the Principal Debitor, & by him only for his Interest. The *Lords* Found, that the Donatar ought to be preferred to the Annualrenter, during the lifetime of the Rebel and his Wife, being on life together; for by this Marriage, as the Husband had Right to the Maills, so the King by the Rebellion had that Right, and whatever Deed the Husband hath done since he was Rebel, being Married, albeit for a preceding necessary Cause of his Wifes Debt, and for satisfying thereof, yet that the Fisk could not be prejudged in the foresaid Casuality by that Deed, especially seing neither the Wife nor her Father were before obliged to grant such Infestment of an Annualrent out of the Lands Libelled, controverted *per expressum*, but only was generally obliged to pay to her an Annualrent of 200 pounds yearly, so long as she lived. Actor. *Advocatus* & *Nicolson*. Alter. *Gilmer* & *Neilson*. *Gibson* Clerk. *Vid.* 24 *Feb.* 1637. *Pilmuir* and the Cases there.

Finlason contra *Weyms*, *December* 11. 1638.

THe Lands of being Wodset to *Alexander Weyms* and Mr. *John Weyms*, under Reversion, which Reversion being Compriſed by *Alexander Finlaſon*, Creditor to him who gave the Wodſet, whereupon Order of Redemption being uſed againſt the ſaid umquhile *Alexander Weyms* in his own lifetime, who deceaſing before Declarator, thereafter Summons and Declarator of Redemption is raiſed againſt the eldeſt Son, and appearand Heir of the ſaid umquhile *Alexander Weyms*, upon the ſame Order uſed againſt umquhile *Alexander*, before his Deceaſe; wherein the Defender Compearing, Alledged, that this Order could not be ſuſtained & uſed againſt *Alexander*, who is now dead, to be declared againſt his appearand Heir, againſt whom it was not uſed, but that he ought to be of new warned, & ought to be charged to enter Heir to his Father for that effect. The *Lords* Repelled this Alledgance, and Found, that the Order uſed againſt the Father, who was dead ſince the uſing thereof, might be lawfully craved to be declared againſt his appearand Heir; and that there was no neceſſity of any new Order to be uſed againſt him, or that he needed to be charged to enter Heir, ſeing Redemptions might be uſed from appearand Heirs. *Item*, the Order being quarrelled, becauſe it was not uſed conform to the Order agreed upon, and preſcribed in the Reverſion, which appointed Premonition to be made at the Paroch Church, upon a *Sunday* before Noon, in time of Divine Service, & that the Reverſion ſhould be then there Read. And the other Replying, that he had done more, for that Clauſe being appointed only, that the Party might be certiorat of the deducing of the Order, he had made him more certain, by premoniſhing him perſonally apprehended, which was a more aſſured way of knowledge, than if it had been done at the Kirk. This Alledgance was alſo Repelled, in reſpect of the perſonal Premonition; neither was it reſpected, that the Defender Alledged, that Reverſions are *ſtricti Juris*, and that conditions agreed upon betwixt Parties ought not to be changed. *And 3ly*, It being Alledged, that the Order could not be ſuſtained, becauſe it was not uſed by a Procurator, having power of the Party to uſe the Order, as is ever obſerved in all the like caſes; but it is only uſed by a Meſſenger, by vertue of the *Lords* Letters, paſſing upon a Bill given in to the *Lords*, at the inſtance of the Party who Compriſed, whereby he craved Warrand to the Meſſenger, to make the ſaid Premonition, and uſe the ſaid Order; which being ſought by the Party, and granted by the *Lords*, is againſt all Form and Practick, and ought not to be ſuſtained; but muſt be done *periculo impetrantis*. The *Lords* alſo Repelled this Alledgance, in reſpect the Party Ratified and Approved the Order, and Allowed the ſame: And the *Lords* Found, that they would not caſt nor evert the Order for this Alledged defect, nor for any other of the Alledged defects in the foreſaids Alledgances; but this is not in uſe to be done in Redemptions, and I remember not of any other uſed in this manner. *Actor. Nicolſon* & *Sibbald*. Alter. *Rollock*. *Gibſon* Clerk. *Vid.* 23 *July* 1622. E. *Deſmond*. 28 *July* 1637. E. *Haddingtoun*. 6 *March* 1639. *Urquhart*.

L. *Tuſhelaw* contra Sir *John Scot*, *Eodem die*.

IN a Removing ſought from ſome Lands, which the Defender Alledged to be Part and Pertinent of the Lands of pertaining to him Heretably, and which has ever been ſo bruiked by him theſe many years bypaſt; and which the Purſuer Alledged alſo to be bruiked by him continually as Part and Pertinent of his Lands. The *Lords* admitted to both the Parties to prove, and Ordained either of them to Adduce ſix Witneſſes to prove the ſame, and after Examination of the Witneſſes, they Decerned to Remove in favours of the Purſuer, who proved clearly, that it was a part of his Lands, except ſome little peice thereof; which

which was proven to be a part of the Defenders Lands, and so here contrary Probations were admitted to both Parties. Actor. *Hope & Advocatus*. Alter *Nicolson & Burnet*. *Scot* Clerk.

L. *Gairntullie* contra Commissar of St. *Andrews*, *December* 15. 1638.

SIr *William Stuart* of *Gairntullie* having a Pension of pounds granted to him by the Duke of *Lennox*, and for payment thereof the Feu-Duties of the Lands of which pertained in Feu to the Commissar of St. *Andrews*, extending to the Sum of pounds yearly of Feu-duty, contained in his Feu Infeftment, being Assigned to him, he Pursues the said Commissar for payment of the saids Feu-duties, many years by past, these fourty years or more. And the Commissar Alledging, that the Action was prescribed, he not being pursued therefore these fourty years by-past, & not being sought for the same. The *Lords* Repelled this Alledgance, for they Found that this being a Pursuit moved for payment of Feu-duty, owing by the Defenders own Charter, he could not be heard competently to propone Prescription against the same; But the *Lords* thought it expedient, that the Pursuer should Retrinsh his Pursuit to so many years by-past, as might be within these fourty years last by-past. Actor. *Stuart*. Alter. *Rollock*.

Ogilvie contra . *Eodem die*.

ONe *Ogilvie*, Servitor to Mr. *John Fletcher* Advocat, Pursuing as Intromettor with his Fathers Goods and Gear, for payment of a Duty of a Tack of the Lands of Set to him in Tack by and which Duty was resting unpayed the years Libelled by the Defenders umquhile Father; And the Excipient Alledging, that he could not be conveened *hoc nomine*, as Intromettor with his Fathers Goods, because his Father died Rebel, and at the Horn. Likeas, the Gift of his Escheat was Disponed to a Donatar, who obtained Declarator, and thereafter Disponed the Right thereof to this Defender, by vertue whereof he Intrometted, which cannot make him lyable to pay his Fathers Debt. The other Replying, that that Gift cannot prejudge the Pursuer, nor Defend the Excipient, because notwithstanding thereof the Defunct remained continually in peaceable Possession of all his own Goods, divers years unto the time of his Decease, at the which time the Defender Immediatly Entred, and possessed himself therewith. Likeas, he yet bruiks the same Lands, Set in Tack to his Father. The *Lords* Found this Reply Relevant *in hoc casu*, to make the Defender lyable for the Tack-duty of the years by-past, owing by his Father *ad hunc effectum*. The Reply was Sustained, notwithstanding the Defender Alledged, he bruiked the Tack by vertue of the said Escheat, as said is, and that he was content to pay the Tack-duty of all the years since his Fathers Decease; For the *Lords* thought the Reply being proven, he ought to pay sicklike the Duty of that Tack owing by his Father, who retained the Possession of his own Goods, during his Life, seing he Entred thereafter to the Possession both of Tack and Goods. Actor. *Fletcher*. Alter.

Corser contra *Durie*, *December* 19. 1638.

IN an Adjudication, umquhile *William Durie* of *Newtoun* being Debitor by his Bond to one *Corser* in *Dysert* of a Sum of Money, which being desired to be Registrat against *Durie* his Son, and his Tutors and Curators, as lawfully Charged to Enter Heir to his Father, who Renuncing to be Heir, upon this Renunciation *Corser* the Creditor Intented Action against this Son of his Debitor of Adjudication, for Adjudging of the Right of the Lands of *Newtoun*, which pertained to his umquhile Father, and whereof he was in Possession the time of his Decease to this Pursuer, and consequently that this Defender should be Decerned to pay to the Pursuer, the Mails and Duties of the Lands, intrometted

with by him and his Tutors and Curators, of all years since the Decease of his Father, so far as would satisfie this Pursuers Debt. And the Defender Alledging, that this form of Summons and Process, ought not to be Sustained, being far against the Practique used in the like Cases: For *first*, the Pursuer ought to Pursue to hear his Debitors Right Adjudged, which being once Adjudged, then he might competently upon that Right so Adjudged, Pursue for the Mails and Duties thereof; but to Pursue for the same before he had the Right established in his person, and before it were Tryed if that Right were of that nature, which might produce an Action for the Duties of these Lands, and that Sentences were given first thereon, it never has been heard; for Adjudication is a Process for Executing of a Sentence, and resembles in this point a Compryſing; and the Intenting of a Process of Compryſing, or Denuncing to Compryse, before the Compryſing were expede and totally compleat, could never be a ground to pursue for Mails and Duties, no more in a Process of Adjudication can the Mails be acclaimed before the Sentence of Adjudication were first given. The *Lords* Repelled the Alledgance, and Found this Process might be Sustained, both to crave the Right of the Lands to be Adjudged inone Summons, and the profits decerned also, the first being Found to crave the bygone Mails uplifted; even as in a Non-entry, the Lands being Decerned or craved to be Decerned to be Found in Non-entry, the Donatar in the same Summons may crave the Profits to be Liquidat, and Decerned; and as in a Declarator of Escheat, the general Declarator may be sought for declaring the Rebellion, so also the special Declarator for the particular Profits of the Lands, in one and the same Summons. Actor, *Advocatus*. Alter, *Nicolson, Gilmore & Dunlop. Scot* Clerk. *Vid. July* 21. 1636. betwixt these parties.

In this Process the Pursuers Procurators having past from any craving of a particular Adjudication, either of Lands, Teinds, or any Writ of the same, and only craving generally Adjudication of all Right, which was competent to the Defunct in the Defuncts person, to any Lands, Teinds, Goods or Gear whatsoever generally. This general Adjudication was Sustained, although craving nothing specially to be Adjudged.

Rentoun contra L. *Lambertoun*, *December* 20. 1638.

UMquhile *John Renton* of *Lambertoun*, being Married upon one *Hume*, Father-sister of *Hume* of *Rentoun* to his second Wife, by Contract of Marriage he is bound to Infeft her in certain Lands, during her Lifetime, and the said umquhile *John Rentoun* the Husband being Deceased, she makes the said Laird of *Rentoun* Assigney to the said Contract, who pursues Registration of the said Contract against *John Rentoun*, eldest Son to the said umquhile *John Rentoun* her Husband Contracter, and Conveens him as Successor to his Father *titulo lucrativo post contractum debitum*; and for verifying of him to be so Successor, produces a Bond granted by the Defender, to his umquhile Father of this Tenor, *viz For sameikle as his said Father had provided and given way* (thir are the words) *to his provision to the Lands of* Lambertoun, *therefore he obliged him to relieve his Father of all Debts and Sums owing by his said Father*. And the Defender Alledging, that this Bond could not prove him Successor *titulo lucrativo*; For that Narrative Clause anent the providing of the Defender, or giving way to his Provision, being but Narrative words, cannot be Found Obligator to Constitute the Defender Successor *titulo lucrativo*, seing the truth is, and he offers to prove, that whatever Provision he has attained to, it is for Causes most onerous, and for Sums of Money deburſed by the Excipient, far exceeding the avail of that which he has obtained by the said Provision, and condescended on the particulars, and instructions thereof; and albeit that Clause of the Bond, *obliging him to pay his Fathers Debt*, be a good ground whereupon he might be pursued by way of Action to pay the same; in which case, when he is so Pursued, he shall Eleid the same, yet

yet that he can be conveened as Successor *titulo lucrativo*, where he does instruct so clear a Cause onerous, it is against all Reason, Law and Conscience, and only for a word Narrative, which by no equity can be drawn to such an extent; for if by the Bond produced, the Defender had been obliged to pay some particular designed Debts therein-named only, it were Iniquity to conclude (albeit the Narrative had been of the same Tenor whereof it is) that therefore the Defender should be Found Successor *titulo lucrativo* to his Father, and were thereby holden to pay all his Fathers other Debts, by and beside the special Debts, which he was bound to pay, and which he could never eschew in Law, if this ground hold that the words foresaid in the Narrative makes him Successor. The *Lords* Repelled this Alledgance, and in respect of the foresaid words, by the which the *Lords* Found, that the Defender had acknowledged himself to be provided by his Father, and so to be Successor to him, They Decerned the Contract to be Registrat against him *hoc nomine* as Successor, as said is. Actor. *Advocatus* & *Nicolson*. Alter. *Stuart* & *Graig*. *Gibson* Clerk. *Vid. March* 21. 1634. *Orr*.

L. *Craigmiller* contra *Nisbets* Relict, *December* 21. 1638.

THe Laird of *Craigmiller* pursues Removing from the Lands of *Little-France*, against the Relict of umquhile Mr. *Gavin Nisbet*, who Alledged, that she had Tack granted to her Husband and her, and the longest liver of them two, during their lifetime, and by vertue thereof her Husband was 30 years and more in Possession, and she divers years sensine, since his Decease. It was Replyed, that the Tack was Set by him, who was only a Liferenter, being Denuded at that time of the Fee, in favours of his Son. 2o. Replyed, that her Husband, who Acquired that Tack, had accepted another Tack thereafter to himself and his Brothers Son, during their Lifetime, by vertue whereof he bruiked the Land, and whereby he had passed from that Tack excepted on; and as the Husband was the Purchaser of the first Tack to himself and his Wife, so he might Revock the same, being *donatio inter virum & uxorem*. Likeas, in effect he has tacitely done the same, by procuring of the second Tack, without nameing of his Wife, to himself and his Brothers Son. And it being Duplyed, that the Tack being once Acquired to the Husband and his Wife expressly, and so *jus uxori acquisitum*, could not be taken away from her, without her own deed, and it cannot be called *donatio inter virum & uxorem*, because it flowes to them both from a third person, the Laird of *Craigmiller*, and so is not Revockable by the Husband; and although it were the Husbands Donation, yet it is not Revockable, because *Maritus non redditur pauperior per hanc donationem*, seing it is conferred to the time of his death, and so falls not under that Revocatory Law. The *Lords* nevertheless Repelled the Exception and Duply, in respect of the first Reply, which they also resolved in this same Order of Removing, to take away the Tack, without necessity of Reduction. Actor. *Gilmore*. Alter. *Hay* Clerk. *Vid.* for the last part of this Decision La. *Borthwick*, and for this part *January* 17. 1632. E. *Lauderdale*. *January* 18. 1633. E. *Marischal*. *February* 19. 1639. betwixt thir same parties. *viz.* L. *Craigmiller*, and betwixt them *penult January* 1639.

contra *Eodem die*.

IN a Pursuit for payment of the Sum of 60 pounds, contained in this Defenders Bond, which bore, *to be all Written and Subscribed by the Defenders own hand*. And the Defender Compearing, and Alledging the Bond to be null, because it wanted Witnesses. And the Pursuer opponing the Bond, bearing, *the Bond to be the Defenders own hand Writ*, as said is. The *Lords* Repelled the Alledgance, in respect the Bond bore, *to be the Defenders own Writing, all Written by himself*, Which the *Lords* Sustained, without necessity of Witnesses, seing the Defender denyed not the same to be his Hand-writ, in which case if he had denyed, the

Pursuer behoved to approve the same. Actor. Alter. *Nicolson* younger. *Gibson* Clerk.

Inglis contra *Bell*, *January* 24. 1639.

MArgaret *Inglis* Relict of umquhile *Alexander Douglas* Macer, Pursues *Patrick Bell* Provost of *Glasgow*, as Executor Confirmed to *James Inglis*, who was the Pursuers Debitor, for payment of the Sums adebted to her by the said *James*. And the said *Patrick* Alledging, that the Testament was totally exhausted by Sentences, obtained by lawful Creditors, to whom he had made payment. The Pursuer Replying, that the Defender had Intromett with as much more of the Defuncts Goods as would pay her, by and attour the Goods Confirmed, and which she referred to his Oath of Verity *simpliciter*. The Defender Duplyed, that an Executor is not obliged *ultra vires Inventarii*, and if he have Intromett with any further, the Pursuer may take a Dative *ad omissa*, whereupon being Pursued, he will be answerable. The *Lords* Repelled the Alledgance in respect of the Reply, which the *Lords* Sustained, specially being referred to the Defenders own Oath, and Found no necessity that the Pursuer should be put to take a Dative *ad omissa*, but Sustained the Tryal thereof in this same Process to be proven, as said is.

La. *Smeiton* contra L. *Smeiton*, *January* 29. 1639.

THe Lady *Smeiton* Pursues Registration of a Contract of Marriage, made betwixt umquhile *James Richardson* of *Smeiton* her Son, and *Rachel Wardlaw* his Spouse, whereby her umquhile Husband, Father to the said umquhile *James* their Son, provided the Pursuer to her Liferent of the Lands of *Smeiton*, in recompence of the Lands of *Wallie-foord*, which she being provided unto, Renounced in Favours of her said Son, for Registration whereof she Pursues *James Richardson*, now of *Smeiton*, Oye to her umquhile Husband, as Successor to his Goodsir, *post contractum debitum*. And it being Alledged, that he could not be conveened, as universal Successor to his Goodsir, because the time of the Acquiring of that Right from his Goodsir, his Father was then living, who was then *Appearand* Heir to the Defenders Goodsir; and so he can never be reput, nor conveened as universal Successor, his Father being on Life, The *Lords* Repelled this *Exception*, in respect of the Infeftment of the Lands, granted after the Contract of Marriage, whereby this Pursuer was provided to her Liferent, as said is, and was given by the Goodsir, to the *Defender* his Oye, with Reservation of the Liferent to the *Defenders* Father, so that the Goodsir and the Father Contracting together, to Infeft the Oye in *Fie*, and providing the Father to the Liferent. The *Lords* Found this sufficient, to make the Oye Successor to his Goodsir, albeit then the Oye had his Father on Life, who was in *Linea Recta* Appearand Heir before the Oye, which was Found no impediment, to exclude this Pursuit, but that the same should be sustained against the Oye, as universal Successor, otherwayes all Just Creditors might be fraudulently eluded. Actor. Alter. *Nicolson* younger. *Scot* Clerk. *Vid. March* 23. 1636. & *Feb.* 23. 1637. L. *Kinnaber*.

Graham contra *Park* and *Gairdin*, *Eodem die*.

BY Contract of Marriage betwixt one *Park*, Daughter to another *Park* Burges of *Edinburgh*, and *William Gairdin* her future Spouse, the said *Park* Father to the Woman Contracted in Marriage, is obliged to pay to the said *Gairdin* the Sum of 5000 Merks in Tocher, to which Sum the said future Husband obliged him to add other 5000 Merks of his own Money, which whole Sum the Husband is obliged by the Contract, to Imploy upon Land, or Annualrent, to himself, and his said future Spouse in Conjunct-fie, and to the Heirs gotten betwixt them, which failzieing, the one half to the Heirs of the Husband, and the

the other half to the Heirs of the Wife; according whereto after the Marriage, the Father to the Wife, having the said 5000 Merks promitted in Tocher, the same was lent to *John Rind*, Merchand Burges of *Edinburgh*, who by his obligation was obliged to pay that Sum to the said Husband, and to the Wife, and to their Heirs, and failzieing of them, to the Wifes Heirs, conform to the Contract; this Sum being thereafter Compriſed by one *Graham* an *Engliſh-man*, for a Debt owing to him by the ſaid *Gairdin* Husband to the Wife, and upon this Compriſing Purſuit being moved againſt *John Rind* Debitor of the Sum, by his foreſaid Bond, for payment thereof to the Compriſer; In the which Purſuit the Huſband, who was Bankrupt, being abſent, his Wife Compearing, and her Father the ſaid *Park* payer of the Tocher, where they Alledged, that the Sum could not be Compriſed by the Husbands Creditors for the Husbands Debts, ſeing the Husband was not Proprietar of the Sum, but only Liferenter; For the Contract and Band bore, *The Sum to be payed to the Husband, and the Wife in Conjunct-fie, and to their Heirs betwixt them Heretably, and Failzieing of Heirs betwixt them, to the Wifes Heirs*; whereby it is evident, that the Wife is Fiar, in reſpect of the Termination of the Security ſo Declared, and that all the Parties has thereto conſented, and that the Father has provided the Money, and gave it after that manner to his Daughter, and Son in Law, who might affect it with what condition he pleaſed to annex thereto, and therefore the moſt that can be Compriſed by the Husbands Creditors, is only his naked Liferent, ſeing no more Right ſubſiſted in his Perſon; And the other Creditor contending, that the Fie remained in the Husbands Perſon, notwithſtanding of the Deſtination foreſaid, and Termination of payment in the Wifes Heirs, failzieing of Heirs gotten betwixt them, becauſe if there be Bairns gotten betwixt them (as there are Two Bairns living betwixt them) they will ever exclude the Wifes Heirs; which Bairns ſo gotten, if they were to ſeek this Sum after their Parents deceaſe, would ſeek it not as Heirs to their Mother, but as Heirs to their Father, and conſequently the Right muſt belong to the Husband, and not to the Wife; and it were a dangerous preparative, tending to the prejudice of the whole Countrey, if Money conditioned to any Man in Tocher, after this manner, were not at the Husbands abſolute Diſpoſition. The *Lords* Found, that the Property of this Money pertained to the Husband, and that he had full Power and Right to Diſpone thereupon at his pleaſure, with Reſervation only of the Liferent thereof to his Wife; and conſequently, that the Creditor *Graham*, who had Compriſed the Sum, had full Right thereto, he alwayes finding Caution, to make the ſame forthcoming to the Wife, to be uſed by her, for her Right of Liferent, in caſe ſhe ſurvive her Husband, and Found that the Property ſubſiſted not in the Wifes Perſon, notwithſtanding of the Termination thereof foreſaid, that it ſhould be payed to her Heirs, failzieing of Heirs begotten betwixt her and her Huſband. Actor. *Advocatus* & *Stuart*. Alter. *Nicolſon*, *Baird* & *Johnſtoun*. *Scot* Clerk. *Vid. November* 21. L. *Kinblakmonth*. *June* 28. 1637. *Galbraith*. *July* 9. 1630. *Veitch*. *Feb.* 4. 1642. *Laitfit*.

La. *Weſtmuirland* contra La. *Hume*, *Eodem die*.

IN an Action betwixt them, wherein Litiscontestation made, and ſome Articles of the Summons was admitted to the Lady *Weſtmuirland* her Probation, which were Found only Probable, either by Writ, or Oath of Party, and at the Term Aſſigned for Probation, the Purſuer producing incident Diligence, for recovering of the Writs, whereby ſhe would prove, the Defender asked Inſtruments thereupon, and Alledged, that ſeing the Summons was probable, and ſo Found, either by Writ, or Oath, that now the Purſuer ſhould make her Election, and declare by what manner ſhe will prove; after which Declaration, that it might be Found, that ſhe could not varie again, and there-

fore seing if she used the Incident, which was an Election to prove by Writ, that she could never be heard thereafter, to refer it to the Lady *Humes* Oath, or to crave her Oath. The *Lords* permitted to the Pursuer, to make her Election, whether she would prove by Writ, or by the Parties Oath; and having chosen any one of them, the *Lords* Found, that she could not be heard, to return to the other; so that if she used Incident Diligence, and took Terms therein, she could have no Liberty to crave the Defenders Oath, albeit she were present at the Bar. And which the *Lords* declared, they would ever observe in all time to come, to cut off that delay, whereby after long and many Terms delay it has been usual, after all the Terms were run out, to refer the Matter, for which the Incident was used, to the Parties Oath, which the *Lords* Found, that they would refuse hereafter, as a thing als unreasonable in this Case, to be granted, as it were against Reason, if the Matter were referred to the Parties Oath, and Sworn, to suffer Writ to be produced to prove the same, and to Impugn the Oath. Actor. *Nicolson*, *Mowat* & *Hog*. Alter. *Advocatus* & *Stuart*. *Gibson* Clerk.

Bell contra *Wilson*, *penult January* 1639.

ONe *Bell* having Charged *Wilson* for payment of a Sum, contained in his Obligation, who Suspending, that the Bond was null, he at the Subscribing thereof being Minor, and having Curators, who has not consented thereto, which being received, and Found Relevant by way of Suspension, he produced his Act of Curatory, and desired a day to prove his Minority. And the Charger Alledging, that the Act of Curatory contained in the Body thereof, that the Minor was at that time of the chusing of his Curators past 16 years compleat, whereby the time of the date of the Bond, it appears clearly he was more than Major. And the other Answering, that notwithstanding of that Assertion, which if he made it, he was then also Minor, and could not know his age, and was it not pertinent to the Judge and Clerk, to insert any such Narration in an Act of Curatory, that yet he might be heard to prove *veritatem rei*, and that he was Minor the time when the Bond was Subscribed. The *Lords* Repelled this Alledgance, and Found that the Minority might be proven, notwithstanding of the Assertion contained in the Act of Curatory, which if it had been true, he would have been Major when the Bond was Subscribed, and the said Declaration contained in the Act was not respected.

L. *Craigmiller* contra *Chalmers*, *Eodem die*.

THe Laird of *Craigmiller* Pursues Removing against *Margaret Chalmers*, Relict of umquhile Mr. *Gavin Nisbet*, for Removing from the Lands of *Little-France*: And she Defending, that she bruiked by vertue of a Tack, Set to her umquhile Husband and her, during their Lifetimes, by umquhile Sir *George Preston* of *Craigmiller*. Whereto it being Replyed, that this Tack could not defend her, being *donatio inter virum & uxorem*, and so Revockable by the Husband, and which was also Revocat by him, in so far as he after the date of this Tack, accepted another Tack from this same Author, Set to himself for his Lifetime, and after his decease to another person, during his Lifetime, not making any mention of the Woman, whereby it is evident, that it was not the Husbands will, that his Wife should bruik the benefit of this prior Tack. The *Lords* Sustained this Exception, and Found, that this Tack was not Revockable, neither was the Wife prejudged by this posterior Tack, Acquired by her Husband. For albeit it was Alleged, that the Acquiring of this Tack, behoved in Law to be presumed a Donation made by the Husband, and the Wife cannot be presumed to have had any Means for Purchasing thereof, *ob evitandam suspitionem turpis questus*, so that the Husband behoved to be repute the Purchaser thereof, yet this

this was not respected, seing the Tack was a Deed immediatly flowing from the Setter, to her Husband and to her, and by the inserting of her Name as Liferenter, after the Husbands death, the Husband was not made thereby *pauperior*, and the Law permits such Donations, and such as are given *ad victum & sustentationem uxoris*, as this is, and therefore was Found not Revockable. *Actor. Nicolson. Alter.* *Hay* Clerk. *Vid. Decemb.* 21. 1638. and *February* 19. 1639. betwixt these same parties.

Cockburn of *Chouslie* contra *Trotters*, *Eodem die.*

UMquhile *Lyel* of *Stanipeth* Setts in Feu his Miln of *Dunce*, for payment of a yearly Feu-duty of certain Victual, to one *Moneylaws*, which Feu-duty is thereafter Wodset to *Cockburn* of *Ryslaw*, who thereafter Dispones the same to *Cockburn* of *Chouslie*, who obtains Decreet against *Alexander* and *James Trotters*, who had Comprised the Feu of this Miln and Lands from *Monylaws*, for payment of the bygone Feu-duties which were owing; which Decreet being Suspended, and Reduced, that the same could not have personal Execution against the Compriser, who was a singular Successor, for any years preceeding his Occupation and Possession of the Miln Comprised. The *Lords* Found, that the Compriser being a singular Successor, could not be holden *personali actione*, to pay the Feu-duties acclaimed, of any years before he came in Possession of the Miln, but since the time he was Possessor, & sustained the Sentence personally for all years sensyne against him, without prejudice of the Parties Action against the Ground, also for the said bygones, as accords. And there being another Reason of Reduction, founded upon a Bond granted by the same umquhile *Lyell* of *Stanipeth* who Feued the Miln, at the time of the Feu granted to this same *Monylaws*, whereby he obliged him to lead the Miln-stones to the Miln, whenever he should be required; and if he did it not, he should lose the Feu-duty of that year; which Clause of the Bond, the Maker thereof held as if it had been Ingross'd in the Body of the Feu, which he confest to have been omitted out of the Feu, by the forgetfulness of the Writer thereof, albeit it was then accorded to have been insert therein betwixt the Parties; and he Subsumed, that he had required this Successor to the Feu, who had failzied, and consequently he should be assoilzied for payment of all the years Duties wherein he was required, and failzied. The *Lords* Assoilzied from this Reason, because they Found, that this was a Bond *extra Corpus Juris*, not insert within the Body of the Principal Feu, and so could not bind a singular Successor in the Right of the Feu: Albeit it was Replyed, that it was done at the time of the Feu, and that the Party had confest, that it ought to have been insert in the Principal Feu, when it was made, and so must be repute *pars Contractus*, being *pactum incontinenter adjectum*, which was not respected by the *Lords*. Actor. *Nicolson* & *Trotter*. Alter. *Stuart* & *Craig*. *Hay* Clerk. *Vid. Feb.* 24. 1632. Bishop of *Galloway*. *Vid.* for the last part, 21 *July* 1636. *King*. 25 *July* 1643. La. *Sinclair*.

Dundass contra Goodsirs Executors, *January* 31. 1639.

GEorge *Dundass*, Oye to the Good-man of *New-Liston*, pursues the Executors of his umquhile Good-sir for payment of 500 merks, left to him in Legacy by his Good-sir, by a Codicil made after his Testament, bearing this Legacy: And the Defender quarrelling this Alledged Codicil, as not sufficient to give him Right to the Legacy, in respect there was a perfected Principal Testament bearing no such Legacy; and this Note made thereafter, is but a Testificat made and Subscribed by Mr. *John Boog*, Minister of the Paroch, wherein the Defunct died, which is neither Subscribed by the Testator, who could Write, nor by the Minister in his name, and at his command, but is only given out under the Form of a Nottars Instrument, and so wants all Formal Solemnities requi-

site to *Acts* Testamentary, to which the Law only Priviledges Ministers to be Nottars. Attour, the Process cannot be sustained, except all the Legatars in the Principal Testament were called thereto. Thir Alledgances were Repelled, and the Codicil Sustained, being in Substance and Matter found good in it self, and no necessity was found to call the rest of the Legatars.

Hamilton of *Broomhill* contra *Lawder*, *Feb.* 9. 1639.

ONe *Lawder* being Debitor to sundry of his Creditors, in divers Sums of Money, and to *Broomhill's* self, in a little Sum, which he had payed for *Lawder*, as his Cautioner; The Right of all which Sums being acquired from *Lawder's* Creditors by *Broomhill*, he upon Assignation to these Debts, and for his own, Comprises *Lawder's* Lands; which Comprising being near at expiring, *Lawder* Intents an Action for Compt, Reckoning, and Payment against *Broomhill*, that after Compt he may be satisfied of his just Sums, and so the saids Lands may be declared freed of that Comprising; in this Action it being controverted as *Lawder* Alledged, that he ought to be subject to pay no further Sums, but such only as were Debursed really by *Broomhill* to his Creditors for their Rights; for seing he had unnecessarly bought these Sums, and the Rights thereof from his Creditors, and had needlessly and unkindly come in betwixt him and his Creditors, with whom he might have transacted upon more easie conditions, it were no reason that therethrough he should take advantage, beyond that which he really and truly Debursed, seing he was content to pay him what he had truly payed therefore, with the Annualrent thereof, ever since the time of his Debursing. The *Lords* Found, that they could not in Law compel *Broomhill*, to receive no more than he payed to the Creditors; for if they had Disponed their Debts to him for never so little a Sum, or had gifted the same to him for nothing, the Assigney could not be urged but at his own pleasure, to remit any part of that which was a just Debt owing to the Cedent. And it being also controverted, if *Broomhill* should be Comptable for the Maills and Duties of such part of the Compri. sed Lands, as was Tennent-stead, and Occupied by Tennents, the time of the Comprising, and thereafter were given over by the Tennents, and lay Waste; seing *Broomhill* Alledged, that by the Act of Parliament 1621. anent Comprisings, the Compriser is not holden to Compt for any more Profits of the Lands, than wherewith he actually intrometted, and is not Comptable for any thing wherewith he may Intromet, far less can he be Comptable for that which was Waste, not in his default, but by the Tennents over-giving and deserting the Room. The *Lords* Found, that seing after the Comprising, the Room was Laboured by Tennents, who had a Tack for endurance of 10 years than these years controverted, and standing yet unexpired; that the laying waste of the Rooms, and giving over of it by the Tennent, ought not to prejudge the Debitor, but that the Compriser ought to be Comptable therefore, seing after the over-giving, he ought either to have Laboured the Room, or Set it to some other Tennent, to the best advantage he might, and done therein, as *bonus Pater-Familias feciſſet in re ſua*, or else he should have made some Intimation to the Debitor, and required him to provide for the Room, and given way to him to make use of it, for his best Profit, if the Compriser had not been willing to make use of it himself, but doing no Diligence to make Profit of the Land, in these years when it was Waste. The *Lords* Found, that notwithstanding of the *Act* of *Parl.* which met not this case, the Compriser remained Comptable. Actor. *Mowat* & *Sandilands*. Alter. *Hamilton*, *Gibson* Clerk. *Vid.* 11 *Feb.* 1636. L. *Bakvie*, &c.

L. *Craigmiller* contra *Chalmers*, *February* 19. 1639.

IN the Action of Removing, Pursued by the Laird of *Craigmiller* against *Chalmers*, whereof mention is made, *Decemb.* 21. 1638. *Ubi Vid.* before the

the Pursuer passing from the first Reply, which he then proponed for Eleiding of the Defenders Exception (which Reply bore, *that the Tack Excepted on was Set by him, who was only Liferenter*) and insisting only upon the second Reply, *viz.* (that the Tack was *donatio inter virum & uxorem*, which was Revocked by the posterior Tack, accepted from *Craigmiller*, to himself during his Lifetime, without mentioning his Wife) in Fortification whereof, he offered to prove, that this Defender the time of the acceptation by the Husband, of the posterior Tack, Renunced that first Tack, which Renunciation being some way miscarried, after the death of the Husband, or Intromitted with by his Relict, who might have put the same out of the way, he offers to prove the same by one of the *Notars*, who is yet on life, who Subscribed the same for her, who is a person without all exception, *viz. John Bannatine*, Clerk to the *Justice*, and also by her own Brother, and which being so joyned to the former Reply, ought to be Sustained, specially seing by and attour the Lands of this Tack, the Husband had provided the Defender to six Chalders of Victual yearly, and the Annualrent of 11000 merks. The *Lords* not the less Sustained the Exception, notwithstanding of the Reply, and Found, that this Tack, specially being Acquired by the Concession of a third Party, and not directly from the Husband, was not such a Donation as fell under the Prohibition of the Law, Prohibiting Donations *inter virum & uxorem*, for by this Donation the Husband was not *pauperior*, and also Donations, which are conferred to take beginning after the decease of the Granter, are not prohibite in Law, concerning the Donations betwixt Husband and Wife, and Found that the Relicts Renunciation could not be proven, but by Writ, or Oath of Party allanerly. Actor. *Nicolson*. Alter. *Hay* Clerk. *Vid. penult January* 1639. betwixt thir parties.

Fleming contra *Robertson*, *Eodem die*.

UMquhile *Robert Robertson* Infefts *John M'duff* in an Annualrent of 80. pounds, to be uplifted out of his Lands of *Belligallan*, whereto *Fleming* is constitute Assigney by *M'duff*, who both desires the Ground of the saids Lands to be poynded therefore, & another *Robertson* compearing, & Alledging, that he was Infeft in the Lands of *Leadgreen* as Principal, & these Lands Lybelled in special warrandice thereof, and that long before the Pursuers Right, and from the same Author. Likeas, after the said Infeftment, their said common Author and this Defender, before the Pursuers Right Transacted also together, that the Disponer should retain the principal Lands, and the Defender the Warrandice Lands, and either of them should rest satisfied therewith, conform whereto the Defender has ever bruiked the warrandice Lands these 14 or 15 years bypast, and the Author the Principal, and so the Pursuer cannot seek Poynding of thir Lands Lybelled. The *Lords* Repelled this Alledgance, for they Found, that the Defenders Infeftment of the Land in Warrandice, could be no impediment to the common Author to give, nor to the Pursuer to receive an Infeftment out of the Warrandice Lands. Which Infeftment, the *Lords* Found effectual, to burden the said warrandice Land, notwithstanding of the Defenders Infeftment thereof, granted to him in Warrandice of the Principal Lands Disponed, ay and while he were Legally distressed in the said Principal Lands disponed; and Found, that the Transaction, (specially being Alledged to be verbal, and not offered to be proven to have been by Writ) was no impediment to the Pursuer, to bruike validely the Right of the said Annualrent out of the Lands foresaid, Disponed in Warrandice, nor yet to the Excipient, to have recourse to the Principal Lands disponed to him, notwithstanding of the Alledged Transaction.

Lo. *Cardross* contra E. of *Mar*, *February* 20. 1639.

THe Lord *Cardross* Pursuing the Earl of *Mar*, as Heir to his Father, for Implement of a Bond, granted by the umquhile Earl his Father, in Favours

vours of the Pursuers Father, *Henry Erskin*, Son to the umquhile Earl, whereby he obliged him and his Heirs to Infeft the said *Henry* and his Heirs (with Reservation of the old Lady *Mar*, the said *Henry's* Mother, her Liferent of the Lands) in the Lands of *Spittletown* and *Arnekeip*, and because the Defender had Sold the Lands, the said Lord *Cardross*, and the Lady *Mar* for her Liferent, Pursues for the price of the saids Lands, and Avails thereof, and for the yearly Duty thereof, since the date of the Bond. And the Defender Alledging, that since the date of the said Bond, the umquhile Earl Granter of the Bond, had given satisfaction by Infefting of the said umquhile *Henry* in far more Lands, of far greater Avail, by a quadruple worth than the Lands of this Bond; Which being done by the Father to the same Son, to whom the Bond was given, and the said Bond Lybelled, bearing, *to be granted for Love and Favour*, must be Found an Implement of the said prior Bond, and so must be a Liberation to the Heirs of the granter, of the Force and Effect of the first Bond; for in Law *Debitor nunquam præsumitur donare quamdiu est debitor*, specially seing the umquhile Earl himself was Possessor, and had the Bond lybelled in his own hands, the time of his decease, and the Pursuer cannot qualifie, that ever the Bond lybelled became his Evident, or was delivered to him before the Defuncts Decease, who lived more than eleven years after the making thereof. Likeas, the Lady *Cardross*, Mother to the Pursuer, being Examined by the *Lords*, she confessed that she recovered the *Bond* since the Earls Decease, maker thereof, by payment of 2000 Merks therefore to an mediat person, who would not declare to her in whose hands that Bond had been, and to whom the Money should have been payed therefore: In respect whereof the Defender Alledged, that Absolvitor ought to be granted from this Pursuit, both for all the years bygone, acclaimed by the Lady *Mar*, as Liferentrix, since her Husbands death, and also for payment of any price of the Land, Sold sensine by the Defender. The *Lords* Repelled the Exception, and Found, that this prior Bond was not taken away by that posterior Security, granted by the Father thereafter to that same Son, in whose favours the Bond was given, seing the last Security made no mention that it was granted for expres Satisfaction of the first, and so they were Found both to stand; But the *Lords* Assoilzied the Defender from all bygones acclaimed by the Liferenter, preceeding the date hereof (being *fructus bona fide percepti*) And also Found, that the Defender for the Heretors and Liferenters Security and Interest in time coming, by their wanting of the Land, ought to have the price of the Land, which the Defender had received therefore, to be payed by him to them at *Whitsunday* next, and for the which the *Lords* Decerned. Actor. *Stuart*, *Hope* & *Baird*. Alter. *Nicolson* & *Primrose*. *Hay* Clerk.

Rule contra *Hume* Minor. *February* 22. 1639.

James Rule having Compryfed from for some Money owing to him, which Lands being desired to be Redeemed, by vertue of an Order of Redemption, used in name of the Minor, by his Tutors; which Order and Action Intented thereupon, being pursued, and used after the expyring of seven years, subsequent to the Compryfing, and before the Minors attaining to the age of 21 years, and so divers years within his Minority. It was questioned betwixt the Compryser and the Minor, and his Tutors and Curators, if the Land should be Redeemed by payment of the principal Sum, for the which the Lands were Compryfed, and the ordinary Annualrent of the Money allowed in Law, as the Minor Alledged they should be, in respect of the Act of Parliament 1621. anent Compryfings, which Declares that Minors has the benefite to Redeem Compryfed Lands, the Right of Reversion whereof is competent to them at all times within the age of 21 years, by payment of the principal Sum, and Annualrent, as said is. Likeas, this Redemption is Pursued within the age of Mi-

Minority. And the Compryser Alledging, that although the Act of Parliament permits to Minors the benefite of Redemption of Compryſed Lands, at any time within their Minority; yet that Act expreſly provides, that after the expyring of the ſeven years ſubſequent to the Compryſings, although the Minor may Redeem the Lands at any time within his Minority, yet the Compryſer has Right to the Duties of the Lands in the Compryſing, of all the years ſubſequent to the firſt ſeven years, and interveening before the Redemption; and the offer and Conſignation of the Annualrent, ſatisfies not. And the other Replying, that the Act provides, and can have no other Interpretation, but that Minors may Redeem at any time within their Minority, in that ſame manner as Majors may Redeem, within the time allowed to them in Law, *viz.* within ſeven years, within which time they are not holden to pay to Majors any more but the Annualrent: And although the Act of Parliament appoints the Mails and Duties of the Lands Compryſed from Minors, of the years ſubſequent to the firſt ſeven years, and interveening to the years of Majority, to pertain to the Compryſer; yet that is only Statute and Appointed, in caſe Minors Redeem not in no year before their age of 21 years, and is ſet down for a Penalty in caſe of Failzie, and ceaſing to Redeem during all the years of Minority, to the which caſe the words of the Act are expreſly limited, and cannot thole any other Interpretation. Likeas, it were Iniquity to prejudge Minors of their Benefite, which they have by that Act, except where the Failzie falls, as it does not in this caſe. The *Lords* Found, that by this Act of Parliament, there is no further benefite granted to Minors, more than they had before the making of that Act, except only for the time of Redemption, which is Declared by that Act, not to run againſt them during the time of their Minority; but that they may Redeem Lands Compryſed at any time within the years of 25 years: But Found, if they Redeem not while the ſeven years be outrun (albeit they Redeem thereafter, and within the age of 21) that the Duties of the Lands for the years after the ſeven years, and before the time of the Redemption ſhould pertain to the Compryſer, and that the Minor ſatisfied not the Tenor and Minde of the *Act*, by paying of the Principal and Annualrents; and ſo Found the Duties of the Lands of the Interveening years to pertain to the Compryſer, and not to the Minor, albeit he Redeemed far within the years of 21 years; and Found that the *Act* ought to be ſo Interpreted. *Actor. Advocatus* & *Alter. Nicolſon* & *Craig. Gibſon* Clerk. *Vid. January* 15, 1624. Viſcount of *Annand* and the other Caſes there.

Johnſton contra *Forbes*, *Eodem die*.

Robert Johnſton Sets in Tack for five years, the Lands of to *Robert Forbes*, wherein the ſaid *Robert Forbes* is obliged by a ſpecial Clauſe, *To Paſture his whole Goods upon the ſaids Lands yearly, during the ſaid ſpace, and to hold his Goods within the Byres, and Stables, and to hold the Thatch within the Town, and to mare the whole Gooding within the Town, during the years of the Tack, and in caſe of failzie, to pay* 100. Pounds; upon the which Tack the Setter obtained Decreet before the Sheriff of *Aberdene*, for payment of the ſaid 100 pounds, becauſe the Tackſ-man the laſt year of the Tack, Gooded not the Ground, and therefore he was Decerned to pay the Sum: Which Decreet being Suſpended, The *Lords* Found, that the Decreet before the Sheriff being given upon Probation of the not Gooding the Ground, the laſt year of the Tack, could not import Condemnitor for payment of the whole Penalty, albeit the Clauſe of the Tack bore, *to pay the ſame in caſe of failzie*, indefinitly, and did not aſtrict the payment of the whole to the failzie of all the years; And therefore Found, that for the Failzie of one year, no more could be Decerned by the Sheriff, but the fifth part of the Penalty, which anſwered in proportion to the five years of the Tack, and Suſpended the Letters *ſimpliciter*, for the reſt of the 100

Pounds, notwithstanding of the Sentence given against the Party compearing, and a Sentence of the *Lords* upon an anterior Suspension, where the Letters were found orderly proceeded for the whole.

Musket contra *Dog*, *Penult February*, 1639.

ONe *Musket* being served Tutor lawful to his Brothers Bairns, Transacts with *Elizabeth Dog*, Mother to the Bairns, and she obtains a Factory from him, for which she by the Mediation of some Friends, obliges her by Bond to pay him 3000 Merks, which the saids Friends appointed her to pay, upon the which Bond she being Charged, Suspends, that it was given *ob turpem causam, viz.* For Selling of his Office of Tutory, or for granting of a Factory, which is equivalent, the Factory being made for Sums payed therefore, and which must tend to the prejudice of the Bairns, and therefore such Pactions ought not to be allowed in Judgement, but are reprobat in Law, and although the Consent of Freinds was obtained to the said Paction, yet that ought not to give warrand to a Paction not warrantable in Law, specially seing *rebus integris* the Suspender Renounces the Factory, and is content to Repone the Charger to the same, and to his own Administration. And the Charger Answering, that it is not now time to offer to Repone, after so long time, there being more than two years and an half, since the date of his Tutory, and where this Bond proceeds upon Decreet Arbitral, done by Friends, mutually chosen, betwixt the Parties, and being done by a Woman, who then was *Major sciens Prudens, Præsens & Volens*, and upon her own earnest dealing; there neither being Violence nor Fraud used against her for doing thereof; for albeit the Office of Tutory may not be sold, yet there is no Reason nor Law, which prohibits a Tutor to make a Factory, and to Transact with the Factor for the same, and therefore he Alledged, that the Reason was not Relevant. The *Lords* Found, that this Transaction ought not to be sustained in Law, being of the nature of *turpia pacta*, which are reprobat in Law, and whereby such Pactions are declared to be unvalid, to produce any *Action* upon the same; and although the condition of the Paction was made, not for Selling the Office of Tutory; But for constituting of the *Mother* of the Bairns to be Factrix in the Office, and that it was also done by the Advice of the Bairns Freinds; yet it was Found to be unallowable in Law, seing it was granted for so great a Sum, *viz.* 3000 Merks, which behoved to come off the Pupils Estate, and consequently behoved to be to their prejudice, and so ought to be rejected; for the *Lords* Found, that although a Tutor might make a Factor, yet to constitute one, for such a Lucrative Cause to himself, could not be sustained, for it were more to be sustained in Law, for the Tutor to give reasonable allowance to a Factor, for satisfaction of his pains; and as the same should merit, then to sell a Factory, which evidently tends to the Pupils Lesion, therefore the Letters, and Charges upon that Bond were Suspended *simpliciter*, it being confest, that the Bond was given for that Cause. Actor. *Primrose*. Alter. *Dunlop*. *Hay* Clerk.

Urquhart contra *Barclay*, *March* 6, 1639.

BY a Contract betwixt umquhile *John Urquhart*, Tutor of *Cromarty*, and umquhile *Barclay* of *Towie*, the Laird of *Towie*, having Wodset to the said *John Urquhart*, certain Lands bearing a Clause, *That notwithstanding of the Wodset, the Debitor should be obliged to pay the Sum upon the Requisition of* 60 *days*; to the which Contract, the umquhile Tutor makes *John Urquhart*, Son to the Laird of *Cromarty* Assigney, who, according to the Contract, after the decease of the Tutor Cedent, and also after the death of the umquhile Laird of *Towie*, the Debitor requires the Son and Heir of the said Debitor, he being at that time Served and Retoured Heir, upon the said Contract, to make payment, conform

to

to the Contract, which *Requisition* is made to the said Son, and Heir, he being then Minor, and to his Tutors and Curators generally, which Contract is thereafter Registrat by the *Assigney*, and Charges raised thereupon, and Suspended; In which Suspension, it being questioned, that the Requisition could not be sustained, being made by the Assigney to the Heir of the Debitor, after the *Decease* both of the Creditor and Debitor, and the Contract then not being Registrat, which not being Decerned, nor Sentenced, at the Cedents instance; the *Cedent* could not in Law, make any Requisition, which could be effectual, before he had recovered *Decreet*. And also he Alledged, that by no privat Warrand could this Party have Power to make Requisition to the Defenders Tutors and Curators; But he ought to have purchased Letters of the *Lords*, giving Warrand to require the Minors Tutors and Curators, which not being done, the Requisition cannot be sustained. These *Alledgances* were both Repelled, and the *Lords* Found no necessity, that the Contract should be Registrat at the Assigneys Instance, before he could require, seing it was Registrat at his Instance, against the *Suspender*, as Heir to his Father *passivè*, after that Requisition, and so, which the *Lords* Found, might be drawn back to the Requisition, and also they *Found* that there was no neceffity to have the *Lords* Letters, in supplement, to Warn Tutors & Curators; but sustained the Order, and yet it is usual in such Cases, to obtain Letters, to warn the Tutors and Curators of Minors, albeit it was *Found* not necessar, or if it should be omitted, that the Omission should anull the Requisition, Actor. *Nicolson.* Alter. *Baird. Vid. December* 11. 1638. *Finlason.*

Sir *James Stuart* contra *Hary Gordon* of *Kingstair*, *Eodem die.*

IN a Reduction of an Infeftment granted by *Sorbie* to *Kingstair*, of the Miln of upon a *Reason*, that the Pursuer had lawfully Compriſed the same, before the Infeftment; and also that he had Inhibit, before the said Infeftment, *Sorbie* to Sell and Dispone. The Defender Alledging, that the Warrand of the Inhibition ought to be Produced, before he could be compelled to Disput upon this Reason of Inhibition, that he might see the Ground thereof. *And* the other Answering, that he Joyned with his Inhibition, the Reason of his Anterior Compriſing upon the same Bonds, which are the Ground of his Inhibition, and the Compriſing being produced, which is a Sentence, he needs produce no more. The *Lords* Found, that seing the *Party* insisted not upon the Reason alone, which was Founded upon the Compriſing, but Joyned therewith the Reason upon the Inhibition, as a Conjunct Reason, that he ought to produce the Warrands, whereupon the Inhibition was raised, that the Defender might object what he may lawfully say against the same, seing the Inhibition, and not the Compriſing, was the main and substantial Part of the Reason of Reduction, which Appeared to add Relevancy thereto. Actor. *Stuart* & *Nicolson.* Alter. *Gilmore. Scot* Clerk.

L. *Scotstarbet* contra *Boswell*, *Eodem die.*

THE L. of *Scotstarbet* Pursues Reduction against *William Boswell*, for Reducing of a Contract of Alienation of the Lands of *Pitodrie*, made by *David Boswell*, to the said *William Boswell* Defender, Redeemable upon payment of 10000 Merks, with an Inhibition Served by the said *William*, upon the said Contract, the Reason was founded upon a Disposition of the saids Lands, Irredeemable, made by the said *David Boswell*, to *Henry Mauld* of *Melguna*, who was Infeft, and which *Henry* had *Disponed* the same to Sir *John Scot* Pursuer; and the Defender Alledging against this Reason, that it was not Relevant, seing both the Pursuers *Right*, and his Authors, are after the *Excipients* Contract and Inhibition: And so as the samen are in Law, good grounds to Reduce the Pursuers *Rights* Lybelled, so must they be found good grounds to Eleid this

Reason. The Pursuer Replyed, that albeit the Contract and Infeftment, granted to his Author, be after the Defenders Contract and Inhibition; yet there was an anterior Contract, preceeding the Defenders Contract, and Inhibition, by the which the said *David Boswell* Sold to the said *Henry Mauld* the saids Lands, and the posterior *Di*sposition of Selling of the saids Lands, albeit done after the Inhibition, yet the same Depending upon that Contract, which preceeded the said Inhibition, the said subsequent Infeftment granted thereafter, and Contract, ought to be drawn back to the first, and the Interveening Inhibition cannot be found any Impediment to have stayed the Acquiring of the second Right, Depending upon the first, and made conform thereto. The *Lords* Repelled the Alledgance, and Found, that the Interveening of the *D*efenders Contract and Inhibition, betwixt the Pursuers Authors first Contract, and before the Pursuers Authors second Conttact, was no Impediment, but that his said Author might lawfully perfect the Contract, after that Inhibition, seing the same Depended upon the prior Contract, before the Inhibition. And that the second was made according to the first, and for Implement thereof. Actor. *Advocatus*. Alter. *Gilmore* & *Sibbald*. *Hay* Clerk.

L. *Kilcadron* contra L. *Balgillo*, *March* 8. 1639.

THe L. *Kilcaldron*, and his Spouse, having Charged the L. *Balgillo*, for payment of the Annualrent of 4000 Merks, adebted by him to *Kilcaldron* his Spouse, conform to the Bond granted to her, and her Daughter, gotten betwixt her and Mr. *Henry Duncan*, her first *S*pouse in *F*ie, he *S*uspends, Alledging, that *Kilcadrons S*pouse to the Wife Liferenter, is owing to him for greater *S*ums, and he is content to compense *pro tanto*. The Charger Answered, that Compensation ought not to be admitted, in respect that the said *An*nualrent Charged for, is destinat by the Husband, for the Wifes Aliment, and she has no other *M*eans to live by but by this Sum, neither of her own, nor by her present Husband; and it were against Conscience and Justice, that her Means should be taken from her, which she has from her prior Husband, for payment of her second Husbands Debt, and that her self should starve for want of Means of Life. The *Lords* Found the *R*eason of Compensation *R*elevant, notwithstanding of the Answer, and *F*ound that the destination of the Sum Lybelled, made by the Husband to the Wife for her Aliment, could not hinder the Compensation, seing neither was this Destination allowed by any Judge to be Alimentar, nor Found to be so, neither bore the Bond, whereupon the Charges were raised, that the Sum was destinat, and payable for *A*liment. Actor. *Barcley*. Alter. *Mowat*. *Vid*. *July* 4. 1637. *Tennent* contra *Fythie*.

Stirling contra *Cunninghame*, *Eodem die*.

COllonel *Cunningham* being obliged to pay 200 pounds, to *Andrew Stirling*, Brother to Captain *Stirling*, to the use and behove of the said Captain, upon the Registrat Bond, he *A*rrests in Mr. *James Aikenheads* hands, certain Goods pertaining to the Collonel, and pursues to make the same forth-coming; And the Collonel Compearing, and Alledging that the said *Andrew Stirling*, by his Missive Letters, written to the Collonel, declared that he should not seek payment of the Sum, while the Collonel pleased, in respect of several Particulars, betwixt the Collonel and the Captain, which were not ended. The *Lords* Repelled the Alledgance, and Found that the Letters written by the Captains Brother, to whom the payment was ordained to be made by the Bond, could not prejudge the Captain himself. The Bond bearing, *That it was made to the behove of the Captain*, and so known to the Debitor, to be the Captains proper Money, and the Letters not being written by him, but by his Brother (who was only an Interposed Person to the Captains behove) and without his Warrand, albeit the payment was appointed to be made to his Brother, *ut supra*, yet the Captain could not be prejudged by that Letter. L. *Heasilhead*

L. *Heasilhead* contra his Tennents, *Eodem die.*

SOme Tennents to the Laird of *Heasilhead*, being Rentallers of some of his Lands for their Lifetimes, and the Life of the Setter for payment of a certain Duty therein contained for the Lands, and for paying of the Teind-Duty, as should be Imposed, obtains Decreet before the *Lords* of Session, against their Master, Setter of the Rentals, and who had acquired Right to the Teind from the Titular, according to a Valuation of the Teinds Tryed and Estimat before the *Commission*, finding that they should bruike the Teinds of their Lands Set to them in Rental, for payment of their proportion of the Valued Bolls. This Decreet was desired to be Reduced, by reason that by vertue of the said *Commission*, the Benefit of Valuation of Teinds, is by no Clause of the *Commission*, conceived in favours of Tennents of other Heretors Lands, who are but naked Rentallers, and Rentallers only during the Lifetime of the Setter, and Receiver conjunctly; for that Clause of the *Commission*, concerning Liferenters, is only to be understood of Liferenters, by vertue of Infeftments, as Conjunct-fee, and other sicklike Right; and therefore thir Rentallers could never have had interest to pursue such an Action, and to crave the benefit of the Valuation of Teinds. The *Lords* Found the Reason Relevant, and Reduced the Decreet; for the *Lords* Found, this *Commission* of Teinds contained no Clause in favours of any Rentaller of Land, which ought to give them Right to claim the benefit of Valuation of Teinds, but when any Action should be pursued against the Rentallers, for their Teinds, The *Lords* declared that they would have consideration of the Rentals, and what should be in equity payed by them for their Teinds. Actor, Alter. *Maxwel. Scot* Clerk.

L. *Pinkell* contra *Kennedy* and *Inglis*, *Eodem die.*

L. *Pinkell* being made Assigney by *Alexander M^culloch* of *Myrtoun*, in and to an Heretable Security and Bond granted by umquhile *Kennedy* of *Ardmillan*, whereby he was obliged to Infeft his Daughter, Spouse to the said *Alexander Mculloch* of *Myrtoun*, in an Annualrent, Redeemable by payment of 8000 merks, Pursues for Registration of the said Bond: In the which Action *John Inglis*, Burgess of *Edinburgh*, Compears, and produces Horning against *Myrtoun*, and Alledges the Assignation made by him to the Pursuer, is null, being done in his fraud and prejudice, who is Creditor to the Cedent, and which Cedent is at the Horn at his instance, and yet remains at the Horn for the same cause; and therefore by the *Act* of *Parl.* 1592 the Assignation is null. The *Lords* Repelled the Alledgance, because they Found, that the *Act* of *Parl.* did not Militat, nor was Intended against Heretable Rights, but that Parties may Dispone them, notwithstanding they were at the Horn; for if the *Act* were generally understood, as the words seems to proport, then none at the Horn could Dispone their Lands, then Horning should be as an Inhibition, whereas the Context of the Act strikes only upon Assignations of things Escheatable. Actor. *Stuart* & *Johnston*. Alter. *Nicolson* & *Mowat*. *Gibson* Clerk. *Vid.* 21 *March* 1623. *Cunninghame* & Lo. *Kilmawers.*

Lo. *Almond* contra *Hope* of *Carse*, *March* 9. 1639.

THe Lo. *Almond* having Compriſed from the *E.* of *Linlithgow* certain Lands, which he had Set in Feu to some Feuars, for a certain small Feu-duty yearly, and which Lands were holden by the E. of *Linlithgow* of the L. of *Carse*, by Ward-holding; upon which Compriſing Sir *Thomas Hope*, Successor to the L. of *Carse*, in his Heretable Right of that Superiority to the *E*arl of *Linlithgow*, being Charged to receive the Compriſer; who Suspending, that he was content to receive him, having received a years Duty of the Lands for his Entry, as use is: And the Lo. *Almond* Compriſer Alledging, that he was content to give him a years Feu-duty, contained in the Feu-Infeftment granted by the *E.*

of *Linlithgow* to the Feuars, which ought to be Found all that he ought to pay, seing by his Comprising he can have no Right but to that which pertained to the Earl, from whom he hath Comprised, and that was only the Right of the Superiority, and the Feu-duty payable to him by his *Feuars*, which was ten pounds yearly; and no reason can compel him to pay for his Entry to the Superior, more than a years Duty of that, which he acquires by his Comprising. The other Answered, that he ought to have a years *Duty*, as the Lands are worth by year, seing the Lands are Fewed since *Act* of *Parl.* 1606. which declares all Feus null *ope exceptionis*, which are made without consent of the Superior; This Feu whereof the years *Duty* is now offered is in this case, being Set in Feu by the E. of *Linlithgow*, since the year 1606, without consent of the L. of *Carse* Superior, and consequently cannot defend against the Superior, to exclude him from the Casuality of a years Duty of the Lands. And the Comprisser Answering, that he ought not in this place to Dispute, especially by way of Exception, upon the Nullity of another Heretors Right, who is not Party, nor Called in this Process, for that were very summar and unjust; but it is enough for him to say, that the Lands are Feued, and that he can have no more by his Comprising but the yearly Feu-duty contained in the Feuars Charter; neither can the Feu be found null for the Alledged defect of being Set since the year 1606, without consent of the Superior; For as the Granter of the Feu could never have been heard to quarrel the Feu upon that ground, being his own Deed, which he is holden to Warrand; no more can the Comprisser, who is a singular Successor, succeeding only in that Right which he had. The *Lords Found*, that the Comprisser was holden to pay a years *Duty*, according to the worth of the Lands to the Superior, and that the offer of a years *Duty* of that which was contained in the Feu-Charter, sufficed not; in respect that the Feus are *Set* since the *Act* of *Parl.* 1606. which declares the Feus thereafter *Set* without consent of the Superior to be null *etiam ope exceptionis*, which the *Lords* Found, must necessarly militat in favours of Superiors, against any objecting such Feus against them, whereby they may be prejudged in their Superiorities, or of the Casualities belonging thereto, as this *Duty* of the Entry was, albeit so far as concerns the Feuars, their Rights were not prejudged by this Interloquitor; but that they remained good *pront de Jure*, as against the Setters, so also against the Compryers of the Setters Right; but the *Lords Declared*, that they would after tryal of the yearly avail of the Lands, reserve the modification to themselves, which they declared should be very moderat, in respect of the Compryers small benefit. *Actor. Stuart.* Alter. Præsens. *Hay* Clerk. *Vid.* 15 *Feb.* 1634. Lo. *Tester.*

Riddoch contra *Younger*, *Eodem die.*

ONe *Riddoch* Reducing some Dispositions made by one *Younger* to his Son *Younger*, upon the reason of the Act of Dyvoury, as done by a Bankrupt to his own Son, without just and true onerous Causes, in defraud of the Pursuer, a true and just Creditor: And the Defender opponing his Right, which bore to be made, *for Sums of Money, and onerous Causes*; against which positive Clause the Pursuer can never be heard to Alledge the same to be made, without payment of any Sums of Money, except that he should prove the same by the Oath of the Receiver. And the Pursuer Replying, that in this case the presumptions were so manifest for him, and for the truth of his Reason, that it laid a necessity upon the Defender, to prove and show that he had payed Sums for this Right made to him, seing it is made by the Father to the Son, who was a young Man Un-married, remaining in House with his Father, and who cannot condescend upon any probable way, by the which he might have acquired Means or Moneys to have acquired this Right, neither can he condescend upon any person, who was Debitor to him in Moneys; and in the Dispositions, the *Fathers* and Mothers

Mothers Liferents are reserved, which all discovers a manifest Fraud. The *Lords* Repelled the Alledgance, except the *Defender* should qualifie and prove some onerous lawful cause, for the which this Disposition was made, otherways than by the Confession contained in the Writ, or by his own Oath; neither whereof the *Lords* Found sufficient in this case, except that beside the same the Defender might make it appear, that he had acquired it for true Sums Debursed by him, and show to whom the Sums were payed, and where and by what means he had acquired these Sums. *Vid.* 22. *Jan.* 1630. *Pringle* contra *Ker*, and the Cases there. *June* 22. 1642. *Nisbet* *.

E. *Montrose* contra *Scot*, *March* 13. 1639.

THe E. of *Montrose*, being in sundry conferences with *James Scot* Burgess in *Montrose*, for buying of a House in *Montrose* from the said *James*; at length by a Ticket Subscribed to the said *James*, he referrs the price of the Land to the Earl's own appointing, who according thereto, having determined a price therefore, and offering the same, he thereafter Pursues the said *James*, for *Disponing* of the same Heretably to him. And the other Excepting, that his determination of the price, flowing from the Party Buyer, upon his Alledged *Reference*, committed to the Earl by the Seller, ought not to bind him to that Bargain, as if it were perfected; seing it is lawful to him, and permissable of Law to resile from that Reference and Bargain, before the Alienation were perfected: And it is against Law, and expresly prohibited in Law, that any should be Arbiter *in re sua*, as *L. Pen. ff. de receptis*, &c. & *L. quod sape* §. *illud ff. de contrahenda emptione: dicit venditionem non valere quando quantitas pretii confertur in voluntatem, vel arbitrium emptoris.* This Alledgance was *Repelled*, and the price determined by the Buyer, upon this Reference made to him by the Seller, was allowed as good, and found not disagreeable to the Laws and Practict of this Kingdom. Actor. *Advocatus* & *Mowat*. Alter. *Nicolson* & *Sandilands*. *Gibson* Clerk.

Hepburn contra *Hepburn*, *March* 14. 1639.

THe Brethren and Sisters of umquhile Collonel Sir *John Hepburn*, having submitted all Questions and Rights, which they might pretend to the Goods, Gear, and Means of the said umquhile Sir *John*, to the Laird of *Wauchtoun* and some other Friends, wherein the Submitters were bound, and did refer to the saids Friends, to determine what proportion of the saids Goods should be given to *George Hepburn*, the Son of the eldest Brother of the said Sir *John*, which *George* was then in *France* the time of the making of the said Submission and Bond, and did not subscribe the same, nor none taking the burden for him; upon the which Submission the saids Friends had given their Decreet Arbitral: the living Brethren and Sisters of the said Sir *John* being Confirmed Executors to him, Pursues one *Beaton* Factor in *Paris*, for payment of 20000 pounds, adebted by him to the said umquhile Sir *John*, who Suspending upon double Poynding, as being distrest by the Executors foresaids on the one part, and by the said *George* the eldest Brothers Son, on the other part. In this *Proces* the said *George* Alledged, that these Executors could never be heard to claim any more of this Sum controverted, but that proportion thereof, which was contained in the said Decreet following upon the said Submission pronounced by the saids Judges: Likeas he produced both the Submission and Decreet, pronounced by the Friends conform thereto, which declares what proportion of this Sum acclaimed is due to ilk one of the Parties, beyond the which none of them ought to be heard to acclaim any more. And the Executors Answering, that the said Decreet-*Arbitral* was null, because it was not pronounced within the year after the date of the Submission; but there was more than two moneths more than a year interveening, betwixt the date of the Submission, and the date of the Decreet, and so the same could not be found valid in Law; especially where the

same proceeds upon an Alledged Submission made, giving power to the Judges to Decern what Proportion should be given to *George*, of the Goods controverted, which was a Clause never Communed on betwixt the Parties, and to whom they have Decerned the Right of the most part of all the Sums truly due to the Executors only, against all reason, although the said *George* was not then within the Country, nor hath Subscribed the same himself, nor no other for him, taking the burden for him, and who was then, and is yet Minor; and who, if he were hurt by that Decreet, could not be bound thereby. The *Lords* having heard both Parties, they Found, that none of thir Parties can claim any more Right to any of the Sums controverted, except the proportion Decerned to ilk one of them by the said Decreet; which Decreet-Arbitral, the *Lords* sustained as lawful and valid, albeit it be not given within the year after the Submission; in respect, albeit the year was long expired before the Judges Decerned, yet they Found the Decreet good and sufficient, being done, and following not upon a naked Submission, but the Submission containing also a Bond, whereby the Parties gave power to the Judges, to determine what proportion of the umquhile Collonel his Goods should be Decerned by them in favours of the said *George*, and obliged them to abide thereat, which Bond was more than a Submission, and there was not any day nor time contained in the said Submission and Bond, nor any Blank left therein, nor Clause conceived thereanent, betwixt and the which the Judges should Decern; and therefore it was Found, that upon a Submission containing such a Bond, and bearing no day, there was no necessity to the Judges to Decern within the year; neither was it respected, that *George* was out of the Country, and did not Subscribe it, and that he was yet Minor, in respect it was a Clause conceived in his favours, which he did accept of, and so might thereby better his Case; and therefore the *Lords* Repelled the Alledgance proponed for the Executors, *&c.* Actor. *Dunlop* for *Beaton*. *Advocatus* & *Stuart* for *George*. Alter. *Nicolson*. *Gibson* Clerk. *Vid.* 25 *Feb.* 1630. *Hay* of *Tourlands* contra E. *Eglingtoun*.

Hamilton contra Relict of *Hamilton*, *March* 15. 1639.

MR. *John Hamilton* having Right to a Compriſing of Lands, pertaining to umquhile Mr. *James Hamilton*, Deduced for his Debt, Purſues the Relict of the ſaid umquhile Mr. *James*, for Reducing of a Seaſin of ſome of the ſaids Lands Compriſed, granted to her by her umquhile Huſband, upon this reaſon, that the Seaſin was granted by the Huſband to his Wife *propriis manibus*, only for meer love and favour, there being no other Adminicle, nor Impelling Cauſe for warrand thereof, and therefore ought not to be ſuſtained to prejudge a true Creditor, who hath Compriſed, and is Infeft, but the Creditor ought to be preferred to the Right of the ſaid Bond, notwithſtanding of the ſaid Infeftment granted to the Wife. In this Proceſs the Defender being abſent, and the Purſuer producing the Defenders Seaſin, Extracted out of the Nottars Prothocal, which being conferred with the Debt, whereupon the Compriſing was Deduced. The *Lords* Found the Reaſon Relevant, and Proven by the ſaid Seaſin, being of the Tenor foreſaid, and none Compearing to ſhow any other Adminicle or Warrand for ſuſtaining thereof, notwithſtanding that the Debts, for which the Compriſing was Deduced, were of a poſterior date to the Wifes Seaſin quarrelled; but the *Lords* Found it requiſite to the Purſuer to prove further with this Reaſon, that the Wife the Defender was otherways ſufficiently provided to ſome reaſonable proportion of her Huſbands Lands, whereby ſhe might competently live, by and attour the Lands contained in this Seaſin quarrelled. Actor. Prælens. Alter. *Johnſton*, who declared he would be abſent. *Gibſon* Clerk.

Forſyths

Forsyth's Assigney contra Captain *Coupland, March* 16. 1639.

CAptain *Coupland* being Debitor to *William Forsyth* in 1000 merks, and being Charged by *William Forsyth's* Assigney for payment, he Suspends upon this Reason, that *Forsyth* was Debitor by two Bonds to *William Ogston* in 1000 merks, and 500 merks; the Right of which Bonds and Sums, was devolved in the person of the Suspender, and he was content to compense this Debt, for which he was Charged, with so much of the Sums foresaids *pro tanto*, owing by the Chargers Cedent, against whom as the Compensation would have been Relevant to have met himself, so must it be against this Assigney. The *Lords* Found this Reason of Compensation Relevant to be received against the Assigney, as well as it would have been against the Cedent; neither was it respected, that the Charger Alledged, that the Compensation ought not to be admitted, in respect that the Suspender was made Assigney a year before the Obligation Libelled, whereby he borrowed this Sum, now acclaimed, from the Chargers Cedent, at which time if the Cedent had been the Suspenders true Debitor, by no probability would he have granted him a Bond of borrowed Money, if he then had been Debitor of these Sums, with which he compenses; for with what probability can it be supponed, that a Creditor will borrow Sums from his Debitor, before he be payed of the Debt owing by him, from whom he borrows: Likeas, the Bond bears, *that the Captain Renounces all Exceptions of not numerat money, and all other Exceptions whatsomever, competent in the contrair*; and this Right being then in the Captains person, when he borrowed the Sum Libelled, it must be presumed to have been payed. Likeas, before any Intimation made by the Captain of his Right to thir Bonds, wherewith he Compenses, *Forsyth's* Assigney raised Inhibition against the Suspender, upon the Bond Libelled: Which Alledgance the *Lords* Repelled, and notwithstanding of the same, Sustained the Reason of Compensation, and Suspended the Letters *Simpliciter*.

Ferguson contra *Forrest, March* 19. 1639.

ONe *Ferguson* Pursuing one *Forrest*, for Restoring to him of his Mare, which properly belonged to him, and was stoln from him, off the Ground of the Lands of ..... whereupon he dwelt, and which Mare was then, and before in his possession, and was his own Mare, so known to the Neighbours about in the Countrey. And the Defender Alledging, that he ought to be Assoilzied, because he bought the Mare Libelled in an open Mercat, at a publick Fair in the Mercat-time of day, and payed the price thereof, which ought to Liberat the Defender, being so Bought and Sold in a Burgh-Royal, in a publick ordinary Fair-day keeped in that Town. Likeas, the Mare is now dead, and so there is no place nor possibility of Restitution, albeit the Action might be Sustained. The *Lords* Repelled the Alledgance, and Sustained the Action, which was Found not Eleided by this Exception of buying in a publick Mercat; for the Excipient ought to have taken *Borgh* and *Ham-hald* from the Seller, conform to the old Laws of the Realm, if he would have provided for his own Security; and the dying of the Mare, albeit it made it impossible to restore her, yet in place of that, the *Lords* Found the Defender should refound the price. Actor. *Nairn*. Alter. *Johnston*. *Hay* Clerk. *Vid. March* 29. 1639. Dam *Margaret Hay*.

Col. *Brogs* Heir contra ..... *March* 23. 1639.

ONe being Served and Retoured Heir to umquhile Collonel *Brogs*, who died in the *Low-Countreys*, and Served there at the Wars where he died. This Heir Pursuing another *Scotsman* for delivery of the said Collonels Heirship Goods, Libelled to have been Intrometted with by the Defender in *Holland*, where the Goods were then. The *Lords* Found, seing the Defunct lived and died in *Holland*, and that the Goods were Alledged to have been in *Holland* when the Defunct

funct died,& where they were intrometted with by the Defender,as was Lybelled,and that the Defender was an actual Residenter in *Holland*,where he was Alledged to have intrometted with the same, &did Reside there these many years of before,and ever sensine,and as yet he being there Married,and an actual Dweller there *animo remanendi*,albeit he was a *Scotsman*,that no Process ought to be granted against him in this Countrey for the said Intromission,but that he ought to be pursued therefore in *Holland*,*quia actor debet sequi forum Rei*; neither was it respected,that the Pursuer Declared,that he Insisted in this Pursuit against the Defender,being a *Scotsman*, that he may have Execution against such of the Defenders Goods and Estate as he had within *Scotland*,for satisfying of the Heirship, as he should recover by this Sentence, which the *Lords* would not allow. *Vid. December* 8, & 9. 1626. Lord *Blantyre*, *February* 1. 1642. *Fa. Douglas.*

Stuart contra *Stuart* and *Hume*, *Eodem die.*

George Stuart having furnished some Moneys to *Christian Stuart*, Daughter to *John Stuart* of *Coldinghame*,and having received her Bond thereupon, and Registrat the same, Arrests in the Hands of *Hume* of *Rentoun*, the Moneys adebted by him to the said *Christian*, to be made forthcoming for payment of the said Debt,and Pursues therefore; wherein the said *Christian* Compears,and Alledges the said Bond to be null, because it was made by her, she then being *in familia paterna*,and the same is not Authorized with his consent,who is her Curator in Law. And it being Replyed,that seing she is now past *annos utiles*, and had never quarrelled this Bond by no Action of Reduction,or Restitution, that the Exception ought not to be respected, specially seing this Bond was granted by her, when her Father was not within the Countrey. The *Lords* Found,that before they would decide this Question,that the Party ought to qualifie for what cause the Bond was given;for if it was granted for necessary furnishing,and at the time when the Father was not in the Countrey,it were no reason that the Party in such a case should be deprived of his just Debt, and therefore superceeded to Discuss the Alledgance, while the Pursuer should condescend upon the cause of the Debt, that the *Lords* might consider thereof.

Hay contra *Elliot*, *March* 29. 1639.

DAm *Margaret Hay* Relict of Sir *Michael Preston*, Pursues one *Elliot*, who had intrometted with certain Corns sold by her Tennent to him, which Tennent was adebted to her in the Farms of her Conjunctfee-lands,of the Cropt 1638. particularly Libelled,and which Corns so Intrometted with,were of the Corns growing upon the saids Lands the same Cropt. And the Defender Alledging,that he bought thir Corns in a publick Mercat, after *Yuil*,and payed the prices therefore,which ought to Liberat him; for it were a dangerous Preparative,to cause Parties who had bought Corns *bona fide* in a publick Mercat, and had payed for the same,to refound over again the prices; for then neither might Tennents sell any of their Corns for a lawful use,for the help of their Labouring, as for payment of furnishing made to their Houses,and borrowed from others before, nor for buying of Plough-Goods, or for changing of their Seed, or for any other such lawful and necessary use; and also it were to take away all Trade and Commerce among the Leidges. And the Pursuer Answering,that all the Fruits of the Ground were Hypothecat to the Master for his Farms,and that he ought not to be prejudged thereof by no Deed of the Tennents;but if the Tennent has made any Bargain,it is more just that the Buyer have his Recourse against the Tennent with whom he Bargained,than that the Master of the Ground should want his Farm. And it being Duplyed, that the Master might have stayed the Tennent,if she had feared him,to transport his Corns, but not having so done, her neglect cannot draw the Defender under so evident, and so dangerous a preparative,

rative, to cauſe him pay over again the prices of that which he had payed for, and bought in a publick Mercat. Likeas, he offered to prove, that at the time when he bought the ſaid Victual, the Tennent had as much Victual in the Barn-yard of that ſame growth, as would have ſatisfied the Purſuer her Farm, and alſo Sown the Ground, which Corns then extent the Purſuer Poynded thereafter for other years Duties, owing to her of the Farms of preceeding ytars, wherein ſhe can have no priviledge, more than any other Creditor, and ſo ſhe Intromitting thereafter, as ſaid is, it muſt not be in her power, to aſcribe that Intromiſſion to any other cauſe, as for Poynding for preceeding Cropts, in prejudice of the Excipient, who had lawfully bought, as ſaid is; But that Intromiſſion muſt be aſcribed to the payment of the Farms of that year, being of that years Corns, and Growth, and if any ſuperplus had been after payment of that years Farms, ſhe might have Poynded that ſuperplus for any preceeding Debt; but the Corns being Hypothecat of that year, ſhe behoved to meddle therewith for that Cauſe, before ever ſhe took her to another Ground of Intromiſſion, and he Contends, that for any Action competent to the Purſuer, it muſt be againſt the Tennents ſelf, and not againſt this Defender. The *Lords* Repelled the Alledgance, and Suſtained the Action, and Found it not Relevant to Alledge, that the time when the Corns were bought, which was condeſcended to be after *Yuil*, but long before *Candlemaſs*, that there was then as many Corns extent as would pay the Farm, and Sow the Ground, except that the Defender ſhould Alledge, that there was as many extant, after, or at *Candlemaſs*, before which time the Maſter cannot in Law meddle with the Tennents Corns for his Farms: And alſo they Found, that the Maſters Poynding of any Corns for the preceeding years Debt, ought not to prejudge her of her Action againſt the Intromettors for her Farm, neither ought ſhe to be compelled to aſcribe that Poynding firſt to that years Farms, as if the Corns were firſt Hypothecat for that uſe; for albeit ſhe might have been preferred to another Creditor, if any had Poynded, yet it was not ſo in her own Poynding Actor. *Advocatus.* Alter. *Nicolſon* younger. *Scot* Clerk. *Vid. March* 19. 1639. *Ferguſon. February* 3. 1624. *Hay. June* 29. 1642. L. *Polwart.*

Weyms contra *Maitland, March penult* 1639.

MR. *James Weyms* of *Lathocker's* Son, ſeeking Reduction of a Bond, granted by him to Mr. *Richard Maitland*, upon reaſon of his being then Minor. And the Defender Alledging, that at the Subſcribing of the Bond, the Purſuer affirmed, and proteſted, that he was Major; which Exception being Found Relevant, the Defender referred the ſame to the Purſuers Oath, who by his Oath Deponed, that he remembred not if he did then affirm or proteſt himſelf to be Major or not; and further Deponed, that he could not Declare to his knowledge, ſo far as he could remember; at the Adviſing of the Proceſs, it being controverted by the Defender, that ſeing the Purſuer had not Deponed upon the Exception *poſitivè*, and had not denyed it expreſly, being *in facto proprio & recenti*, which binds him in Law to Anſwer Determinatly, and not to ſay Nakedly, that he remembers not, that therefore he ought yet either to Depone *Affirmativè*, or *Negativè*, or elſe the Exception ought to be Found Proven. The *Lords* Repelled the Objection, and Found the Oath as it was conceived, ſufficient to condemn the Defender, for the Purſuer could not be compelled to Depone further, than as he remembred, and having Deponed ſo, the ſame was Found enough, and was Found not to prove the Exception. Actor. *Stuart.* Alter. *Gilmore. Gibſon* Clerk.

Long Ceſſation for near three years, becauſe of the Troubles, &c.

Smith contra *Williamson, January* 24. 1642.

George Wilson Smith in *Edinburgh*, having Charged *Gilbert Williamson*, one of the Baillies of *Edinburgh*, to Incarcerat one *Hay* Rebel, at his Instance, and conform to the Charge being put within the Tolbooth of *Edinburgh*, whereout of he escaped, Pursues *George Suitie* and *John Rynd*, who were two Baillies with the said *Gilbert*, (he being now deceased) conjunctly & severally to pay the Debt. And they Alledging, that they could not be conveened, but only the Heirs and Executors of the Baillie who did the wrong. The *Lords* Found, that the Party had good Action against any of the Magistrats surviving, conjunctly and severally, as well as against the Magistrat Deceased, if he were living; and Sustained the Process against the Parties called, without necessity to Pursue the Heir or Executor of the Magistrat Deceased. In this Process, the *Lords* Found it not enough, to prove it by the Messengers Execution, that the Rebel was Warded by that Baillies Command; but Found, that it ought to be proven by the Witnesses of the Execution and the Messenger, or by other lawful Witnesses, or other Legal Probation; and Found no necessity to prove it by the Note of the Jaylors Book, seing this Pursuer was but a poor Smith, and had not so much Money to pay the Jaylor, as he uses to take for In-booking of Wairders, which he affirmed to be ten, or thereby for every hundreth, for which he was Incarcerat, Which the *Lords* Found, that they would Try, and take Order for to amend that abuse. Actor. Alter. *Stuart*. *Gibson* Clerk. *Vid. November* 11. 1634. *Bower* contra Town of *Inverness*. *February* 10. 1631. Provost of *Inverness* and the cases there.

Scot contra *Hart, Eodem die.*

UMquhile *William Hart*, being obliged to pay to *Scot* the Sum of 77 pounds, for furnishing of Aliment and Clothes to the said *William*, and his Bond being Registrat against one of the two Daughters, and Heirs of the said *William*, reserving her Defences against the Execution, whereupon the Daughter being Charged, she Suspends, that she was but one of the two Heirs, and her other Sister should be conveened, who was Co-Heir. It was Answered, that she who was conveened, ought to be conveened *in solidum*, in respect the other Sister was a poor Woman, *non solvendo*; Likeas the other Sister Disponed all her Right which she had to her Fathers Lands, in favours of this Sister, which was conveened; Which Reply the *Lords* Sustained, to make this Sister lyable *in solidum*, for the whole Debt, seing also it was a matter but of a mean consequence; but here both the Sisters would appear necessar, to have been conveened in the Process, as representing the Defunct, who was Debitor, and who cannot be represented by any one of the two, and who being both conveened, might have been heard to Dispute, why the one should pay all, and the other be freed. *Scot* Clerk.

Johnston contra *Loch, January* 25. 1642.

ONe *James Loch*, having Comprysed the Lands of for Debt, and this *Johnston* Pursuing, to hear the Comprysing Declared to be extinct, as satisfied, he being a posterior Compryser; and *Loch* Alledging, that this Comprysing was null, being Deduced upon a Bond, bearing payment of Annualrent, and which so was Heretable, and no Charge to pay the Principal Sum preceeded: this Exception was Repelled, and the Comprysing was Sustained, for as the Party might Poynd without a preceeding Charge, so he might Compryse.

Stirling contra *Aikenhead, Eodem die.*

MAjor *Stirling* having Arrested in Mr. *James Aikenhead's* hands, certain Silver Plait pertaining to Collonel *Cunninghame*, for satisfying of 300. Merks, adebted by the said Collonel to *Andrew Stirling* of *Law*, Brother to the Major,

Major, and which he was obliged to pay to his said Brother in name of the said Major, whereupon the said Mr. *James* being pursued to make the Arrested Goods forth coming. It was Alledged by Mr. *James*, that the Principal Bond was Suspended by the Collonel, so that while that Suspension were discussed, no Process could be granted upon this Pursuit, seing this Pursuit is but a Part of the Execution of that Bond, which is Suspended. The *Lords* Repelled this Exception, seing the Principal Party was called in this Process, who might propone by way of Exception, any reasons contained in that Suspension, which might Eleid the Principal Debt. *Vid. Feb.* 10. 1642. *Johnstoun.*

Dundas contra *Broun*, *January* 28. 1642.

ONe *Patrick Dundas* being Confirmed Executor to the Goodman of *Newlistoun* conveens *George Broun* Occupier of the Lands of *Philipstoun*, and haver of some Steil-bow Corn and Straw due upon the saids Lands, given to the Tennent by the said umquhile *Dundas* of *Newliston*, for payment of the Prices thereof. And it being Alledged, that the said Steil-bow Corn and Straw being Set by the Defunct to the Tennent, for a Conjunct-Duty for the saids Lands, with the said Steil-bow Corn and Straw, if the Steil-bow foresaid were taken from the Tennent, the Tennent could not pay that Duty, conditioned to be payed by him for the Ground; and the Steil-bow must pertain to the Heir, or to him who succeeds to the Land, by Right from the Defunct, as *Pars Fundi*, and cannot pertain to the Executors of the said Defunct. The *Lords* Repelled this Alledgance, and Found this Steil-bow Corn and Straw pertained to the Executors of the Defunct, and neither to the Heir nor to the Successor in the Right of the Land, and did not respect, that thereby the Rent of the Lands should decresce; for the Defunct had not Set any Tack, or other Right in Writ to the Tennent of these Lands, with these Steil-bow Goods; but only had verbally Set the same from year to year, during the Tennents Occupation; so that that Set could not indure any longer than the Setter lived, after whose decease the Heretor might use the Ground as he pleased, and the Executor might seek the Steil-bow. *Vid. December* 6. 1628. *Lawson*, and the Cases there. *Decem.* 4. 1638. La. *Westmuirland.*

Douglas contra *Cunninghame*, *February* 1. 1642.

James Douglas of *Chester*, Pursuing Sir *David Cunninghame*, and *George Muirhead*, for payment of a Sum of Money, conform to an *English* Bond, and they Alledging, that they could not be conveened in this Kingdom, to answer before any *Scots* Judge, because they dwelt presently in *England*, where they have dwelt these 24 years continually *animo remanendi*; and therefore ought only to be conveened there, seing *Actor sequitur forum Rei*, and that the subject is for a Bargain made in *England*, and for *English* Business. The *Lords* Repelled the Alledgance, seing the Bond was made betwixt *Scotish Men*, and to have Execution for *Scotish* Goods, lyand in *Scotland*. Actor. Alter. *Johnstoun. Gibson* Clerk. *Vid. March* 7. 1629. *Wilkie. March* 23. 1639. Coll. *Brogs Heir.*

Murray contra *Merchinstoun*, *February* 2. 1642.

Ronald Murray being as Creditor to umquhile *Thomas Merchinston* decerned Executor to him, Pursues Mr. *David Merchinstoun* to pay to him 400 Merks, which the said Mr. *David* was owing to the said umquhile *Thomas* his Debitor, and the Defender Alledged, that he ought to be Assoilzied, for so much as he had payed of this Sum, before the Defuncts decease, to some Tailors, and Baxters, for some Furnishing made by them to him, at his direction, which Direction he offered to prove by the Oath of these Persons, to whom he made payment. The *Lords* Found, that the said Direction was not probable by the Oath of these to whom the said payment was made, albeit the

Particulars were but small, and the Debt was constitute by Writ, and if it were to be proven by Witnesses, these could not be Witnesses to prove for their own advantage.

Lutfit contra *Johnstoun*, *February* 4. 1642.

BY Contract of Marriage *James Johnstoun* is obliged to Imploy upon Land, Annualrent or Merchant-Trading to himself, and *Margaret Wachop* his Spouse, and to the longest liver of them two, and to the Bairns to be gotten betwixt them 1600 Merks, and failzieing of Bairns betwixt them 400 Merks, to the *Heirs*, Executors, Legatars and Assigneys of the said umquhile *Margaret*: and *Marion Wauchop*, only Sister and Heir Served to the said umquhile *Margaret* and *John Lutfit* her Spouse, having obtained Decreet against the said *James*, for the Imployment of the said Sum, conform to the said Contract, for the uses of the said *Marion*. (There being no Bairn on Life gotten of the said Marriage) and thereupon Charging the said *Johnstoun*, The *Lords* Suspended the Charges, in respect there was a Daughter, who survived the Mother, and who was Executrix Confirmed to her Mother, albeit that Bairn died within 4 or 5. weeks after her Mother, seing by the existance once of the Daughter, albeit shortly thereafter dying, the Condition of the Contract was purged; For it is sufficient once *habuisse Liberos quamvis statim decesserint*. And the Confirming of the Bairn Executrix to her Mother, to whom the benefit of that Clause was Alledged to pertain, being conceived in favours of the Executors, was not much respected, seing the Bairn who was Executrix died, this Debt not being Execut before her decease; so that if that Debt fell to the Executors, and not the Heir, yet the same would belong to those who would be Executors again *de novo* to the Relict, who was dead, and this Charger was the same, who was served Heir and only would be Executor in Law; But it was Found, that the once existance of a Bairn, although she had never been Confirmed Executor, took away the benefit of that Clause of the Contract of Marriage from any other, either Heir or Executor to the Defunct. Actor. the Charger by *Dunlop*. Alter. *Gibson* Clerk. *Vid. January* 27. 1630, *Turnbull. January* 29. 1639. *Graham. July* 23. 1634. *Maxwell.*

Hunter and *Forbes* contra *Hunters*, *February* 8. 1642.

John Hunter in *Edinburgh*, having four Daughters, he Married one upon *Alexander Forbes*, and Contracts to him 5000 Merks, and before the payment he dies, making after the Marriage a Testament, wherein he Ordained all his four Daughters equally to succeed to all his Lands, Goods and Gear whatsoever, notwithstanding of any prior Assignation, or Right made of before to any of his Bairns, which Testament is thereafter Confirmed, and the said *Alexander Forbes*'s Wife is Confirmed one of the Fathers four Executors; upon this Contract *Alexander Forbes* Pursues the other Three Daughters as Executors, for payment of the Tocher. And the Defenders Alledging, that the Defunct declared in his Testament, that all the four Daughters should be equal Portioners, as said is; Likeas this Pursuer had Homologat the said Testament, not only by Confirming his Wife one of the Four Executors, but also by up-lifting of a Part of the Defuncts Moveable Sums, as Executor Confirmed. The *Lords* Repelled the Alledgance, and Found that the other Three Sisters were Lyable to the Fourth Sister, for the Tocher Contracted to her as said is, as a Debt owing by their common Father, which did affect all his free Gear, in the same Case as it would have been affected to a Creditor, who had been a Stranger; and Repelled the Alledgance of Homologation of the Testament, notwithstanding that this Sister was Confirmed one of the four Executors of their Father; because at the time of the said Confirmation she protested, that the Confirmation foresaid should

not

not prejudge her in her Debt; and also that the Husband and she renounced all benefit that they could claim by the Executry, & for any Intromission had by them, with the Defuncts Goods, they were content to allow the same in part of payment of this Sum now acclaimed, Which the *Lords* sustained to Bleid this Homologation. And thereafter it being Alledged, that the Pursuer, as one of the four Daughters, and Heirs, should be lyable for her own Part, and the Defenders only for the Remanent, *viz.* Three Parts. This Alledgance was Repelled, and the Three Daughters were Found lyable to the whole Debt *in solidum*, without Defalcation or Collation, the Pursuer being alwayes obliged, if any Debts arise, which may exhaust the whole Moveables, to be Lyable to Refound his own Part proportionally; and the Father being in the said Contract obliged to entertain the Pursuer and his Wife, in his House for a year; and dieing before the year, it was Found, that this was a Debt which should ly totally upon the other Executors, without Division; albeit it was Alledged, that he Entertained them so long as he lived: and the Contract cannot be drawn to any other meaning, but that he should so Entertain them, if he lived that whole space himself, and modified 400 Merks therefore. *Actor. Fletcher & Johnston.* Alter. *Heriot.* *Gibson* Clerk.

Weddel contra E. *Finlater*, *Eodem die.*

ONe *Weddel* having Compriſed *James Ogilvies* Lands, and being Infeft therein by the Earl of *Finlaters* Precept, who was Superior; wherein it was provided, that that Entry should be without prejudice of the Earls Right to the Land, by the Vassals Rebellion: upon this Infeftment Removing being Pursued, the Earl Compears, and propones, that the Vassal was year and day at the Horn, therefore in respect of the Provision foresaid, the Pursuer cannot Pursue Removing, seing he accepted the Precept, with that Clause. The *Lords* Repelled this Alledgance, in Respect there was no Declarator obtained of the Vassals Liferent.

Leslie contra *Dickson*, *February* 10. 1642.

MR. *John Lesly* being Retoured Heir to his umquhile Brother Collonel *George Lesly*, with concourse of the Executors of the said umquhile Collonel, gives in a Supplication, Craving some Bonds belonging to the umquhile Collonel, which was consigned in *John Dicksons* Hands as Clerk, to be given up to them by him; and the Executors to the said umquhile Collonel's Relict Alledging, that this Summar Order could not be sustained by way of Supplication, but ought to abide an ordinar Pursuit, by way of Action, that all Parties having interest might be called; Likeas they, as having special interest, Compear, and Alledge, that if they were cited, they would Answer, that the Relict has Right to the half of the Bonds, and Sums therein, there being no Bairns on Life betwixt them; notwithstanding whereof the *Lords* Ordained thir Bonds to be given up to the Supplicants by the Clerk, upon Inventary.

Johnston contra *Johnston*, *Eodem die.*

ONe *Johnston* conveening *Johnston* the Appearand Heir to his Debitor, as lawfully Charged to Enter Heir to him, for payment of his Fathers Debts: And the Defender Renuncing to be Heir, The *Lords* Found, that he could not Renunce, in respect of this Reply, which the *Lords* Found Relevant, *viz.* that the Pursuer offered to prove, that the said Defender had bought the Defenders Fathers Lands from a Compryser, who had Sold the saids Lands, and his Right of Comprysing to the Lord *Johnston*; To which Disposition the Defender consented, and had received for his consent to the said Heretable Disposition thereof 10 or 12000 merks, whereby *res non erant integræ* for him to Renunce; specially seing the time of the said Disposition, the Comprysing was not expy-

red, but the Right of Reverſion was Competent to him, Which the *Lords* admitted to the Purſuers Probation in this Proceſs: Alſo, the *Lords* Suſtained another Proceſs at this ſame Purſuers Inſtance againſt the Lord *Johnſton*, for making Arreſted Goods forthcoming, notwithſtanding that this Debt was not Deceaned againſt the Principal Party, but was Depending *ut ſupra*; And Found, that this Purſuit, to make Arreſted Goods forthcoming, might be Intented, albeit the ſaid Principal Cauſe was not Declared *ut ſupra*, But Found, that the ſaid Proceſs of Arreſted Goods could not be proſecute, but ſhould ly over, while the Principal Cauſe for the Principal Debt were firſt Diſcuſſed. Actor. Alter. *Johnſton*, *Hay* Clerk. *Vid. January* 27. 1636. *Straiton*, *January* 25. 1642. Major *Stirling*.

Mowat contra *Keith*, *Eodem die.*

MR. *Rodger Mowat* and one *Keith* of Son in Law to *Jean Guthrie*, having either of them Arreſted the Prices of ſome Victual, adebted to the Laird of *Ludquharn*, and contending for preference, Mr. *Rodger* craves to be preferd, becauſe he was both Creditor to *Ludquharn*, and Donatar to his Eſcheat. The *Lords* Found, he could not crave preference as Donatar, becauſe he was Donatar only to his ſimple Eſcheat, under which they Found that nothing could be comprehended but Moveables, which then at the time of the Gift, and a year thereafter, only ſhould pertain to the Rebel; and the Victual now controverted was of a Cropt five or ſix years ſubſequent after the Gift, and ſo that it could not pertain to the Donatar of the Rebels ſimple Eſcheat: and they reſpected not the Tenor of the Gift, which Diſponed expreſly all the Rebels Goods, *which he ſhould Acquire at any time thereafter during his Rebellion*, and that he was ſtill Rebel, which was not reſpected. Actor. preſent. Alter. *Gilmore*.

Monteith contra L. *Weſt-nisbet*, *February* 11. 1642.

William Monteith Purſuing Poynding of the Ground againſt the Laird of *Weſt-nisbet*, for an Annualrent wherein he was Inſeft, by a Baſe Inſeftment, and other Creditors of *Weſt-nisbet*, who were Inſeft by publick Inſeftments upon Compryſings, but poſterior, ſome years after this Purſuer, Alledging, that all the Creditors ſhould come in *pari paſſu* in ſuch a caſe, as Concerned ſo many Perſons heavily prejudged by *Weſt-nisbet*, who was become Bankrupt; whereas if any which were prior ſhould be preferred therefore, that would overthrow many others who were wracked thereby; The *Lords* preferred *Monteith* in reſpect of the priority of his Real Right, notwithſtanding that it was Alledged, that the ſame was but Baſe, Holden of the Granter, and that the King's Confirmation thereof made it no more Publick, but would ſave the ſame only from Forefaulture, or Recognition, and ſuch Accidents, and that their Inſeftments were publick, Holden of the King; and alſo, albeit it was Anſwered to the Reply of Poſſeſſion, that the ſame ought not to be reſpected, becauſe the ſame was only Clad with Payment, made by the Debitor of the Annualrent for his Money, which could not Corroborat that Right, the Poſſeſſion not being out of the Land, nor made by the Tennents; Notwithſtanding whereof the Reply was Suſtained, ſeing he offered to prove, that the payment was made conform to his Inſeftment, at the date of the which Right; it was lawful to the Purſuer to Contract with his Debitor, he neither being then Bankrupt, nor Inhibite, nor at the Horn, and whatever was his caſe thereafter, that ought not to prejudge him, who had dealt with a Reſponſal Party, when he Contracted with him. *Hay* Clerk. *Vid. January* 26. 1631. *William Brown's* Creditors, and the caſes there.

Grant of *Ballindalloch* contra *Leſlie*, *February* 12. 1642.

JOhn *Grant* Fiar of *Ballindalloch*, being taken treacherouſly by *James Grant* and his Complices, and remaining in obſcure and private Captivity, every hour

sour under fear of his Life, Transacts with one *Leonard Lesly*, who was one of his actual Takers, and one of his Keepers, and promises by a great Oath, to give him a Bond of 4000 merks, if he would concur to Rolle and put him to Liberty, according whereto, with the hazard of his own Life, he Plutsed his Liberty and escaped with him, whereupon within 14 days after his Escape, he gave the said Bond of 4000 merks to the said *Leonard*, and about a year thereafter payed 1000 merks thereof, and retired his own Bond, and then renewed to him another new Bond of 3000 merks, which being now Charged to pay, he Suspends, Alledging the Promise was Extorted *ob metum*, and the Bond following thereupon was *ob turpem causam*, for the Promise was for fear of his Life, done when he was in Captivity, and the subsequent Bond depending thereupon, was for an unjust Cause, for Relieving of a lawful Subject, Barbarously and Unjustly Taken by Sorners and Out-laws. The Reason was Rejected, and the Bond Sustained, for the Charger had hazarded his own Life, in helping to put the Suspender to Liberty, and fled away with him. Actor, *Stuart*.

Mosman contra Tennents of *Monkcastle*, *Eodem die*.

KATHARIN *Mosman* Donatar to her Husband *James Nisbet's* Escheat, Charges the Tennents of *Monkcastle*, for payment of some Money, contained in a Bond granted by them to her said umquhile Husband, conform to a Sentence of Declarator, obtained by her against them thereupon; And they Suspending, Alledged, that her Husband in his own Lifetime, made an Assigney to that Bond, which was Intimat to them, and to which Assigney they made payment, and Reported his Discharges, with consent of the said *James Nisbet* in his own Lifetime; This Reason was Sustained, albeit the Wife Alledged, that when the payment was made, her Husband was at the Horn, so that his Rebellion made the Right to pertain to the King, which was Repelled, seing the Payment was made with consent of the Husband, before the Gift of Escheat Disponed to the Donatar, which they Found only put the Tennents Debitors in *mala fide*. *Scot* Clerk.

Paroch of *Innerkeithing* contra La. *Rosyth*, *February* 15. 1642.

THE Parochioners of *Innerkeithing* and Stent-Masters, having Charged the Lady *Rosyth* to pay her proportion of the Stent, Imposed upon the Parochioners of *Innerkeithing*, both to Burgh and Land-ward, for furnishing of Bells to the Kirk; And she Suspending upon this Reason, that albeit there be an Act of Parliament for Belting and Repairing of the Kirk and Kirk-Yard-Dykes, yet there is no Warrand to Stent the Parochioners for buying of a Bell, specially a Bell within a Burgh-Royal, which only is incumbent to be done by the Burgesses and Indwellers within the Burgh, and not by these dwelling in Land-ward, their Bells being in use at all times, to serve for their own Burgesses, and for their own use at Prayers Morning and Evening, and for their other Meetings about their Town Business; And this Suspender, nor the Heretor did never consent to this Stent, but did expressly oppose the same: Attour, she Alledged that the Titular and these who had Right to the Teinds, should bear the Burthen of this Stent, or the third part of the Burthen, as in Reparation of the Kirk: Notwithstanding of all which Reasons, the Stent-Roll, and Letters Raised thereon, were Sustained and allowed.

Halpland contra *Crawfurd*, *Eodem die*.

ONE *Halpland* having obtained Decreet of Removing against *Crawfurd* of *Camlarge*; Pursues his Daughters as Charged to Enter Heirs to their Defunct Father, and their Husbands to pay the Violent Profits of the Lands, Intromitted with by their umquhile Father. This Action, and all Actions of Violent Profits, the *Lords* Found, ought to abide Continuation, and the rather

where the Summons bore no Priviledge, as being accessory to the *Lords* Decreet of Removing which preceeded. *Scot* Clerk.

Veitch contra Tennents and Possessors, *February* 16, 1642.

KAtharine *Veitch* being Served and Kenned to a Terce of some Lands, wherein her umquhile Husband died Infeft Redeemable, Pursues for the Duties of the saids Lands, Intrometted with by *Veitch* of *Dawick*, divers years since the death of her Husband. And the Defenders Alledging, that before the Pursuers Husbands Decease, the Sums whereupon the Lands were Redeemable, were Charged for to be payed in the Defuncts lifetime, so that the Sums were thereby Moveable, which makes the Terce of the Lands to cease. This Alledgance was Repelled, because no Redemption followed, nor no Renunciation, nor other Deed upon that Charge, and the Defunct died Infeft, and undenuded. And the Defender Duplying, that after the Defunct's Decease, his Son and his Tutors Renunced that Right of Wodset. And the Pursuer Answering, that that Renunciation done by the Tutors, ought not to be respected, not being done by the Father in his Lifetime, who made the money Moveable. The *Lords* Found the Renunciation made by the Tutors and Minor Relevant to Eleid this Pursuit, to Exclude the Tercer, seing the Wodset was Redeemable, and the Renunciation made was Sustained, being dependant upon a preceeding necessary Ground of Revertion, albeit there was no Declarator of Redemption, but because the Pursuer Alledged Colluſion, done betwixt the Tutors to her prejudice, the Matter was Ordained to be further heard. *Gibson* Clerk.

La: *Brunton* contra *Eodem die.*

THe Lady *Brunton* Relict of the sometime Bishop of *Glasgow*, Her Executors Pursuing for the Duties of some Lands, wherein she was Infeft in Liferent by her umquhile Husband, of the Term of *Martinmass*, *anno* years, she living to *Martinmass* day that year, and not dying till the Afternoon that day about three or four hours: And the Heir of her Husband, who was Heretor of that Land, Alledging, that that Term could not pertain to the Liferenter, or to her Executors, because she dying on *Martinmass* day, the same Term behoved to pertain to the Heretor of the Land, and not to her. The *Lords* Found, that this Term was due to the Liferenter, and her Executors, and not to the Heretor, seing the Liferenter lived to the *Martinmass* day, and dyed on *Martinmass* day at Afternoon, as said is, which they admitted to the Pursuers Probation, so that hereby the Liferenter living to the Entry of the Term, she was Found to have Right to that Term, begun to run before her Decease, as said is, she having lived to the Afternoon of that same day, whereon the Term fell. *Actor. Stuart.* Alter. *Nicolson* & *Mowat*. *Gibson* Clerk.

Crawfurd contra *Pursels*, *February* 25. 1642.

MAlcolm *Crawfurd* having by Gift under the Great-Seal, the Right of a Tenement of Land in *Edinburgh*,, pertaining to the King as *ultimus Hares*, by the Decease of umquhile *Hugh Crawfurd*, last Infeft therein, who was Bastard, and who died without lawful Bairns, And *Helen* and *Bessie Pursels*, who were Possessors of this Land, and thir Defenders Alledging, that this Action ought not to be Sustained, because it is 30 years since the time of the Decease of the said umquhile *Hugh*, who is Alledged to be Bastard, and at the time of his Decease he was betwixt 40 and 50 years of age, so that before that time there can be none living to prove the Marriage of the said umquhile *Hugh* his Parents, or that they Cohabited together as Married Folks, for this is *ultra hominum memoriam*, and his lawfulness was never drawn in question all this time while now, likeas, while he lived, he was ever repute lawful. The *Lords* in this case (which was a case of such Antiquity) Found it a matter of dangerous preparative

rative, to give way to such Actions, and to Sustain and draw in question *statum defunctorum post lapsum tanti temporis*, which may concern the Subjects of all qualities, who are of any years: And therefore Found no Process on that Gift, this Alledgance being proven. *Gibson* Clerk.

Nisbet contra *Williamson*, *Foulis* and *Nisbet*, *June* 22. 1642.

IN a Triple Poynding *Foulis* being Debitor to *Nisbet* in a Sum, for which the said *Foulis* being Charged by another *Foulis*, Assigney to the said *Nisbet*: And *Nisbet* compearing as another of his Creditors, who had Arrested the Sum in *Foulis* his hands, for satisfying of the Debt owing to them by their common Debitor. And *Williamson* Compearing as another of the said common Debitors Creditors; The Assigney claiming preference to the Arresters Creditors of the common Debitors, in this Sum controverted, because he was made Assigney before these other Parties Arrestments, and had done Diligence before them, the common Debitor being his lawful Debitor, as is confest by him in his Assignation. And the Arresters Answering, that they should be preferred to the Assigney, seing the Assignation was made by a Bankrupt, *in meditatione fugæ*, there being no Debt, which the Assigney can Instruct was owing to him; Likeas, he was then the Cedents Servant, and so presumed a Confident Person: and the Assigney opponing his Assignation thereto, the *Lords* preferred the Assigney to the Arresters, the Assigney giving his Oath, that the Cedent was his true Debitor the time of the *Assignation*, in as great Sums as that Money *Assigned*, and he giving so his Oath, The *Lords* Found no necessity, that the *Assigney* should be holden to qualifie by any other Writ, that the Cedent was his Debitor, in respect of the *Act* of Parliament, which admits that Probation by the Parties Oath: for as when any Party buyes Lands, or Goods from any person who becomes Bankrupt, the *Alienation* cannot fail, albeit the Buyer cannot Instruct by a preceeding Writ, that the Seller was his Debitor in any Sums of Money, the *Alienation* being done *bona fide*, even so in this case. *Hay* Clerk.

Falconer of *Glenfarquhar* contra L. *Glenbervie*, *June* 24. 1642.

MR. *David Falconer* being Infeft in the Lands of *Glenfarquhar*, with the priviledge of an ancient Fair, called *Padie-Fair*, from *Palladius*, holden upon the saids Lands of past memory of Man from the first of *July* to the seventh day thereof, Pursues the Laird of *Glenbervie*, who had *Acquired* from the King a late Infeftment, *anno* 1635. of his Lands, with the priviledge of a Fair to be holden on his Lands of *Dilivard*, which lyes within a mile, or less of the Pursuers Lands, whereon his Fair holes, to be holden from the 24 of *June* to the first of *July* yearly, to hear it be Found that the said Infeftment ought to be Declared Null, so far as concerns, or may be extended to the having of any Fair on the saids Lands of *Dillivard* the time foresaid, as being a Priviledge privatly Purchased, and indirectly tending to take away the Liberty and Priviledge of the Pursuers Fair, in respect that the Pursuers Lands and the Defenders, which has the Fairs, are not distant from others a mile of Ground; and the time of the Holding is so Eweſt, without any Interval of time, that the Defenders Fair (which ends the very day when the Pursuers Fair begins) must necessarly evert all Priviledge and use of his Fair, and prejudge him of all Commodity, which he can have thereby, and tends manifestly to kindle Trouble betwixt the Parties, and to disturb the Quietness and Peace of the Countrey: Which *Action* being heard in the *Lords* presence, and the Parties, and their *Advocats* being heard to *Dispute* thereupon, they Found, that the Defenders Infeftment ought not to extend to the Priviledge of a Fair, to be holden of such nearness to the saids Lands, for keeping of the same, within the time contained in his Infeftment, which is in such Vicinity, and immediatly preceeds the time of the Pursuers antient Fair. The

Defender having taken the same, to end the same day when the Pursuers Fair begins; for however he might take a Right from the King of his Lands, with the said Priviledge of a Fair, yet that Priviledge ought to have been sought, not to destroy the effect and use of that antient Fair granted to, and bruiked immemorially by the Pursuer and his Authors and Predecessors of before; And therefore they Ordained that Priviledge, so far as concerns that time of the holding thereof, to cease, as Impetrat in *æmulationem vicini*. And Found that the said Fair might been lawfully Impetrat, and may be keeped by the Defender, upon his saids Lands at any time after the end of the Pursuers Fair, or at any time before, by the space of a Month preceeding the Pursuers beginning of his Fair: But Found that the Defender cannot have any Fair before the Pursuers Fair begin, except there interveen the space of a Month at least free, betwixt the end of the Defenders Fair, and the beginning of the Pursuers. And the *Lords* Decerned accordingly. *Actor. Advocatus, Nicolson & Stuart. Alter, Mowat, Gilmore & Nisbet, Gibson* Clerk.

Lo. *Forrester* contra *Castlelaw*, *Eodem die*.

IN a Double Poynding betwixt the Lord *Forrester* and one *Castlelaw*, where *Castlelaw* having Arrested in the Tennents hands, the Farms adebted by them to the Laird of *Grange* their Master, for satisfying of a Debt owing to *Castlelaw* by their Master; And the Lord *Forrester* claiming to be preferred to the said *Castlelaw*, because before the Arrestment, the Lands for most onerous Causes were Disponed to him, conform whereto he is in possession, by holding of Courts. *Castlelaw* Answered, that the Disposition ought to have no respect, no real Right by Chatter and Seasin having followed thereupon, and the Disposition containing no Clause whereby the Farms controverted were Assigned to him. Likeas, notwithstanding thereof, the L. of *Grange* remained in possession of the Lands, and uplifted the Farms and Duties thereof continually, whereby this year controverted, the Farms Arrested by him, ought to be paid to him, as pertaining to his Debitor, and cannot be claimed by the Lord *Forrester*, by this Disposition, which remained *in nudis finibus obligationis* without Seasin, and he having done no Legal Diligence to Recover Payment thereby. The *Lords* Repelled the Lord *Forrester's* Alledgance, and preferred *Castlelaw's* Alledgance, and admitted the same to his Probation, that the Debitor retained the Real Possession of the said Lands, and that the Lord *Forrester* had no Real Possession of the Lands, nor Real Right, and Repelled the Alledgance of Anteriority, neither did they Respect that part concerning his Possession, qualified by holding of courts. *Actor. Herriot.*

Rose contra *Robertson*, *June* 25. 1642.

ONe *Mungo Rose* having begotten two Daughters upon one *Robertson*, thereafter gives her a Bond to pay to her 1000 Merks at a Term, and failzieing of her by decease before the Term, to pay it to their said Bairns. The Woman being Married upon an Husband, Charges to pay the Sum, and the Man Suspending, that it was given *ob turpem causam*, for the said cause of Adultery. The *Lords* Rejected the Reason, and sustained the Bond, neither respected they that it was Alledged, that the Bond was given *ob causam Adulterii, tanquam causa turpis fuerit*, seing it is said in Law, *quod Mulier turpiter facit cum sit meretrix, sed cum sit meretrix accipiendo non facit turpiter*, tho the Suspender Answered, that *etiam acceptum ob præmium Adulterii restituendum est a Muliere*, which was Repelled; and the Suspender further Alledging, that in respect of the Tenor of the Bond, providing the Sum to the Bairns, in case the Woman die before the Term, therefore and in respect of the cause it self, in all equity, the Woman who is now Married on an Husband, ought only to have her Liferent use of the Sum, and that the Fie thereof should pertain to her Bairns. This Alledgance was also Repelled

led, in respect the Woman survived the Term of payment, and the Fee was Found to pertain to her. The Suspender *per Lautk.* Alter.

Wyllie contra Baillies of *Wigtoun*, *Eodem die*.

ONe *John Ross* being taken and Warded, by Letters of Caption at the Instance of *Thomas Wyllie*, by the Baillies of *Wigtoun*, and thereafter they setting him at Liberty, they are pursued for payment of the Debt therefore. And they Suspending, that after he was Incarcerat, there was in a space thereafter shown to them a Suspension of that Decreet, and Debt, for which he was Incarcerat. To the which the Creditor Answered, that that Suspension was Impetrat before the Party was Warded, and was not shown, as it ought to have been the time when he was Warded, nor long thereafter; and after he was Warded, the Magistrats could not at their own hands, put him to Liberty, they never being Charged to that effect, and the Suspension bearing no such Clause; Likeas, the Party remains still Rebel, and was never Relaxed, and the Charger was never Summoned to the day of the Suspension; so that they cannot be excused, to have enlarged the Rebel at their own hands, without Warrand. And the Baillies further Answering, that they had dealt with the Sherif of *Wigtoun* to take the Rebel again, who took him, and since he was taken, he died in his Company, at which time he was in that same estate undeteriorat, as he was in when he was taken; all which being considered, should be enough to liberat the Baillies, who are but of a mean Burgh, and ignorant of the strict Points of Law. The *Lords* Repelled the Exception, and sustained the Pursuit, seing it was Found, that they could not enlarge the Party once Warded, at their own hands, without Warrand, specially when the Debitor was Three years at Liberty, after he was put out of Ward, before he died. But the *Lords* permitted the Baillies to say all, which the Party might say, against the Debt, if he were living, and to insist in the Suspension.

L. *Polwart* contra *June* 29. 1642.

THe L. of *Polwart* pursuing one, who had Intromett with certain Nolt, and other Goods, being upon his Lands of which were Set by him to a Tennent, for payment of the Farm-Duty in Victual, for which the saids Lands were Set to that Tennent, of that Crop which came last off the Ground, shortly after the Terms of payment were past. And the Defender Alledging, that she had poynded the saids Goods, by vertue of a Sentence recovered against this Tennent, for Debt owing by the Tennent to her, and that at the time of the Poynding, she had left the Tennent in that Case, that the Room was fully Sown, and the Corns growing thereon, which Corns thereafter in the harvest were Led, and Stacked by the Tennent in his Barn-yard, upon the said Lands, whereby the Pursuer had within the Room, als many Corns as might have payed him, both of that Crop whereof the Corns grew, and for the Farms of the Crop preceeding, which is now controverted, so that she ought not to be Compelled to render back again the saids Goods, lawfully Poynded for a Just Debt, seing the Master might have been otherwise satisfied, by the forefaid subsequent Crop. The *Lords* having heard the Parties Reasons on either side, they Found, that the Master of the Ground, had an preference for his Farms, of all the Tennents Goods, being upon that Ground; And albeit the Corns be *primo loco* Hypothecat to the Master for his Farms, yet they Found the same Hypothecation, did also extend to any other Goods belonging to the Tennent, being upon that Ground; In respect of the which Priviledge they Found, that the Master ought to be preferred to any other Creditor of the Tennents for that years Farm; and therefore Repelled the Alledgance founded upon the Poynding, seing the Poynder did not Alledge, that at the time of the Poynding, she left als many

Corns and other Goods upon the Ground of the Lands, as might have been sufficient to have payed the Master his Farms, for that year; For they Found the Sowing of the subsequent Cropt, was not a sufficient Cause, to have stayed the Master, to seek payment of the immediat preceeding Cropt, whereof the Terms were then past, against any who had meddled with the Tennents Goods. And so the *Lords* Found, that the Master had a Tacit Hypothecation for the Tennents Farms, of the immediat bygone year, not only in the Corns which grew upon the Ground that year, but also in the Tennents other Goods, against any other Intromettors therewith, whether Creditor, or other whatsoever. Actor. Alter. *Lawrence Oliphant. Vid. Feb.* 3. 1624. *Hay.* and the other Cases there cited. *Vlt. Martij* 1624. Sir *John Carnegy. March* 29. 1639. Dam *Margaret Hay.*

Huntly contra *Manson*, *July* 8. 1642.

ONe *Huntly* having obtained Decreet against umquhile Mr. *John Manson*, for payment of an hundred and sixty pounds, conform to his Bond granted thereon, and the said *Mr. John* being Denounced Rebel, for not payment thereof, and dying Rebel, after his decease 20 or 24 years, he pursues his Heir, for payment of the said Sum, and of the profits, and Annualrents thereof, of all years since he was Rebel, as well during the Rebel his own Lifetime, as of all years since the time of his death, and continually, while the principal Sum be payed. This Pursuit was sustained against the Heir, not only for all years since the Debitor was Denounced, by this Creditor, during the Debitors Lifetime, but also for the years since the Rebels decease, and continually while the payment be made by him of the Principal Sum. Actor. *Baird.* Alter. *Heriot. Scot* Clerk. *Vid. March* 15. 1631. *Fletcher* contra *Kid. January* 26. 1631. L. *Glober-hill*, and the other Cases there.

Agnes Grant contra *Eodem die.*

IN a Reduction of a Disposition of a Tenement in *Perth*, which was provided to one in Conjunct-fie, by her Contract of Marriage; which Land being thereafter Disponed by her Husband, to *Andrew Balvaird*, she consented thereto, which, together with the Judicial Act, made before the Baillies of *Perth*, bearing, *That she had Ratified that Disposition, and sworn that she did it voluntarly, without any Coaction*, she desired to be Reduced *ex capite metus*, being compelled both to subscribe the Disposition, and also to Ratifie the same Judicially, and to swear that she did it voluntarly, *&c.* From the which the *Lords* Assoilzied *simpliciter*, in respect that the Disposition foresaid, so subscribed by the Woman was Ratified as said is, in presence of the Baillie of the Town, & sworn by her, to have been done voluntarly, conform to the 84 Act of 11. Par. *Ja.* 3. which Consent of hers so Ratified and Proven, The *Lords* Found sufficient to purge all Action *super metu*; Although the Woman Replyed, that the same Ratification and Oath was extorted also, *per eandem vim & metum*, and which then still continued. And the *Lords* Respected it not where the Woman Replyed, That the Ratification was made within an House, and not done in Judgment. Actor. *Cheap.* Alter. *Mowat.* *Hay* Clerk.

Inglis and young *Aikit* contra old *Aikit*, *Eodem die.*

IN an Action of Reduction Pursued by *Anna Inglis*, with consent of young *Aikit* her Husband, against old *Aikit* her Father in Law, for Reducing of her Contract of Marriage, upon the Reason of Lesion, Minority, and Revocation, wherein her Husband Compearing, and Declaring that he would not concur, nor assist this Pursuit. The *Lords*, notwithstanding of the Husbands refusing to concur with the Pursuit, sustained the Proces, seing in effect now the Proces was betwixt the Husband and his Wife; for seing the Husbands Father, who

who was Defender, and was called in the Process, was dead, and that the Husband, who refused to concur with his Wife, was Heir to his Father, whereby the Husband became directly the Party to defend the Contract, Therefore the *Lords* sustained the Pursuit, although betwixt the Husband and the Wife. *Item*, the Husband Alledging the Wife to be past *annos utiles* before intenting of this Action, the Wife Alledging her Minority then, was preferred Actor. *Stuart.* Alter. *Nicolson. Gibson* Clerk.

Lady *Gairles* contra E. *Galloway*, *July* 15. 1642.

THe Lady *Gairles* being provided by her Contract of Marriage to certain Lands, which her Father in Law, the Earl of *Galloway* obliged him to make yearly worth to her 6000 Merks, whereupon she having raised Letters and Charges, and the same being Suspended by the Earl, at the calling whereof the Lady declared, that she Charged the Earl to make the Rental of the Lands good, conform to the Contract, which she declared the Lands were not able to pay, having never payed the half of the Rental; And it being here controverted by the Suspender, that this Tryal could not be taken *hoc ordine* by a Charge so summarly, but that it ought to abide an ordinar Pursuit, by way of Declarator, or other Action, and not by way of Suspension: The *Lords* sustained the Tryal to be cognosced upon the same Charge in this Suspension, and Found no necessity, that the Charger should be put to any other Pursuit, or Declarator therefore, and sustained the same to be taken *hoc ordine.* Actor. *Stuart, Nisbet* & *Neilson.* Alter. & *Oswald. Hay* Clerk. *Vid. July* 22. 1635. L. *Rentoun*, and *March* 21. 1635. Lo. *Yester.*

Elder contra *Mercer*, *July* 16. 1642.

John Elder Son to *Henry Elder*, Clerk of *Perth*, being provided to the Office of Clerk-ship in *Perth*, by the Council of the Town, with reservation of his Fathers Liferent, in *April* 1623. at which time he was an Infant within three years of Age, with Provision, that he with his Tutors, by Advice of the Council of the Town, should appoint Deputs to Serve therein, during his Minority, and the Father thereafter dying in *October*, the same year 1623. *John Mercer* is provided to the same Office, vacand by his decease, and is provided during all the dayes of his Lifetime; In which Provision, in the Clause of Warrandice thereof, special Exception is made of that prior Provision, granted to *John Elder* the deceast Clerks Son; Likeas the said Son, when he was past Majority, was also admitted and received by the Council of the Town to that same Office. And they contending, who should be preferred to the said place, which the said *John Mercer* Alledged was only due to him, he being provided by a lawful manner of Vacation, *viz.* The Incumbents decease, and during his Lifetime, and having served therein 20 years bygone; and the other Provision being null, not having a cause of Vacation, but bearing Reservation of his Fathers Liferent, who was then living, and being granted to an Infant, who could not serve in the Office, and he wanting Tutors, and no Deputs being either sought, or given to him; his Gift given to him for his Lifetime, ought to be preferred, and which cannot be questioned now, after his 20 years Possession. And the Clause of Warrandice in his Gift, ought not to be respected, seing it is not Excepted in the *Dispositive* Words, but in the general Clause of Warrandice, which cannot be prejudicial neither to him, nor to the Town; It being a Gift in it self null, being granted to an Infant, of a Place, which deserved to be provided to one able to serve therein. And the other Opponing the Priority of his Gift, whereon he is now, being Major, admitted to the Office, and wherein he actually serves, and is Received, the Posterior Gift cannot be Respected, but as a Deputation, during his Minority; seing he being then Pupil, and under the Govern-

ment of the same *John Mercer*, who Married his Mother, and with whom he remained, he ought to have sought Tutors to him, and cannot be reput to have dealt *bona fide* with him, who was under his Trust, in not doing the same, but must be esteemed to have fraudfully abused his Trust, in taking a Liferent-Gift to himself, over the Pupils Head. The *Lords* preferred *Elder* to *Mercer* in the Right of this Office, now after *Elder's* Majority, he being of new again received therein, by consent of the most Part of the Council, and respected not, that there were no Tutors given to *Elder*, nor that *Mercer* had obtained another Gift of the Office from the Town in *anno* 1627. Wherein there was no such Clause of Exception from the Warrandice; but in respect of the foresaid prior Gift, and new Admission of *Elder*, and in respect of all the Circumstances, which they Found very considerable in this Matter, They Authorized *Elder's* Right to this Place. Actor. *per Nicolson*. *Mercer per Cheap*. *Hay* Clerk.

Cætera, sed pauca, Injuriâ Temporum, perierunt.

FINIS.

INDEX.

INDEX

OF THE

Purſuers and Defenders Names, for the uſual and eaſier Citing of the Lords Deciſions.

By *W. A.*

A

Abercrombie contra *Robertſon*, *November* 21. 1627
Miniſter of *Aberchirdor* con: parochioners of *Gemry*, *Decemb:* 7. 1633
Biſhop of *Abirdene* contra his Tennents, *penult June* 1622
Colledge of *Abirdene* con: *Jarden*, *March* 22. 1627
Colledge of *Abirdene* con: *Menzies*, *March* 26. 1629
Biſh. of *Aberdene*'s Baillie con: Vaſſals, *March* 11. 1630
La: *Abergeldie* con: her Son, *July* 23. 1633
Adam con: B: B: of *Air*, *July* 14. 1626
Adamſon con: *Forland*, *January* 12. 1630
Adamſon con: *Mitchel*, *June* 15. 1624
Adie con: *Gray*, *January* 24, & 26. 1628
K. Advocat con: *Moriſon*, *March* 8. 1623
K. Advocat con: Excommunicants, *June* 26. 1629
Affleck con: *Matthie*, *March* 20. 1629
Agnew con: E: *Caſſils*, *January* 26. 1627
Achannay con: *March* 13. 1632
Aikman con: *Hunter*, *Feb:* 26. 1624
Aitkin con: L: *Grimſlaw*, *January* 16. 1623
Aitkin con: *Hewart*, *July* 23. 1615
Aitkin con: *Hewart*, *January* 9. 1628
L: *Aiton* con. *Aitkin*, *November* 20. 1623
Aiton of *Kinaldie* con: *Kadie*, *June* 17. 1625
L. *Aiton* con: his Tennents, *July* 5 & 7. 1625
Aiton con. *Mowat*, *Novemb:* 28. 1626
La. *Aiton* con: Lo: *Lindſay*, *January* 18. 1628
La: *Aiton* con: *Hume*, *January* 21. 1629
La: *Aiton* con: *Hume*, *Feb:* 4. 1629
Aiton con: L: *Halkerton*, *Decemb:* 22. 1629
Aiton con: *Aiton*, *Feb:* 15. 1632
Alcorn con. *Ker*, *January* 15: 1630
Alexander con: *Kinniter*, *Feb:* 21. 1632
Aliſon con: *Trail*, *July* 8. 1628
Allan and his Curators con: *Fairholm*, *Nov:* 20. 1627
Allans con: *Lawder*, *January* 16. 1628
Lo: *Almond* con: E: *Linlithgow*, *March* 9. 1639
L: *Alter* con: L: *Affleck*, *March* 2. 1636
Anderſon con: *Anderſon*, *July* 15. 1623
Anderſon con: *Gordon*, *Feb:* 22 1628
Anderſon con: *Gibſon*, *March* 22. 1637
Anderſon con: *Montfir*, *June* 16. 1637
Viſcount of *Annand* con: *Scot* of *Harden*, *January* 15. 1624
Annand con: his Tennents, *January* 26. 1628
Annand con: *Annand*, *Novemb:* 24: 1632
E: *Annandale* con: *Johnſton*, *July* 3. 1624

B

E: *Annandale* con. *Murray*, *July* 6. 1627
E: *Annandale* con: his Tennents, *July* 20. 1633
E: *Annandale* con: *Johnſton*, *March*, 29. 1636
Arbuthnet con: Tennents of *Fairniflat*, *Dec:* 13. 1627
Arbuthnet con: *Lighton*, *July* 11. 1628
Prior of *Ardchatton* con: Capt. *Clanronald*, *June* 18. 1631
L. *Ardchatton* con: parochioners of *Kinnivar*, *July* 8 1631
Ardwel con: *M'culloch*, *July* 17. 1632
Arnot contra Executors of *Hume*, *Feb:* 12. 1623
Arnot con: L: *Manderſton*, *July* 9. 1623
La: *Athol* con: E: *Athol*, *Feb:* 20: 1633
L: *Auchinleck* con: *Cathcart*, *July* 17. 1632
Auchterlony con: *Oliphant*, *Decemb.* 17. 1631
Auld contra *Smith*, *January* 29. 1629
Auld con: *Yull*, *March* 9. 1630
Auſtain con: *Ker* of *Kippilaw*, *July* 25. 1626

B.

B*Aillie* contra *Porter*, *Novemb:* 28. 1628
Baillie con: *Rutherfoord*, *March* 25. 1623
Baillie con: *Robertſon*, *June* penult 1627
Baine con: *Feb:* 14. 1622
Baird & *Forreſt* con: *Chalmers*, *Jan:* 14. 1630
Baird con: *July* 18. 1633
Baker con: *Mckieſon*, *Novemb:* 27. 1624
La: *Balbegno* con: L: *Lawriſtoun*, *Decemb:* 1: 1626
La: *Balbegno* con: Heir of *Balbegno*, *July* 7. 1637
Lo: *Balcleugh* con: Tennents of *Eliſton*, *Dec:* 9. 1626
E: *Balcleugh* con: *Young*, *December* 13 1626
E: *Balcleugh* con: *Burnet* &c. *Jan:* 19. 1627
E: *Balcleugh* con: *Young* & *Ker*, *March* 20 & 25. 1629
Viſc: *Balhaven* con: L: *Luſs*, *July* 18. 1637
Tutor of *Balmachie* con: *Maxwel*, *Jan:* 16: 1634
L: *Balmanno* con: *Oliphant*, *Novemb:* 27. 1629
Balmanno con: *Tuil*, *March* 21 & 26. 1628
Lo: *Balmerinoch* con: L: *Lochinvar*, *June* 21. 1626
Lo: *Balmerinoch* con: L: *Lochinvar*, *Feb:* 2. 1627
Lo: *Balmerinoch* con: *Seton* of *Pitmedden*, *March* 10. 1627
L: *Balmerinoch* con: L: *Covingtoun*, *March* 31 1627
La: *Balmerinoch* con: Lo: *Jedburgh*, *July* 12. 1634
L: *Balnamoon* con: L: *Balcomie*, *Feb:* 4. 1623
L: *Balvenie* con: *Grant*, *Feb:* 1629
Lo: *Bamff* con: his Tennents, *Decemb:* 7: 1627
Lo: *Bamff* con: L: *Boyn*'s Chamberlain, *July* 2. 1629
Bannantyn and *Murray* Donatars to the L: *Drummelziers* Eſcheat, *Decemb:* 23. 1623
Bannantyne con: *Cranſtoun*, *June* 25. 1624

Bannantyne con: *July* 17. 1618
Lo: *Barganie* con: *Stuart, Decemb:* 6. 1621
Lo: *Barganie* con: his Son, *March* 7. 1623
Barclay con: *Patoun, January* 11. 1627
Barclay con: *Stevenson, March* 18. 1629
Barclay con: *Binnie, March* 6. 1630
Barclay con: E. *Caſſils, Jan:* 13. 1631
L: *Barnbarrow* con: L: *Ile, Decemb:* 21. 1621
L. *Barns* con: Feuers of *Creil, March* 9. 1622
L: *Barns* con: *Gail, Feb:* 11. 1634
Bartilmo con: *Haſſingtoun, Feb:* 2. 1632
L: *Baſs* con: *Wauchops, Nov.* 13. 1622
Prior of St. *Bathans* con: *Carmichael, Junè* 16. 1626
Beatie con. *Dundee, March* 7. 1633
Bell con: B. B. of *Duns, July* 20. 1624
Bell con: *Mow, Jan:* 22. 1635
Bells con: *Parks, March* 18. 1636
Bell con: *wilſon, Jan* penult. 1639
Bennet con: *Turnbul, July* 12. 1628
Bennet con: *Bennet, March* 18. 1631
Benuet con: *Bennet, Decemb:* 10. 1631
Berrils Reliƈt con: his Creditors, *Nov:* 25. 1626
Betſon con: L: *Grange, Novemb:* 14. 1628
Binnie con: *Roſs, March* 5. 1628
Biſſet con. *Biſſet, Nov:* 25. 1624
Biſſet con: *Biſſet, Feb:* 20. 1627
Black con: *Dick Novemb:* 15. 1627
Black con: L *Pitmedden, July* 17. 1632
Black con: L. *Pitmedden, July* 20. 1633
Black con: L. *Pitmedden, March* 5. 1634
L. *Blackader* con: E. *Murray, Decemb:* 19. 1622
Blackburn con: *Gibſon, Feb:* 20. 1629
Blaickburn contra *Gibſon, Feb:* 17 & 20. 1629
Blaickburn contra *Gibſon, Jan:* penult, 1629
Blaickburn contra *Dryſdale, Feb.* 18. 1623
Blaickburn contra *Gibſon, March* 25. 1628
Blair contra *Brown, July* 14. 1631
La. *Blairquhen* contra Tennents, *Junt* 22. 1637
La. *Blairquhen* contra Tennents, *July* 11 & 28. 1637
L. *Blanſe* contra *Winraham, Feb.* 1. 1631
Lo. *Blantyre* contra Tennents o*f Glaſgow, Junt.* 28. 1623
Lo. *Blantyre* contra *Forſyth, Decemb.* 8 & 9. 1626
Lo. *Blantyre* contra Parochioners of *Bothwel, March* 15, 18 & 25 1628
Blyth contra *Trotter, Feb:* 20. 1629
Bonar contra *Nicolſon, Novemb:* 13. 1622
Bonnington contra *Crafurd, Novemb:* 6. 1624
L. *Boquhen* contra L. *Clunie, March* 16. 1622
Lo. *Borthwicks* Bairns con: their Father, *June* 25. 1622
Lo. *Borthwick* con: L. *Gallowſhiils, March* 23. 1622
La. *Borthwick* con: the Vaſſals, *Feb:* 13. 1627
Lo. *Borthwick* & *May* contra *Hilſton* & *Smith, July* 22 1628
Borthwick contra *Clark, Nov.* 28. 1628
La. *Borthwick* contra *Scot Decemb:* 16. 1628
La. *Borthwick* contra *Scot, Feb:* 6. 1629
La. *Borthwick* contra *Goldilands, March* 5. 1629
La. *Borthwick* contra *Scot, July* 17. 1632
La. *Borthwick* contra L. *Gallowſhiels, March* 4. 1635
L. *Borthwick* con: L. *Gallowſhiels, March* 18. 1635
La. *Borthwick* contra *Ker, January* 26. 1636
Bothwel contra *Oliphant, Feb:* 16. 1627
Bower contra B: B: of *Inverneſs, Novemb:* 11. 1634
La. *Boyn* contra her Tennents, *July* 14. 1627
L. *Braco* contra *Ogilvie, March* 22. 1623
L. *Braco* con: Tennents of *Strylaw, March* 22. 1628
Commiſſar of *Brechin* contra *Feb:* 10. 1631
Brog's Heirs contra *March* 23. 1639
Brown contra *Wright, July* 5. 1623
Brown contra L. *Johnſton, Feb:* 21. 1624
Brown contra Tennents &c. *March* 23. 1624
Brown contra *Hiddelſon, June* 17. 1625
Brown & *Mercer* contra *Pitcairn, July* 7. 1626
Browns Executors contra *Drummond, Dec.* 21. 1626
Brown contra *Brown, March* 2. 1627
Brown contra *Murray, March* 8. 1628
Brown con: Town of *Innerkeithing* &c. *Junt* 28. 1628
Brown contra *Nicolſon, Jan:* 9. 1629
Browns contra *Dalmahoy, Feb:* 7. 1629
Brown contra *Lamb, Novemb:* 9. 1630
Creditors of *Brown, Jan:* 20. 1631
Brown contra *Murray, March* 8. 1631
Brown contra *Maxwel, July* 20. 1633
Brown con: her Husbands Heirs, *March* 15. 1634
Brown contra *Binnie, Feb:* 12. 1635
Brown contra *Achiſon, March* 9. 1637
Brown contra *Lands, March* 15. 1637
Brown contra *Blaickburn, July* 25. 1638
Brown contra *Hamilton, Novemb:* 28. 1638
Brownhil contra *Lawder, Jan:* ult. 1639
Bruce contra *King, March* 16. 1627
Bruce contra *Bruce, Novemb:* 21 & 26. 1628
Bruce contra *wardlaw, Jan:* 14 & 19. 1630
Bruce contra *Durie, June* 26, 1634
Bruce contra *Forbes, July* 11. 1634
Bar of *Brughtoun* con: T. of the *Cannongate, Feb:* 5. 1624
Bar. of *Brughtoun* contra *Mcmath, March* 14. 1628
Brunſfield contra *Trotter, July* 24. 1634
Bruntouns Executors con: the Heir of her Husband, *February* 16. 1642
Buchannan contra L. *Buchannan, July* 23. 1629
Buchannan Min: con: his parochioners, *Jan.* 21. 1636
Burnet contra E: of *Buccleugh, July* 4. 1632
Burrel contra *Kilgower, July* 12. 1636
Butter contra *Vauſs, January* 29 1631
Byres of *Coats* contra *Johnſton, December* 16. 1626
——— contra ——— *July* 19. 1622
——— contra ——— July 20. 1622
——— contra ——— *February* 5. 1623
——— contra ——— *July* 25. 1623
——— contra ——— *December* 3. 1623
——— contra *Carmichael, December* 6. 1623
——— Compryſer con: L: *Falwood, June* 29. 1624
——— Tennents con: *Crawfurd, November* 25. 1624
——— contra ——— *Junt* ult. 1625
——— contra ——— July 29. 1625
——— contra *Douglas, February* ult, 1626
——— contra ——— *March* 1. 1626
——— contra ——— *July* 22. 1626
——— Supplicants contra *Nemmo, January* 9. 1627
——— contra ——— *March* 10. 1627
——— contra ——— July 18. 1627
——— Executor *ad omiſſa* contra——*Decem:* 5. 1627
——— contra *Mckenzie, January* 18. 1628
——— contra *Chiſholm, March* 22. 1628
——— contra Miniſter of *Lanerk Decemb:* 10. 1628
——— contra ——— *February* 26. 1629
——— contra ——— *November* 20. 1629
——— contra ——— *January* 22. 1630
——— contra ——— *February* 25. 1630
——— contra ——— *July* 10. 1630
——— contra ——— *February* 1. 1631
——— contra B: B: of *Perth, July* 6, 1631
——— contra ——— *March* 15. 1632
——— contra *Bruce, January* 12. 1633
——— contra ——— *February* 13. 1634
——— contra L. *Lagg, March* 8. 1634
——— contra ——— *June* 21: 1634
——— contra Sir *James Hamilton, June* 21. 1634
——— contra ——— *March* 29. 1636
——— contra ——— *December* 21. 1638

C.

L. *Caddel* contra *Boyd, January* 23. 1635
L. *Cairns* contra *Hunter, March* 28. 1628
Caldwel contra *Caldwel, July* 18. 1622
Caldwel contra *Stirk, July* 17. 1629
Campbel contra L. *Glenurchy, December* 20. 1622
Campbel contra Lo. *Cencleavin, December* 6. 1626
Campbel contra *Campbel, July* 6. 1627
Campbel and *Orr* contra *Salmond, March* 5. 1630
Campbel contra *Mcchartly, July* 23. 1634
Campbel contra *Chalmers, December* 9. 1634
Campbel contra *Baxter, November* 20. 1628
Cant contra *Chiſſly, March* 18. 1623
Cant contra *Edzer, July* 10. 1628

Cant contra *Gray*, *March* 5. 1630
L. *Capringtoun*, contra L. *Keir*, *July* 29. 1624
L. *Capringtoun* contra *Bartholmo*, *March* 8. 1626
L. *Capringtoun* contra *Cunninghame*, *December* 17. 1629
L. *Carberry* contra *Kello*, *January* 22. 1629
La. *Cardross* contra her Son, *July* 28. 1635
La. *Cardross* contra Earl *Marr*, *February* 20. 1639
Carmichael contra *Lermonth*, *July* 2. 1622
Carmichael contra *Hay*, *June* 26. 1623
Carmichael contra *Gibson*, *March* 3. 1629
Carnagie contra his Vassals, *February* 23. 1622
Carnagie contra *Lermonth*, *February* 24. 1627
Carnagie contra L. *Torrie*, *February* 11, 1631
Carnagie and *Panter* contra *Dick*, *December* 1. 1632
L. *Carnousie* contra ——— *January* 21. 1624
L. *Carnousie* contra *Keith*, *January* penult. 1624
L. *Carnousie* contra *Meldrum*, *July* 22 & penult. 1630
E. *Carrick* contra Duke of *Lennox*, *December* 7. 1630
Mr. *Carstorphin* contra Tennents, *March* 26. 1636
L. *Kesketen* contra ——— *March* 6. 1630
Cassie contra *Fleming*, *June* 7 and 20. 1632
E. *Cassils* contra *Simpson*, *March* 18. 1626
E. *Cassils* contra *Mcmartine*, *February* 15 & 24. 1627
E. *Cassils* contra *Aitkin*, *March* 21. 1627
E. *Cassils* contra E. *Wigtoun*, *July* 22. 1629
Lo. *Cathcart* contra L. *Carse*, *July* 12. 1625
Lo: *Cathcart* contra L: *Carse*, *March* 18. 1628
La: *Cathcart* contra her Tennents. *July* 7 & 24. 1623
Catherwood contra *Smith*, *December* 14. 1626
Catherwood contra *Porteous*, *January* penult, 1630
Sheriff of *Cavers* contra *Henderson*, *July* 8. 1623
Sheriff of *Cavers* contra *Turnbul*, *June* 25 & last, 1629
Chalmers contra L: *Craigivar*, *December* 17. 1628
Fewars of *Chapletoun* contra L: *Ernock*, *Dec*: 1. 1630
Chapman contra *Weir*, *June* 17. 1631
Charters contra L: *Balmachie*, *February* 14. 1633
Charters contra *Myles*, *March* 8. 1634
Chisholm contra L. *Torsons*, *March* 18. 1630
Chisholm contra L: *Torsons*, *June* 3. 1630
Chisholm contra *Mcdowgal*, *March* 8. 1631
Chisholm contra *Gordon*, *December* 6 1632
Christie contra *Jack*, *June* 4. 1631
Christison Minister contra *Anderson*, *February* 15. 1631
L: *Clackmannan* contra *Burn*, *November* 17. 1627
L: *Clackmannan* contra L: *Pingask*, *December* 7. 1627
L: *Clackmannan* contra E: *Balnamoon*, *January* 30. 1628
L: *Clackmannan* contra L: *Barounie*, *January* 22. 1629
L. *Clackmannan* contra L: *Barounie*, *July* 10. 1629
L: *Clackmannan* contra L: *Allardice*, *November* 16. 1630
L: *Clackmannan* contra L: *Allardit*, *March* 8 & 18. 1631
Clappertoun contra *Hume*, *November* 22. 1628
Donatar L: *Clerborns* Escheat contra his Tennents, *January* 31. 1628
Clerborn contra *Fairlie*, *January* 15. 1630
Clerborn contra *Crasurd*, *January* ult. 1633
Clerborn contra *Ferguson*, *July* 8. 1636
L: *Clerk* contra *Sanders*, *December* 7 & 8. 1631
Clerland contra Relict of *Baillie*, *February* 13. 1627
Clerland contra *Knolls*, *March* 20. 1627
Clerk contra L: *Balgonie*, *December* 7. 1621
Clerk contra *Brown*, *June* 17. 1624
L. *Cloberhil* contra *Medie*, *January* 22. 1631
L: *Cloberhill* contra L. *Ladyland*, *January* 26. 1631
L: *Clunie* contra L: *Boquhen*, *March* 7. 1622
L: *Clunie* & *Stirling* contra *Ogilvie*, *July* 20. 1626
L: *Clunie* contra L. *Hartbill*, *February* 17. 1631
Cochran contra *Gibson*, *June* 26. 1623
Cochran contra *Stenton*, *March* 20. 1624
Cochran contra *Dalzel*, *February* 13 and penult 1629
Cochran contra *Dalzel*, *June* 29. 1630
Cochran contra *Hamilton*, *July* 3. 1630
Cochran contra *Daline*, *December* 6. 1638
L: *Coil* contra L: *Lochbuy*, *June* 16. 1629
Cock con: Parochioners of *Auchtergevan*, *Feb*: 12. 1635
Cockburn of *Chousile* con: *Trotters*, penult *January* 1639
L: *Cockpul* contra *Johnson*, *December* 4. 1629
Collace contra Lo: *Elphingstoun*, *March* 22. 1626
L: *Collingtoun* & her Son con: *Ker*, *December* 11. 1623
L: *Collingtoun* contra *Foulis*, *July* 29. 1624
La: *Collingtoun* contra *Halswel*, *July* 11. 1628
Colquhoun contra *Wardrop*, *February* 22. 1628
Colquhoun contra L: *Babie*, *February* 11. 1636
L: *Colstoun* contra Lo: *Cranstoun*, *July* 8. 1636
Coltburd contra *Patterson*, *March* 2. 1624
Lo: *Colvil* contra *Hird* & his Sister, *February* 16. 1627
Lo: *Colvil* contra *February* 9. 1628
L: *Conhat* contra L. *Earlstoun*, *December* 6. 1631
Corbet of *Ardbal* contra neareſt of Kin, *July* 4. 1629
Corsan contra *Corsans* Daughters, *Feb*: 9 & 19. 1631
Corsan contra *Durie*, *December* 19. 1638
L: *Corsbie* contra L: *Kilspth*, *December* 5. 1628
L: *Corsbie* contra L: *Schaw*, *January* 15. 1629
L: *Corsbie* contra L: *Polwart*, *December* 21, 1630
L: *Corsbie* contra *Achison*, *February* 22, 1631
L: *Corsbie* contra *Hume*, *March* 3. 16,7
Corse contra ——— *February* 13. 1624
Corser contra *Durie*, *July* 21. 1635
L: *Corshil* contra *Wilson*, *March* 11. 1626
La: *Corsinday* contra Tennents, *March* 8. 1622
Cow contra *Craig*, *March* 20. 1633
Cowan contra *Murray*, *January* 26. 1622
Cowan con Lo: *Elphingstoun*, *March* 29. 1636
L: *Covingtoun* contra Captain *Crasurd*, *July* 1. 1623
L: *Coulter* contra *Forbes*, *February* 18. 1624
Couper contra *Kinloch*, *December* 12. 1623
Couper contra La: *Haltoun*, *January* 26. 1625
Couper contra La: *Haltoun*, *June* 24. 1625
Couper contra *Williamson*, *January* 30. 1627
B: *Coupers* Bairns contra Tutors, *February* 28. 1628
Lo: *Couper* contra Dr. *Sharp*, *March* 25. 1629
Courtie contra *Cunninghame*, *January* 16. 1627
Courtie contra *Weyms*, *January* 14. 1637
Coustoun contra *Stuart*, *March* 29. 1626
Couts contra *Couts* *January* 24. 1636
Craig contra his Tennents, *November* 28. 1623
Craig contra *Sinclar*, *December* 16. 1628
Lo: *Craighal* contra *Bothwel*, *July* 17. 1635
L: *Craigie* contra his Vassals, *February* 1. 1622
L: *Craigie wallace* con: his Tennents. *March* 21. 1623
L: *Craigie wallace* contra *wallace*, *July* 12. 1626
L: *Craigivar* contra *Aikinhead*, *December* 4. 1635
Heir of Tailzie of *Craigmiller* contra *Edger*, *March* 22 1627
L: *Craigmiller* contra Relict of *Nisbet*. *Decem*: 21. 1638
L: *Craigmiller* con: Relict of *Nisbet*, *Jan*: penult, 1639
L: *Craigmiller* contra *Chalmers*, *February* 19. 1639
Cranstoun contra L: *Eastnisbet*, *July* 20. 1622
Cranstoun contra *Hume* of *Sleighden*, *July* 18: 1623
Cranstoun contra *Adieson*, *December* 6. 1628
Lo: *Cranstoun* contra Sir *John Scot*, *Feb*: 10 & 18. 1631
Cranstoun contra *Richardson*, *July* 1. 1637
Craw contra *Irwing*, *February* 21. 1623
Crawfurd contra *Wood*, *June* 17. 1624
Crawfurd contra *Wallance*, *June* penult 1625
Crawfurd contra *Crawfurd*, *February* 9: 1627
Crawfurd contra *Cunninghame*, *June* 8. 1627
Crawfurd contra L: *Lamingtoun*, *January* penult, 1629
E: *Crafurd* contra ——— *June* 19. 1630
Crawfurd contra *Matheson*, *July* 25. 1634
Crawfurd contra L: *Murdistoun*, *March* 9. 1636
Crawfurd contra *Pursels*, *February* 25. 1642
Crichtoun contra *Wilson*, *December* 6. 1628
Crichton contra *Peirie*, *March* 19. 1630
Crichton contra *Wallace*, *March* 19. 1631
Crichton contra Lo. *Air*, *July* 26. 1631
Crombie contra *December* 12. 1623
Camming contra *Camming*, *November* 14. 1628
Cunninghame contra *Forrester*, *February* 21. 1623
Cunninghame contra E: *Glencairn*, *March* 21. 1623
Cunninghame contra *Ahlain*, *December* 11. 1623
Cunninghame contra *Sempil*, *March* 5. 1624
Cunninghame contra *Ross*, *February* 15. 1627
Cunninghame contra *Houston* of *Park*, *March* 10. 1627

Cunninghame contra Sheriff Depute of *Stirling March* 12. 1629
Cunninghame contra *Mouttray*, *July* 2. 1629
Cunninghame contra *Borthwick*, *December* 22. 1629
Cunninghame contra *Williamson*, *February* 1. 1631
Cunninghame contra *Stuart*, *February* 19. 1635
Cunninghame contra *Stirling*, *March* 8. 1639
L:*Currithill* contra Executors of *Cumming*, *March* 2 and 31. 1624
Cuthbert contra Town of *Invernes*, *March* 21. 1637

D.

Dalls contra M^c^*kitson*, *January* 29. 1633
Dalgarno contra E: *Marishal*, *March* 20. 1623
Dalgarno contra *Forbes* of *Blyth*, *March* 18 1630
Dalmahoy & her Spouse contra *Horsburgh*, *March* 11. 1628
Dalrymple contra *L: Closeburn*, *June* 28. 1632
Dalrymple contra *L: Closeburn*, *July* 4. 1632
Dalrymple contra *Douglas*, *December* 18. 1632
Davidson contra *L: Buckit*. *July* 26. 1622
Davidson contra *Gordon*, *March* 22. 1626
Davidson contra *Balcanquel*, *January* penult, 1629
Davidson contra *Hamilton*, *July* 4. 1632
Davidson contra *Jack*, *February* 22. 1634
Dawlings Bairns contra *Lo: Balmerinoch*, *Jan:* 16. 1627
Denholms contra *Denholms*, *July* 17. 1638
Dennistoun contra *Young*, *February* 12. 1622
Dennistoun contra M^c^*Linto*, *January* penult, 1630
Dennistoun contra *Lindsay*, *January* 11. 1633
E: *Desmont* contra *Hay*, *July* 23. 1622
Dick contra *Skelden*, *March* 10, 1627
Dick contra *Lands*, *December* 7. 1630
Dick contra *Spence* & *Thomson*, *March* 11. 1635
Dickson contra *L: Coldingknows*, *July* 15. 1624
Dickson contra *Anderson*, *July* 25. 1626
Dickson contra *L: Aitkin*, *February* 22. 1627
Dickson contra *Hanna*, *June* 16. 1627
Dickson contra *Dickson*, *December* 14. 1627
Dickson contra *Hume*, *December* 27. 1627
Dickson contra *Ker*, *November* 25. 1629
Dickson contra *L: Urtil*, *January* 24. 1629
Dickson contra *Young*, *December* 23. 1629
Dickson contra *Scot*, *March* 7. 1632
Dickson contra *Halliday*, *July* 24. 1634
Dickson contra *Dickson*, *November* 14. 1635
Dickson contra *L: Urthil*, *July* 8. 1637
Dinmuir contra *Payweel*, *February* 25. 1624
L: *Dirleton* contra *L: Eastnisbet*, *January* 10. 1623
Dog contra *Mashet*, *February* 5. 1635
Donaldson & *Kirkwood* contra Sheriff of *Edinburgh*, *March* 26. 1623
Donaldson contra *Donaldson*, *February* 24. 1624
Donaldson's Oy contra *Brown*, *December* 17. 1627
Dowgal contra *Henderson*, *March* 11. 1623
Douglas contra E: *Murray*, *July* 12. 1621
Douglas contra *Belshes*, *December* 10. 1623
Douglas contra *Weddel*, *January* penult, 1624
Douglas contra *L: Eastnisbet*, *March* 6, 9, & 11. 1624
Douglas contra——— *March* 3. 1626
Douglas & *Stuart* contra *Tenants*, *February* 17. 1627
Douglas & *Acheson* contra *Gilbert*, *January* 12. 1628
Douglas contra *Idingtoun*, *February* 28. 1628
Douglas contra *White*, *February* 20, & *March* 5. 1629
Douglas contra M^c^*mitchel*, *February* 26. 1629
Douglas & E: of *Angus* contra E. *Lauderdail*, *March* 19. 1629
Douglas & *Touris* contra——— *June* 20. 1629
Douglas Executors contra *L: Edrim*, *July* 17. 1629
Douglas of *Pamphartoun* contra *Lyne*, *February* 2. 1630
Douglas contra *L: of Swintoun*, *February* 19. 1630
Douglas contra *Johnstoun*, *November* 27. 1630
Douglas contra *Wardlaw*, *November* ult. 1630
Douglas contra *L: Edrim*, *July* ult: 1632
Douglas and his Spouse contra *Oliphant*, *July* 11. 1633
Douglas contra *Bothwel*, *March* 18. 1634
Douglas contra *Leymouth*, *December* 6. 1638
Douglas contra *Cunninghame*, *February* 1, 1642
La: Dowhill contra *L: Dowhill*, *January* ult. 1623
Downie contra *Brown*, *November* 24. 1629
L: Drum contra his Tennents, *November* 27. 1627
E: *Drumkilbo* contra *Lo: Stormonth*, *February* 20. 1629
La: Drumlanrig contra *L: Casbegil*, *January* 16. 1622
Lo. Drumlanrig contra *Maxwel*, *March* 14. 1622
Lo: Drumlanrig contra *Maxwel* of *Hills*, *June* 24 1623
Lo: Drumlanrig contra B: B: of *Hawick*, *Jan:* 15. 1624
Lo: Drumlanrig contra *Scot*, *July* 5. 1625
Drummond contra *Drummond*, *January* 22. 1624
Drummond contra *Cunninghame*, *June* 26. 1624
Drummond contra Baron of *Broghtoun*, *June* 22. 1627
Drummond contra Fishers of *Newhaven*, *Dec:* 4. 1632
Drummond contra Captain *Rollock*, *February* 11. 1634
Drummond contra *Drummond*, *July* 15. 1636
L: Drumquhassel contra *Cleland*, *July* 17 & 23. 1628
L: Drumquhassel contra *Cleland*, *December* 4. 1628
L: Drumquhassel contra *Cleland*, *December* 10. 1628
Drysdail contra *L: Sornbeg* & *L: Langtoun*, *March* 4 1624
Drysdail contra *Drysdail*, *June* penult. 1627
Drysps Tennents con: Sheriff of *Forres*, *Dec:* 13. 1627
Duff contra *Kellie*, *March* 23. 1624
Duff contra *Boyd* & *Wilson*, *March* 26. 1629.
Duff contra *Alves*, *March* 8 & 12. 1631
Lo: Duffus contra *Monroes*, *January* 13. 1625
Lo: Duffus Executors contra——— *February* 2. 1628
E: *Dumfermling* con: the Lady his Mother, *July* 3. 1627
La: Dumfermling contra E: her son, *January* 31. 1628
La: Dumfermling contra her Son, *February* 13. 1628
La: Dumfermling contra her Son, *March* 12. 1628
La: Dumfermling contra *Mcgil*, *February* 13. 1629
E: *Dumfermling* contra his Mother, *June* last, 1629
La Dumfermling contra her Son, *November* 26. 1629
La: Dumfermling contra the E: her Son, *March* 27. 1634
La: Dun contra *L: Dun*, *March* ult. 1624
Dunbar of *Burgie* contra Tennents, *January* 20. 1627
Dunbar contra *Wilson*, *November* 23. 1627
Dunbars contra *Lesly*, *February* 23. 1628
Dunbar contra *Lesly*, *July* 8. 1628
Dunbar contra *Madie*, *July* 11. 1628
Dunbar contra *Turnour*, *June* 18. 1629
Dunbar contra Provost of *Elgin*, *March* 26. 1634
Dunbar contra *Dunbar*, *July* 14. 1638
Bishop of *Dunblain* contra his Vassals, *March* 10. 1626
Duncan contra *Fraser*, *February* 25. 1637
Dundas contra *Hamilton*, *November* 6. 1623
Dundas contra *Strang*, *December* 21. 1626
Dundas contra *L: Swintoun*, *February* 8. 1628
Dundas contra *Brown*, *January* 28. 1642
L: Dunipace contra his Tennents, *March* 25. 1623
L: Dunipace contra *Sands*, *March* ult: 1624
La: Dunipace con: *L: Lawriston*, *March* 10 & 19. 1636
Lo: Dunipace contra *Littles*, *July* 28. 1637
Commissar of *Dunkell* con: *Crombie*, *January* 26 1628
Commissar of *Dunkell* contra *Murray*, *February* 9. 1630
B. of *Dunkel* con *Lo: Balmerinoch*, *March* 25. 1631
Commissar of *Dunkel* contra *Lady*, *July* 22. 1634
B: B: of *Duns* contra *Madits* Creditors, *March* 13. 1623
Durie of that Ilk contra *Lo: Ramsay*, *February* 17. 1624
Durie contra *Kinross*, *July* 8. 1629
Durie contra *Bruce*, *July* 1. 1634
Dutchman contra *Hatcheson*, *February* 9. 1631

E.

L. *Earlstoun* contra *L: Grimmet*, *February* 21. 1635
Easthouses Tennents contra *Hepburn*, *November* last, 1627
Town of *Edinburgh* contra *Logan*, *December* 11. 1626
Town of *Edinburgh* contra T. *Leith*, *February* 4. 1630
Town of *Edinburgh* contra T. *Leith*, *March* 11. 1630
Bishop of *Edinburgh* contra *Brown*, *July* 13. 1636
Edingtoun con: Tennents of *Clettis*, *January* 24. 1628
Edmiston of *Wolmet* contra *July* 10. 1623
L: *Edmiston* contra E: *Lothian*, *February* 10. 1624
La: Edmiston contra the Heir, *June* 26. 1628
Edmiston contra *Edmiston*, *July* 18. 1635
Edmiston contra *Sime* and *Skeen*, *February* 10. 1636
Edmiston contra *Edmistons*, *March* 16. 1637

La: Edem contra *L: Edem*, July 11 and 23. 1628
Edgar contra *Halliday*, *June* penult. 1624
Edgar contra Heirs of *Graigmiller*, July 12. 1626
Edgar and *Johnstoun* contra *Finlason*, *July* 4. 1627
Elder contra July 16. 1642
Town of *Elgin* contra *Mckenzie*, *March* 23. 1624
Elliot contra *Mortoun*, *December* 19. 1629
Elliot contra *Eleis*, July 1. 1631
Elliot contra Lo: *Buccleugh*, *February* 24. 1637
Lo: Elphingstoun contra Earl of *Mar*, *February* 17. 1624
Elphingstoun contra *Guthrie*, *January* 20. 1625
L: Enstruther contra Debitors, *July* 27. 1627
L: Ernock contra L: *Prestoun*, *February* 25. 1636
E: *Errol* contra L: *Buckie*, *July* 25. 1623
E: *Errol* contra *Gordon*, *June* 28. 1636
Erskin contra *Stevin*, *June* 25. 1622
Erskin contra his Tennents, *March* 22. 1626
Erskin contra *L: Erskin*, *January* 24. 1627
Lo: *Erskin* contra E: *Hume*, *July* 17. 1630
L: Esmouth contra *L: Buckie*, *February* penult. 1623
L: Estils contra *Wallace*, *January* 13. 1630

F.

Fairits contra *Johnston*, *Jan.* 26. 1625
Fairlie contra *Fairlie*, *March* 12. 1622
Fairly contra *Fairlie*, *June* 11. 1630
Fairlie contra *Maxwel*, *July* 21. 1630
L: *Fairnes* Bairns contra *L: Aiton*, *July* 17. 1617
Falconer contra *Wishart*, *June* ult. 1625
Falconer contra *Irving*, *July* 7. 1625
Falconer contra Heir of *Beatie*, *December* 11. 1627
Falconer contra *Beatie*, *January* 15. 1628
Falconer contra L: *Halkertoun*, *January* 18. 1628
Falconer contra *Blair*, *Feb:* 10 & *March* 7. 1629
Falconer contra *June* 24. 1642
L: *Faldounside* contra L: *Bimerside*, *December* 14. 1621
Idem contra *Eundem*, *January* 11. 1622
Minister of *Falkland* contra Minister of *Stramiglo*, *February* 2. 1630
Farquher contra *Campbel*, *March* 22. 1628
Farquher contra *Wallace*, *February* 14. 1629
Farquher contra *Mckean*, *July* 28. 1637
Ferguson contra *Couper* &c. *March* 11. 1628
Ferguson contra *Mckenzie*, *June* ult. 1632
Ferguson contra *Forrest*, *March* 19. 1639
Lo: *Fentoun* contra *Drummond*, *July* 10. 1632
Fenton contra *Carnagie*, *November* 17. 1635
Ferm contra *Hume*, *June* 24. 1630
Ferm contra Captain *Wisharts* Heirs, *February* 18 & 25 1624
Finlason contra *Veitch*, *February* 8. 1622
Finlason contra *Johnstoun*, *March* 6. 1623
Finlasons Wife contra *Wood*, *June* 15. 1614
Finlason contra Tennents and *Stuart*, *July* 27. 1626
Finlason contra Executors of *Lawder*, *Decemb:* 16. 1626
Finlason contra *Luckup*, *January* 16. 1628
Finlason contra *Weyms*, *December* 11. 1638
L: *Finmouth* contra *Weyms*, *March* 20. 1619
Finnie contra *Oliphant*, *February* 22. 1631
Finnie contra *Gray*, *March* 22. 1637
Fisher contra *Brown*, *July* 9. 1630
Fisher contra *Turnbul*, *July* 10. 1632
Fitbie contra *Carmichael*, *March* 20. 1623
Lo: *Fleming* contra *L: Covingtoun*, *March* 7. 1633
Fleming contra *Irving*, *February* 11. 1634
Fletcher contra *Irving*. *March* 28. 1628
Fletcher contra *Irving* & L: *Craigivar*, *March* 3. 1629
Fletcher contra *Kid* in *Dundee*, *March* 15. 1631
Forbes contra B: B. of *Aberdene*, *March* 16. 1622
Forbes contra L: *Muchal*, *November* 13. 1622
Forbes of *Gask* contra L: *Pitsligo*, *July* 1. 1628
Forbes contra E: *Mariſhal*, *July* 15. 1631
Forbes contra *Forbes*, *February* 12. 1633
Forbes contra *Fullertoun*, *March* 23. 1636
Forbes contra *Hunters* Daughters, *February* 8. 1642
Sheriff of *Forrest* contra Town of *Selkrig*, *July* 5. 1632
Forrester contra *Clerk*, *March* 10. 1627
Forrester contra *Clerk*, *March* 4. 1628
Forrester contra *Gowley*, *March* 27 1633
Forrester contra Feuers of *Bathkennet*, *July* 22. 1634
Forrester contra *Castellaw*, *June* 24. 1642
Forsyth contra L: *Smeton*, *November* 20. 1624
Forsyth contra *Forsyth*, *November* 29 1626
Forsyth contra *Durie*, *March* 1. 1632
Forsyth contra *Crupland*, *March* 16. 1639
Fothringhame & *Scrimzour* con: *Watson*, *Jan:* ult. 1623
Fothringhame contra his Fathers Relict, *Dec.* 6. 1623
Foulter contra *Allan*, *March* 23. 1626
Foulis contra June 14. 1626
Foulis of *Ravelstoun* con: his Tennents, *July* 8. 1636
La: *Foulis* contra Lo: *Lovat*, *December* 15. 1626
La: Foulis contra her Husband, *Decemb.* 21. 1626
Frazer contra L: *Monimusk*, *January* 17. 1627
Frazer contra *February* 11. 1629
Frazer contra *Bishop*, *Novemb:* 17. 1638
L: *Fretland* contra Sheriff of *Perth*, *July* 28. 1630
L: *Fretland* contra *Murray*, *February* 23. 1631
French contra *Cranstoun*, *July* 3. 1622
Idem contra *Eundem*, *July* 11. 1622
L: *Frendraught* contra L: *Balvanie*, *July* 1. 1624
L: *Frendraught* contra Lo: *Bamff*, *July* 19. 1636
Furd contra *Stevenson*, *March* 13. 1637
Fullertoun contra *Kennedie*, *Novemb:* 26. 1630

G.

Gagit contra *Guthrie*, *Feb:* 23. 1628
L. La. *Garlies* contra Earl of *Galloway* July 15 1642
Gaits contra his Parochioners, *Novemb.* 23. 1621
Gall contra *Eviot*, *March* 28. 1629
L: *Gallashiels* contra *L:* Mckerstoun, *March* 12. 1629
Galbraith contra *Cunninghame*, *Novemb.* 15 & 16. 1626
Galbraith contra *Lennox*, *June* 28. 1637
E: *Galloway* contra *Vans*, *Decemb:* 17. 1623
E: *Galloway* contra M^culloch, *Decemb:* 13. 1626
E: *Galloway* contra *Tailzifer*, *June* 26. 1626
E: *Galloway* contra *Bogmiln*, *Feb:* 20. 1629
E: *Galloway* contra *Maxwel*, *Decemb:* 16. 1629
E: *Galloway* contra Burgesses of *Wigtoun*, *Feb:* 10. 1631
E: *Galloway* con: Burgesses of *Wigtoun*, *March* 15 1631
E: *Galloway* contra *Gordon*, *March* 29. 1636
Bishop of *Galloway* contra *Inglis*, *July* 12. 1627
Bishop of *Galloway* contra Vassals, *Feb:* 24. 1632
Sheriff of *Galloway* con: L: *Craigarthir*, *Dec.* li. 1629
Sheriff of *Galloway* contra E. *Cassils*, *March* li. 1634
Garden contra *Garden*, *Feb.* 20. 1627
Gardner contra *Chalmers*, *July* 19. 1636
L. *Garthland* contra Lo. *Jedburgh*, *Feb.* 26. 1631
L. *Garthland* contra *Murray*, *March* 2. 1631
L. Garthland contra *Ker*, *March* 6. 1632
L. Gatgirth contra *L. Affleck*, *Jan.* 26 & *July* 13. 1631
Gechan contra *Hay* and *Davidson*, *Decem.* 4. 1623
Gechan contra *Cochran*, *March* 5. 1624
Gechan contra *Wicketshaw*, *July* 17. 1628
Gemmel contra B. B. of *Glasgow*, *March* penult. 1626
Gemmel contra *Boyll*, *January* 8. 1629
Gib contra *Miller*, *March* 14. 1634
Gibson contra *Coway*, *January* 29. 1629
Gibson contra L. *Corsbie*, *Decemb.* 1. 1630
Glaidstanes contra *Hamilton* &c. *Feb.* 28. 1624
Glasford contra *Dawlin*, *March* 22. 1634
Burgesses of *Glasgow* contra Lo. *Lorn*, *March* 1. 1627
Hammermen of *Glasgow* contra *Crasurd*, *March* 5. 1628
Colledge of *Glasgow* contra *Stuart*, *Feb.* 20. 1633
Bishop of *Glasgow* contra *Mauld*, *March* 20. 1635
Glen contra Tennents, *Novem.* 24. 1626
Glen contra *Binnie*, *Novem.* 24. 1626
Glen of Bar contra L. *Knock*, *Feb.* 28. 1628
La. *Glenbervie* contra *L. Glenbervie*, *July* 13. 1638
Glendinning contra *Willie*, *July* 24. 1634
Glindinning contra *L. Barnbarroch*, *July* 1. 1634
L. Glengavie contra *Lo. Lovat*, *Feb.* 4. 1631
La. Glengarnock contra *L. Mushet*, *June* 29. 1626
La. Glengarnock contra *L. Kilbirnie*, *July* 18. 1626
L. Glenkindie contra *Crawsurd*, *Jan.* 24. 1627
Goldman contra *Goldman*, *July* 1. 1625

Gordlit contra *Adamſon*, *Novem.* 22. 1628
Gordon contra L. *Garlits*, *March* 23. 1622
Gordon of *Clunie* contra M^c*culloch*, *June* 13. 1622
Gordon contra M^c*heugh*, *Feb.* 6. 1624
Gordon Supplicant, *Decem.* 22. 1626
Gordon contra *Meldrum*, *June* 27. 1628
Gordon contra E. of *Galloway*, *Decem.* 11. 1629
Gordon contra E. of *Galloway*, *Jan.* 20. 1631
Gordon contra *Corſan*, *Feb.* ult. 1632
Gordon contra M^c*quhen*, *Jan.* 22. 1633
Gordon contra M^c*culloch*, *Feb.* 6. 1633
Gordon contra —— *March* 7, & *July* 27. 1633
Govan contra *Richardſon*, *Feb.* 12. 1633
Gourlay contra —— *Novem.* 24. 1627
Grahame contra her Husbands Heirs, &c. *March* 14. 1628
Grahame contra *Stuart*, *Jan.* 28. 1631
Grahame contra *Stirling*, *Decem.* 9. 1631
Grahame contra *Purk* & *Gordon*, *Jan.* 29. 1639
L. *Grange* contra *Beiſon* of *Carden*, *July* 14. 1626
Grant contra *Grant*, *July* 15. 1631
Grant contra *Grant*, *Jan.* 28. 1632
Grant contra *Grant*, *Novem.* 16. 1633
Grant contra —— *July* 8. 1642
L. *Grantoun* contra L. *Collingtoun*, *Decem.* 16. 1628
Gray contra *Burgh*, *July* 8. 1625
Gray contra his Debitors, *March* 2. 1626
Gray contra Tennents of *Fairniſlat*, *March* 24. 1626
Lo: *Gray* contra *Grahame* & his Wife, *Jan.* 30. 1628
Gray contra *Campbel*, *June* 12. 1629
Gray contra —— *June* 19. 1629
Gray contra *Maxwel*, *Feb.* 6. 1622
Grier contra *Crawfurd*, *Novem.* 14. 1627
Grierſon contra *Gordon* of *Troquhen*, *March* 10. 1630
Grierſon contra *Gordon* of *Troquhir*, *Decem.* 7. 1631
Grierſon contra *Gordon*, *Jan.* 21. 1632
Grierſon contra *Grierſon*, *Feb.* 14. 1633
Grierſon contra L. *Cloſeburn*, *July* 21. 1636
Grierſon contra L. *Cloſeburn*, *Jan.* 20. 1637
Grieve contra *Cant*, *March* penult. 1626
Grieve contra *Hepburn*, *June* 26. 1635
Grinlaw contra *Anderſon*, *Jan.* penult. 1624
Grinlaw contra *Galloway*, *March* 24. 1626
L. *Grinock* contra —— *Novem.* 28. 1621
Guild contra *Guild*, *Feb.* 4. 1623
Gullan contra *Dinmuirs*, *Novem.* 15. 1627
Guthrie contra *Somervail*, *July* penult. 1625
Guthrie contra *Guthrie*, *July* 7. 1626
Guthrie contra L. *Barnbarroch*, *July* 12. 1626
Guthrie contra *Guthrie*, *Feb.* 24. & *March* 1. 1627
Guthrie contra *Guthrie*, *Feb.* 11. 1630
Guthrie contra Tennents of *Friercroſs*, *March* 1. 1636
Guthrie contra L. *Sorbie*, *March* 15. 1637

H.

HAddingtoun contra L. *Lamingtoun*, *Dec.* 11. 1632
H. *Haddingtoun* contra his Tennents, *July* 28. 1637.
L. *Haddo's* Daughter com the Heirs, *July* 28. 1625
L. *Haddo* contra *Mowat*, *June* 20. 1629
L. *Haddo* contra L. *Ludquharn*, *July* 23. 1629
L. *Haddo* contra L. *Ludquharn*, *March* 18. 1630
L. *Haddo* contra L. *Ludquharn*, *March* 10 & 29. 1631
L. *Haddo* contra *Johnſton*, *Novem.* penult. 1632
L. *Haddo* contra *Johnſton*, *Feb.* 6. 1633
L. *Halcartoun* con: *Kadie* & *Grieves* Tennents, *Feb.* 1. 1628
L. *Halcro* contra *Somervail*, *July* 13. 1626
Halliburton con: L. *Murthils* Debitors, *Feb.* pen. 1623
Halliburton con: Provoſt of *Jedburgh*, *June* 29. 1626
Halliburton contra *Stuart*, *July* 1. 1626
Halliburton contra *Monteith*, *Jan.* 20. 1632
Halliburton contra *Hunter*, *Feb.* 14. 1633
Halliburton contra *Paterſon*, *July* 13. 1636
Halliday contra —— *Decem.* 14. 1621
Halkſtoun contra *Rutherfoord*, *July* 16. 1636
Halyland contra *Crawfurd*, *Feb.* 13. 1642
Hamilton contra *Sinclar*, *Decem.* 11. 1621
Hamilton contra *Durham*, *Decem.* 21. 1621
Hamilton contra *Sinclar*, *Jan.* 17. 1622
Hamilton contra Lo. *Sinclar*, *Feb.* 26. 1622
Hamilton contra *Roſs*, *Decem.* 6. 1622
Hamilton contra *Cochran*, *Decem.* 12. 1622
Hamilton contra *Drummond*, *March* 1. 1623
Hamilton contra *Sharp*, *March* 6. 1623
Hamilton contra *Dick*, *Novem.* 19 & 20. 1623
Hamilton contra *Livingſtoun*, *March* 23. 1624
Hamilton contra *Matheſon*, *Novem.* 25. 1624
Hamilton contra her Husband, *Jan.* 11. 1625
Hamilton contra Tennents of *Barganie*, *March* 2. 1626
Hamilton contra Vaſſals of *Barganie*, *July* 14. 1626
Hamilton contra *Brown*, *Jan.* laſt, 1628
Hamilton Miniſter contra —— *June* 13. 1628
Hamilton & his Curator contra *Hamilton*, *July* 2. 1628
Hamilton contra B: of *Galloways* Relict. *July* 4. 1628
Hamilton contra *Hamilton*, *June* 27. 1629
Hamilton of *Blair* contra his Goodſir, &c. *July* 7. 1629
Hamilton of *Skirling* contra Tennents, *July* 15. 1629
Hamilton contra *Inglis*, *Feb.* 2. 1630
Hamilton Miniſter contra *Tweedit*, *Feb.* 2. 1636
Hamilton contra *Houſton*, *Jan.* 13. 1631
Hamilton contra *Dundonald*, *Jan.* 25. 1632
Hamilton contra —— *July* 21. 1632
Hamilton of *Sbeils* contra his Tennents, *Nov.* 22 1632
Hamilton contra *Hamilton*, *Decem.* 20. 1632
Hamilton contra Tennents of *Milnhouſe*, *Jan.* ult. 1633
Hamilton contra *Elliot*, *Jan.* 27. 1636
Hamilton contra *Glendinning*, *March* 28. 1637
Hamilton contra *Hamilton*, *March* 15. 1639
Marqueſs of *Hamilton* contra *Calder*, *Jan.* 19. 1627
L. *Harden* and his Son contra L. *Gallowhils*, *Nov.* 29. 1626
Hardie contra *M^caulay*, *Jan.* 22. 1631
L. *Harmeſtoun* contra *Butler*, *July* 6. 1630
Harper contra *Jaffrey*, *Feb.* 15. 1630
Harper contra *Cockburn*, *Feb.* 16. 1633
Harpers contra *Hamilton*, *Feb.* 6. 1633
Hart contra *Hart*, *March* 18. 1630
Hart contra —— *Decemb.* 23. 1630
Hart contra —— *July* 18. 1634
L. *Hartwoodmires* contra *Turnbul*, *March* 22. 1634
Harvie contra *Baron* of *Kinaird*, *July* 20. 1626
Haſſingtoun contra *Bartilms*, *July* 12. 1631
L. *Hatton* contra Poſſeſſors of *Hatton*, *March* 15. 1628
Hay contra *Keith*, *July* 25. 1623
Hays La. *Errols* Children contra *Keith*, *Feb.* 3. 1624
Hay contra *Wright*, *March* 5. 1624
Hay in *Brantiſland* contra —— *July* 19. 1625
Hay in *Haddingtoun* contra —— *July* 1. 1626
Hay contra La: *Borthwick*, *Jan.* laſt. 1627
Hay contra *Ker*, *March* 16. 1627
Hay of *Tourlands* contra E. *Eglingtoun*, *Feb.* 25. 1630
Hay of *Tourlands* con: *Achnames*, *March* 19 & 23. 1630
Hay contra L. *Philorth*, *July* 9. 1630
Hay contra E. *Mariſhal*, *July* 13. 1630
Hay contra M^c*mitchel*, *March* 4. 1631
Hay contra L. *Etigbi*, *July* 11. 1634
Hay contra B. B. in *Aberdeen*, *July* 22. 1634
Hay contra *Elliot*, *March* 29. 1639
Hempſfield contra *Maxwel*, *July* 2. 1624
Colonel *Henderſons* Children contra Debitors, *Dec.* 9. 1623
Colonel *Henderſons* Children con: *Murray*, *Jan.* 8. 1624
Henderſon contra La. *Knockhil*, *June* 28. 1628
Henderſon contra La. *Knockhil*, *July* 1. 1628
Henderſon contra Relict of *Henderſon*, *Feb.* 3. 1631
Henderſons contra *Sanders* Miniſter, *July* 18. 1634
Hepburn contra *Lyel*, *Decemb.* 14. 1627
Hepburn contra *Seaton*, *Feb.* 12. 1635
Hepburn contra *Barclay*, *Feb.* 25. 1637
Hepburn contra *Hepburn*, *March* 14. 1639
Herring contra *Ramſay*, *Jan.* 11. 1622

Lo: *Herris* contra Lo. *Drumlaurig*, *July* 23. 1624
Herris contra *Glendinning*, &c. *Decemb.* 3. 1623
Herris and *Cunninghame* contra *Lindſay*, *July* 10. 1628
Herris contra *Stuart*, *March* 3. 1629
Herris contra Lo: *Herris*, *March* 19. 1629
Higet contra *Plumber*, *July* 16. 1629
Hill contra *Wright*, *Novemb.* 25. 1628
Hog contra *Nivint*, *June* 11. 1629
Hope contra Miniſter of *Craighal*, *Nov.* 9 & 16. 1624
Hope and *Nicolſon* contra *Nicolſon*, *Novemb.* 28. 1626
Hoppringle contra E. *Hume*, *Feb.* 15. 1623
Hoppringle contra *Keir* & Lo. *Barthwick*, *Jan.* 29. 1624
Hoppringle contra *Mark Ker*, *Jan.* 22. 1630
Horn contra *Pow*, *February* 1. 1634
Horſeburgh contra *M'Ilvain*, *Jan.* penult. 1629
Horſeburgh contra *Frank*, *March* 18. 1630
Houſton contra *Maxwel*, *July* 9. 1630
Houſton contra *Houſton*, *Jan.* 13 & 20. & *Feb.* 18. 1631
Houſton contra *Maxwel*, *Jan.* 25. 1631
L. *Humby* contra *Hume*, *July* 19. 1634
Hume contra *M'math*, *March* 16. 1622
Hume contra Creditors of *Aikman*, *Decemb.* 20. 1623
Hume of *Baſſingtoun* contra *Hume*, *Jan.* 11. 1627
Hume contra L. *Renton*, *Feb.* 7. 1628
Hume contra Tennents of *Kello*, *March* 22. 1628
Hume contra *Hume* and *Juſtice*, *March* 25. 1628
Hume contra her Tennents, *Decemb.* 16. 1629
Hume contra *Hume*, *Jan.* 27. 1630
Hume contra *Hume*, *June* 17. 1630
Hume contra *Stuart*, *June* 2. 1630
Hume contra *Hume*, *July* 8. 1630
Hume contra L. *Renton*, *Decemb.* 23. 1630
Hume contra *Hume*, *Jan.* 29. 1631
Hume contra *Hume*, *Feb:* 7. 1632
Hume contra *Bowmaker*, *July* 10. 1632
Hume contra *Hume*, *July* 21. 1632
Hume contra *Hume*, *Feb.* 6. 1633
Hume contra two Daughters of the E. *Hume*, &c. *March* 4. 1634
Hume contra *Hume*, *July* 3. 1634
Hume contra *Riddel*, *March* 19 & 21. 1635
Hume contra La: *Haddingtoun*, *Decemb.* 2. 1635
Hume contra *Fiſh*, *Feb.* 13. 1636
Hume contra *Hepburn*, *Feb.* 14. 1637
Hume contra *Craw*, *Feb.* ult. 1637
Hume contra *Hume*, *March* 16. 1637
E. *Hume* contra La. *Hume*, *Jan.* 18. 1637
Hunter contra *Watſon*, *July* 3. 1623
Hunter contra Tennents, *Decemb.* 16. 1629
Hunter contra Tennents, *Jan.* 14. 1630
Hunter contra *Hardie*, *Decemb.* 16. 1630
Hunter contra *Halliburton*, *Decemb.* 1. 1632
Hunter contra *Dick*, *July* 29. 1634
L. *Hunthil* contra *Rutherfoord*, *March* 15. 1623
Huntly contra *Hume* & L. *Renton*, *Decemb.* 13. 1628
Huntly contra *Manſon*, *July* 8. 1642
La. *Huttonhal* contra L. *Moriſtoun*, *March* 9. 1631
L. *Huttonhal* contra *Cranſtoun*, *July* 12. 1631
Hynd contra L. *Wedderburn*, *Novemb.* 24. 1632
Tennents of *Hyndwood* contra Miniſter, *July* 9. 1636

I.

Iack contra *Gray*, *Feb:* 2. 1632
Jaffray contra *Gray*, *Decem:* 5. 1626
Mr. *Jedburgh* contra *Elliot*, *February* penult. 1623
Mr. *Jedburgh* contra E. *Hume*, *Feb:* 15. 1628
L. *Jerriſwood* contra L. *Livingſtoun*, *Feb:* 23. 1632
Inglis contra L. *Capringtoun*, *June* 26. 1622
Inglis contra *Drummond*, *Jan.* 27. 1624
Inglis contra *Auſtain*, *March* 26. 1624
Inglis & *Scot* contra *Junkin*, *July* 1. 1626
Inglis contra *Kirkwood*, *March* 16. 1627
Inglis contra *Kirkwood*, *Novemb:* 17. 1627
Inglis of *Murdiſtoun* contra *Tennents*, *Decemb:* 16. 1628
Inglis contra La. *Dunfermling*, *Feb:* 17. 1629
Inglis contra *Frazer*, *June* 13. 1629
Inglis contra Executors of *John Sharp*, *Feb.* 5. 1631
Inglis contra *M'cubini*, *July* 1. 1631
Inglis contra *Bell*, *Jan.* 24. 1639
Inglis contra L. *Aikit*, *July* 8. 1642
Parochioners of *Innerkeithing* contra L. *Roſyth*, *Feb.* 13. 1642
L. *Innerweik* contra *Wilkit*, *Jan.* 10. 1624
L. *Innerweik*'s Son contra *Schaw*, *July* 7. 1625
L. *Innerweik* contra *Hamilton*, *July* 29. 1634
L. *Innerweik* contra *Hamilton*, *July* 7. 1635
Innes contra *Innes*, *Decemb:* 8. 1622
Innes contra *Leſlie*, *February* 13. 1634
Town of *Inverneſs* contra *Cuthbert*, *March* 21. 1623
Provoſt of *Inverneſs* contra the Town thereof, *Feb:* 10. 1631
Job contra *Ker*, *Novemb:* 26. 1624
Johnſton contra *Roriſon*, *Novemb:* 26. 1624
Johnſton contra *williamſon*, *March* 14. 1626
Johnſton and his Spouſe contra *Maſon*, *July* 14. 1626
Johnſton of *Elſhiſhiels* contra Lo. *Herris*, *March* 20. 1627
L. *Johnſton* contra his Tennents; *Decemb:* 18. 1628
Johnſton contra *Hope*, *July* penult. 1630
Johnſton contra *Howiſon*, *Jan.* ult. 1632
Johnſton contra L. *Johnſton*, *March* 7. 1633
Johnſton contra *Irving*, *March* 14. 1634
Johnſton contra *Forbes*, *Feb:* 22. 1639
Johnſton contra *Loch*, *Jan.* 24. 1642
Johnſton contra *Johnſton*, *Feb:* 10. 1642
L. *Johnſton* contra E. *Annandale*, *Decemb:* 21. 1630
L. *Johnſton* contra Captain *Johnſton*, *Feb:* 21. 1632
Lo. *Johnſton* contra E. *Queinsberry*, *June* 26. 1634
Lo. *Johnſton* contra *Johnſton*, *Decemb:* 3. 1634
Lo. *Johnſton* contra E. *Queinsberry*, *July* 12. 1634
Lo. *Johnſton* contra *Johnſton*, *July* 17. 1635
Lo. *Johnſton* contra E. *Nithsdale*, *March* 16. 1637
Irving contra L. *Graitnay* & others, *Feb:* 22. 1623
Irving contra *Forbes*, *Feb:* penult. 1623
Irving contra ——— *Decemb.* 10. 1623
Irving contra L. *Monymusk*, *December* 21. 1626
Irving contra *Young*, *March* 27. 1627
T. *Irving* contra ——— *Feb:* 7. 1629
Irving contra L. *Elſick*, *June* 29. 1632
Irving contra *Robertſon*, *July* 20. 1632
Irving contra Commiſſar of *Dunkel*, *June* 17. 1635
Lo. *Iſles* contra ——— *June* 22. 1627
Biſhop of the *Iſles* contra his Vaſſals, *March* 6. 1629
Biſhop of the *Iſles* contra *Schaw* & others, *July* 26. 1631

K:

Kaidiſlit contra *Lawder*, *Jan.* 25. 1632
Keir contra *Lamb*, *June* 24. 1630
Keith contra Tennents of *Peterhead*, *July* 11. 1621
Keith contra *Robertſon*, *March* 29. 1626
Keith contra *Ogilvit*, *June.* 20. 1629
Keith contra *Herriot*, *Feb:* 14. 1633
Keith Parſon of *Strabrock* contra *Oliphant*, *March* 21. & *July* 23. 1633
Keith contra *Innes*, *June* 26. 1634
Keith &c. contra *Irving*, *December* 23. 1635
Keith contra ——— his Tennent, *July* 16. 1636
Keith contra *Simpſon*, *March* 2. 1637
La. *Kelburn* contra Tennents thereof, *July* 12. 1626
Kello contra *M'kiſon* & *Hunter*, *Feb:* 13. 1628
Kelly contra *Winraham*, *Jan.* 29. 1629
Kennedy contra *M'dowgal*, *Jan.* 25. 1628
Kennedy contra *Grahame*, *Feb.* 21. 1629
Kenoway contra *Mowat*, *July* 25. 1638
Ker contra *Scot* of *Hartwoodmirrs*, *Feb.* 5. 1623
Ker contra *Foulis*, *July* 24. 1623
Ker contra *Colthurd* and *Patrſon*, *Novemb:* 19. 1623
Ker contra *Dickſon*, *Jan.* 15. 1624
Ker contra *Hepburn*, *June* ult. 1624
Ker contra *Ker*, *July* 19. 1625
Ker contra ——— *July* 29. 1625
Ker contra B. B. of *Jedburgh*, *Jan.* penult. 1627
Ker of *Ancrum* contra E. of *Lothians* Heirs, *Feb.* 8. 1627

Ker contra La. Covingtoun, March 9. 1627
Ker contra La. Covingtoun, March 13. 1627
Ker contra Minister of Ancrum, July 17. 1627
Ker contra Scot of Hartwoodmires, Feb. 12. 1627
Ker contra L. Coldinknows, March 13. 1628
Ker contra L. Limpitlaw, Feb. 11. 1630
Ker contra Ker, Feb. 16. 1633
Ker contra Knows, Jan. 29 & Feb. 5. 1635
Ker contra Forsyth, February 5. 1635
L. Kerse contra Reid Minister, July 5. 1626
L. Kerse contra his Brother, March 23. 1627
Lo. Kildrimmit contra ——— June 29. 1626
Kilgowre contra Thomson, Jan. 24, & Feb. 16. 1628
L. Kilkerran contra Ferguson, December 1. 1632
B B Kilrimmy contra ——— July 6. 1624
Lo. Kilsyth contra Lennox, Jan. 14. 1625
Lo. Kilsyth contra Balfour & Aberuthie, Jan. 28. 1625
Kinnaird contra Yeaman, Feb. 17 & 24. 1632
Kincaid contra Halliburton, Novemb. 18. 1624
Doctor Kincaid contra Hallibarton, July 2. 1625
Kincaid of Waristoun contra Bar. of Broughtoun, Jan. 9. 1629
Kincaid contra L. Lawder, Decemb. 1. 1629
Kincaid contra Aikinhead, Decemb. 15. 1631
King and E. of Hume contra Cranstoun, June 11. 1623
K. Majesty contra E. of Strathearn, March 20 & 21. 1633
King contra Tailzor, March 29. 1626
King Relict of Herriot contra Ker, July 13. 1627
King contra Douglas, July 21. 1636
E. Kinghorn contra L. Inchstair, Feb. 26. 1622
E. Kinghorn contra Collace and others, March 8 & ult. 1626
E. Kinghorn contra Wood, Novemb. 25 & 28. 1626
E. Kinghorn contra L. Grange Kirkaldy, March 15. 1627
E. Kinghorn contra Strang, Feb. 4. 1630
E. Kinghorn contra Strang, July 19. 1631
L. Kincaldrum contra L. Balgillo, March 8. 1639
Kinloch contra Lo. Conservator, July 1. 1624
Kinloch contra Finlason, Jan. 8 & 13. 1629
Executors of Kinnyre contra Executors of Rat, Jan. 28. 1623
Kinnyre contra L. Eastnisbet, Jan. 15. 1633
Kirk contra Gilcrist, Feb 19. 1629
Kirkhead contra Nairn, Feb. 9. 1628
Minister of Kirkliston contra Wardlaw, July 23. 1625
Kirkwood contra Beiths, July 5. 1623
Kirkwood contra Ferguson, July 19. 1639
Kirkwood contra Ferguson, Decemb. 14. 1633
L. Kirkonnel contra L. Barnbarroch, Feb. 2. 1628
Knox contra Brown, July 16. 1625
Knox contra Knox, Decemb. 20. 1632

L.

Lachop contra L. Cleghorns Tennents, Feb. last, 1628
L. Lachop Donatar to the B. of Galloways Liferent, July 8. 1634
L. Lag contra Parochioners of Linton, Dec. 12. 1621
L. Lag contra Baillie of Hallywood, July 24. 1622
L. Lag contra his Tennents, Nov. 18, 19 & 20. 1624
Lamb contra Tweddit, Feb. 22. 1623
Lamb contra Heath, March 11. 1624
Lamb contra Blaickburn, March 19. 1628
L. Lamington contra Baillie, Decemb. 17. 1629
La. Lamington contra the Laird, Feb. 14. 1628
L. Lamington contra Foulis, Feb. 14. 1632
B. B. of Lanerk contra Beg, Decemb. 14. 1637
Lands contra Dick, July 7. 1630
Langnewtouns Tennents contra Jamison, Dec. 6. 1626
L. Longtoun contra Baillies of Duns, Feb. 12. 1624
L. Langshaw contra Muir, July 4. 1629
Law contra L. Balgonie, March 3. 1626
Lawder contra Aitkin, Decemb. 7. 1627
Lawder contra Douglas, January 29. 1629
Lawder contra Colmestit, Novemb. 27. 1630
Lawder contra Douglas, Novemb. 29. 1631
Lawder contra La. Whitekirk, Feb. 15. 1637
Mr. Lawderdale contra the Vassals of the Priory of Haddingtoun, March 28. 1623
E. of Lawderdale contra L. Waterstoun, Jan. 17. 1632
L. Lawers contra Dumbars, July 26. 1637
Lawmond Minister contra Bennet, July 13. 1636
L. Lawriston contra Tennents, &c. Jan. last, 1627
L. Lawriston contra Sheriff of Merns, March 12. 1628
L. Lawristoun contra La. Dunypace, March 25. 1635
La. Lawristoun contra her Tennents, March 6. 1632
Lawrie contra Miller, Decemb. 19. 1629
Lawrie contra Miller, January 14. 1630
Lawrie contra Ker, January 29. 1630
Lawson contra Kello, Feb. 16 & 27. 1627
Lawson contra La. Boghal, Decemb. 6. 1628
Lawson contra Reid, Decemb. 17. 1629
Lawson contra Scot, July 23. 1633
Lawson contra L. Arkinlass, Feb. 24. 1636
Leckie contra E. B. of Glasgow, Novemb: 21. 1628
Leitch contra L. Balnamoon, Feb. 22. 1623
Lennox contra Tennents, &c. March 22. 1626
Lennox contra M'morran, Feb. 20. 1633
D. of Lennox contra Wems, Jan. 20. 1627
D. of Lennox contra Fleming, Feb. 20. 1627
D. of Lennox contra Houstoun, Jan. 29. 1628
Lermonth contra Alexander, Jan. 22. 1624
Lo. Leslie contra L. Pitcaple, March 23. 1622
Lo. Leslie contra L. Boquhen &c. Feb. 12. 1629
Lo. Leslie contra ——— March 4. 1630
Lo. Leslie contra Grant, Feb. 12. 1642
Leslie contra Leslie and her Spouse, July 4. 1627
Leslie contra L. Ludquharn, Feb. 12. 1636
Leslie contra Dickson, Feb. 10. 1642
L. Lesmores Tennents contra L. Drum, Jan. 26. 1628
L. Lesmore contra the Lady, July 11. 1637
L. Lesmories contra Hutchison, Decemb. 11. 1634
L. Ley contra Stuart, Decemb. 13. 1623
L. Ley younger contra Blairs Relict &c. Dec. 20. 1626
L. Ley contra Bar, March 13. 1627
L. Ley younger contra Kirkwood, March 5. 1629
L. Ley contra Porteous, July 17 & 20. 1630
L. Ley contra E. Lauderdale, March 20. 1632
Libertoun contra Adamson, March 11. 1626
Liddel contra Doctor Rob, Novem. 26. 1622
Liddel contra Robs, March 26. 1624
Lighton contra L. Kinnaber, Feb. 23. 1637
Lighton contra Muirhead, July 11. 1632
Lillie contra L. Innerleith, March 4. 1636
L. Limpitlaw contra Aikinhead, Novemb: 11. 1630
Lindsay contra L. Balgonie, June 19. 1627
Lindsay contra Minister of Brichen, June 26. 1627
Lindseys Relict contra Eleis &c. March 21. 1628
Lindsay contra Gray, July 24. 1629
Lindsay contra L. Lawristoun, July 24. 1629
Lindsay contra Town of Edinburgh, March 10. 1630
Lindsay contra Nisbet, Feb. 2. 1632
Lindsay contra Dennistoun, Feb. 9. 1633
Lindsay contra Fairfoul, Novemb. 26. 1633
Lindsay contra Scots, December 3. 1634
T. of Linlithgow contra Fleshers in Edinburgh, Nov. 15. 1621
E. Linlithgow contra Sharp &c. March 4. 1623
E. Linlithgow contra Henderson, July 12. 1625
E. Linlithgow contra Menzies of Culterraws, Feb. 13. 1627
Livingstoun contra Galloway, July 14. 1621
Relict and Bairns of the Minister of Livingstoun, Decemb. 17. 1623
Livingstoun contra L. of Bass, Novemb. penult. 1628
Loch contra Dick, July 26. 1638
L. Lochinvar contra Lindsay, March 24 & 28. 1632
L. Lochinvar contra Grahame, Decemb. 14. 1633
L. Lochmabony contra Rollock, March 11. 1630
L. Lochtour contra ——— Feb. 27. 1630

Lockhart contra *Lockhart* of Bar, *July* 25. 1626
Lockhart of *Bar* contra his Tennents, *March* 25. 1628
Lockhart contra Tennents of *Bothwel*, *Feb*: 26. 1630
Lockhart contra *Simpſon*, *Feb*: ult. 1637
Lockie contra *Cunninghame*, *Novemb*: 20. 1627
Logan contra L: *Kinblethmont*, *Novemb*: 21. 1623
Logan contra *Hunter*, *Decemb*: 4. 1628
Logan contra L. *Luſs*, *March* 8. 1632
Lookup contra *Downie*, *Feb*: 7. 1632
Lo. *Lorn* contra L: *Panbols*, *March* 3. 1640
E: *Lothian* contra Sir *John Ker*, &c. *Jan*: 18. 1623
Lo: *Lowdoun* contra Parochioners &c. *Feb*: 22. 1628
Lo: *Lowdoun* contra L: *Caprington*, *Dec*. 17. 1631
Lo. *Lovit* contra L: *Philorth*, *July* 25. 1626
Lo: *Lovit* contra Sheriff of *Nairn*, *March* 26. 1628
Loutſut contra *Johnſtoun*, *Feb*: 4. 1642
L: *Ludquhairn* contra L: *Haddo*, *March* 10 & 28. 1632
L: *Lugtoun* contra *Somervail* of *Drum*, July 18. 1628
L: *Lugtoun* contra *Edmiſtoun*, *Decemb*: 11. 1632
L: *Lugtoun* contra *Diſhingtoun*, July 29. 1634
Lundie contra *Gourlay*, *Jan*. 16. 1627
Lundie contra *Lundie*, *Novemb*: 20. 1629
Lyle contra *Hepburn*, *Decemb*: 2. 1628
Lyming contra *Walkers*, *July* 17. 1627
Lyon contra *Scot*, *Feb*: 25. 1623
Lyon contra B: B: of *Forfar*, *June* 28. 1632
Lyon contra *Stuart*, *March* 20. 1633

M:

M'Culloch contra L: *Martint*, *July* 22 & 27. 1626
M'culloch contra *Marſhal* & *Reid*, *June* 19. 1628
M'dougal contra Prior of *Ardchatton*, *Jan*: 10. 1623
M'dougal contra *Aitkin*, *July* 8. 1623
M'duff contra *M'culloch*, *Feb*: 9. 1627
M'duff contra Executors of *M'duff*, *July* 5. 1637
M'duff & *Fleming* contra *Robertſon*, *Feb*: 19. 1639
M'ghie contra *Livingſtoun*, *March* 13. 1627
Megil contra *Edmiſtoun*, *March* 5. 1628
M'cala contra Tennents, *Jan*: 30. 1627
M'kala contra *Watſon*, *Jan*. 19. 1636
M'kay contra L: *Skelmorlie*, *July* 10. 1623
M'kay contra *Menzies*, *March* 14. 1635
M'kenzie contra Town of *Elgin*, *March* 23. 1624
M'kenzie contra his Parochioners, *July* 4. 1627
M'kenzie & *Moncrief* contra *Roſs*, *March* 1. 1637
M'kie contra *Dumbar*, *Decemb*. 9. 1628
M'korinoch contra *Johnſton*, *July* ult. 1632
M'math contra *Nisbet*, *Decemb*: 14. 1621
M'math contra *Power*, *Jan*: 10. 1624
M'math &c. contra Lo. *Ochiltrie* &c. *Jan*: 21. 1624
M'michael contra *M'wharg*, *Jan*: 13. 1624
M'michael contra L: *Caprington*, *Decemb*. 14. 1626
M'millan contra *Gordon* of *Troquhen*, *June* 23. 1627
M'morran contra *Black*. *Jan*: 23. 1624
M'phaderick contra *M'lachlan*, *July* 15. 1626
La: *Manderſtoun* contra L: *Rentoun*, *March* 21. 1637
Martine contra *Birſs*, *July* penult, 1628
Martint contra *Robertſon*, *Jan*. 22. 1629
Martine contra *Livingſtoun*, *Decemb*: 12. 1632
E: *Mar* contra Lo: *Elphingſtoun*, *June* 23. 1623
E: *Mar* contra Lo: *Kildrimmie*, *Feb*: 12. 1624
E: *Mar* contra his Vaſſals, *Jan*: 11. 1628
E: *Mar* contra his Vaſſals, *June* 19. 1628
Marſhal contra *Blair*, *March* 12. 1622
Marſhal contra *Marſhal* & *Yuil*, *Jan*: 9. 1623
Marſhal contra *Marſhal*, *Novemb*. 13. 1623
Marſhal contra *Chalmers*, *Novemb*: 16. 1626
Marſhals Creditors contra *Byres*, *Feb*: 16. 1628
Marſhal contra L: *Drumkilbo*, *March* 12. 1629
E: *Mariſhal* contra his Brother, *July* 29. 1623
E: *Mariſhal* con. Miniſter of *Peterhead*, *July* 19. 1629
E: *Mariſhal* contra his Tennents, *Jan*. 18. 1633
Matheſon contra —— *March* 28. 1629
Matthew contra *Sibbald*, *Decemb*: 19. 1626
Mawer contra *Hadden*, *Jan*: laſt, 1629
Mauld contra L: *Mathers*, *Feb*: 28. 1628
Maxwel contra L: *Wiſtraw*, *July* 19. 1623
Maxwel contra *Mbrair*, *Feb*. 17. 1624
Maxwel of *Pollock* contra *Maxwel*, *Feb*: 27. 1624
Maxwel contra —— *Novemb*: 27. 1624
Maxwel of *Hills* contra Lo. *Drumlanrig*, *June* 23. 1626
Maxwel contra L. *Innerweik*, *Feb*: 7. 1628
Maxwel contra L: *Portrack*, *March* 21 & 26. 1628
Maxwel contra L: *Livingſtoun*, *July* 3. 1628
Maxwel contra L: *Minto*, *Decemb*: 6. 1628
Maxwel contra *Fairlie*, *July* 7. 1629
Maxwel contra *Rodger*, *Feb*: 25. 1630
Maxwel of *Hills* contra *Tennents*, *March* 3. 1630
Maxwel contra Lo: *Herreis*, *March* 24. 1630
Maxwel contra L: *Earliſtoun*, *July* 26. 1631
Maxwel contra La: *Stanly*, *March* 28. 1632
Maxwel contra E: *Nithſdale*, *Decemb*. 19. 1632
Maxwel contra L: *Earliſtoun*, *Feb*: 26. 1633
Maxwel contra Lo: *Herreis*, *March* 9. 1633
Maxwel contra *Murray* & *Wright*, *March* 21. 1634
Maxwel contra *Harſtanes*, *July* 23. 1634
Maxwel contra *Wright*, *Decemb*: 16. 1635
Maxwel contra *Maxwel*, *June* 28. 1636
La: *Maxwel* contra her Tennents, *July* 10 & 15. 1628
La: *Maxwel* contra her Tennents, *March* 18. 1630
La: *Maxwel* contra her Tennents, *July* 28. 1630
L: *Medhop* contra *Hepburns*, *Feb*: 24. 1636
Menzies contra L: *Carſhogle*, *Decemb*: 20. 1631
Donatar of *Meldrums* Eſcheat *Jan*: 23. 1624
E: *Melroſs* contra *L*: *Baſs*, *Novemb*: 25. 1623
E: *Melroſs* contra *Ker*, *Novemb*: 25. 1623
B: B: of *Melroſs* contra *Darling*, *Feb*: 13. 1634
Melvil contra *Drummond*, *July* 3. 1634
Melvil contra Lo: *Melvil*, *March* 2. 1636
Meſſengers contra Lo: *Lyon*, *July* 26. 1631
Methvin contra an appearand Heir, *Jan*: 18. 1622
Middleburgh ſtrangers, *Decemb*. 6 & 8. 1626
Miller contra *Nisbet*, *Jan*: ult. 1632
Miniman contra *Ramſay*, *Novemb*: 25. 1630
Mitchel contra *Barclay*, *July* 25. 1633
Mitchelſon contra *Law*, *July* 2. 1624
Mitchelſon contra *Law*, *July* 26. 1628
Mitchelſon contra *Monbray*, *Jan*: 30. 1635
L. *Monktoun* contra Lo. *Teſter*, *Feb*: 15. 1634
Moncrief contra L: *Balnagown*, *July* 11. 1629
Moncrief contra L: *Balnagown*, July 21. 1630
Moncrief contra L: *Balnagown*, *Jan*: 29. 1635
La: *Monquhanny* con. Com. of St. *And*. *Jan*: 27. 1632
Monro contra Doctor *Kincaid*, *March* 8. 1626
Monro contra *Scots* Executors, *July* 6. 1630
E: *Montteth* contra —— *March* 29 & penult, 1630
Montteth contra L: *Weſtnisbet*, *Feb*: 11. 1642
Montgomrie contra L: *Fergushil*, *Novemb*: 9. 1632
E: *Montroſe* contra *Scot*, *March* 13. 1639
L: *Monymusk* contra *Forbes*, *Decemb*: 18. 1623
L: *Monymusk* contra *Gairden*, *July* 16. 1624
L: *Monymusk* contra L: *Pittarrow*, *Feb*: 21. 1628
L: *Monymusk* contra L: *Leſlie*, *July* 4. 1625
Monypennie contra *Tennents*, *March* 9. 1624
Moris contra *Johnſton*, *March* 7. 1629
Moris contra *Johnſton*, *July* 21. 1620
L: *Moriſtoun* contra L: *Frendraught*, *July* 12. 1628
L: *Moriſtoun* con. Tennents of *Eaſtnisbet*, *Feb*: 19. 1631
L: *Moriſtoun* contra Tennents, *Novemb*: 28. 1635
Mortimer contra *Scrimgour*, *Feb*: 9. 1622
E: *Mortoun* contra *Hamilton*, *July* 28. 1625
E: *Mortoun* contra Feuers of *Muckart*, *July* 13. 1632
Mortoun contra *Scot* of *Harden*, *July* 6. 1625
Moſman contra *Lockhart*, *Feb*. 10 & 14. 1635
Moſman contra E: *Abercorn*, *July* 22. 1635
Moſman contra Tennents, *Feb*: 12. 1642
Mowat contra *Mowat*, *Decemb*: 18. 1623
Mowat contra *Mowat*, *July* 1. 1624
Mowat contra *M'lellan*, *July* 6. 1625
Mowat contra *Lawder*, *July* 9. 1628
Mowat contra B: B: of *Stirling*, *June* 12. 1630
Mowat's Relict contra *Gray*, *Novemb*. 28. 1635
Mowat & *Dagers* contra *Young*, *Feb*: 5. 1636

Mowat & Keith contra L: Ludquharn, Feb: 10. 1642
L. Muckhal contra Tennents, July 13. 1621
L: Muckhal contra Stuart, Novemb: 22. 1621
L: Muckhal contra Innes, Feb: 8. 1622
Mudie contra Lighton & T: Montroſe, Nov: 13. 1634
Mug contra Campbil, Jan: 23. 1635
Muir contra Ahanney & E: Galloway, July 3. 1624
Muir contra L: Rowallan, Feb: 27. 1627
Muir & Thomſon contra Kincaid &c: March 8. 1628
Muir contra Crawfurd, March 11. 1628
Muir contra his Tennents, Feb: laſt, 1629
Muir contra Muir, Feb: 6. 1630
Muir contra Fleming, Decem: 3, 1634
Muir contra Muir, Feb: 11: 1635
Muir contra Calder, Feb: 22. 1637
Muirhead con: Muirheads Creditors, March 9. 1623
Mungal contra Steel, Feb. 18. 1637
L: Murdiſtoun contra Baillie, June 21. 1625
Murray contra Scot of Harden, March, 23. 1622
Murray contra Durhame, Novemb: laſt, 1622
Murray contra Scot, June 21. 1626
Murray con: Iotrometors with Telnds, March 21: 1628
Murray con: Lo: Yeſter, March 3. 1629
Murray con: L: Inchmartine, June 25. 1629
Murray con Roſs, July 16. 1629
Murray con: Miles, March 3. 1630
Murray con: M'Kenzie, March 20. 1630
Murray con: ——— March 23. 1630
Murray con: Cochran, Novemb: 16. 1630
Murray con: Lo: Yeſter, Feb: 12 & 22. 1631
Murray con: Lo: Yeſter, March 29. 1631
Murray con: Oliphant, Feb: 1. 1634
Murray con: Lo: Blantire, March 5. 1634
Murray con. Sinclar, Feb: 10. 1636
Murray con: L: Lammond, June penult, 1637
Murray con: Merchinſtoun, Feb: 2. 1642
E: Murray con: Dumbar, July 21. 1630
Muſbet con: Dog, Feb: penult, 1639

N.

Nairn con: Naper, July 19. 1625
Nairn con: Roſwel, July 24. 1629
Naper con: Rollock, July 27. 1631
Naſmith con: Naſmith, Novemb: 11. 1624
Naſmith con: Hume, Jan: laſt. 1628
Naſmith con: Naſmith, March 18. 1628
Naſmith con: Menzits, July 2. 1628
Naſmith con: Naſmith, July 18. 1629
Neilſon con: Sheriff of Galloway, June 27. 1623
L: New-wark con: his Son, June 26. 1628
L. Newliſtoun con: Inglis, July 17. 1629
Nicol con: Hume, March 6. 1628
Nicolſon con: Baillie, July penult: 1623
Nicolſon & Lile con: Lile, June 15. 1627
Nicolſon con: Burnets, July 7. 1637
Niſbet con: Short, July 15. 1624
Niſbets Bairns contra Whitlaw, July 1 1626
Niſbets Bairns contra their Mother, July 26. 1626
Niſbet con: Hume, March 25. 1628
Niſbet con: Niſbet, Jan: 13. 1629
Niſbet con: La: Abercorn, June 19. 1630
Niſbet con: E: Caſſils, July 6. 1630
Niſbet con: Newlands, Decemb: 10. 1630
Niſbet con: Williamſon, June 22. 1642
E: Nithiſdale con: Irwing, Novemb: 27. 1621
E: Nithiſdale con: ——— July 25. 1623
E: Nithiſdale con: L: weſtraw, Feb: laſt, 1628
La: Nithiſdale con: Pollock &c. March 22. 1627
Noble con: his pupils Mother, July 14. 1627
Norbat Engliſhman con: Hume, July 29. 1624
Norbat Engliſhman con: ——— March 10. 1627

O.

Ochiltree con: Miller, March 22. 1634
L. La: Ogilvie con: Lo: Ogilvie, Jan: 20. 1627
Ogilvie con: Lo: Ogilvie, Decemb. 15 & 23. 1630
Ogilvie con: ——— Decemb: 15: 1638
Ogrie con: Murray, Feb: 3. 1631
Oliphant con: Oliphant, July 15. 1626
Oliphant con: L: Monorgan, Decemb: 5. 1628
Oliphant con: Finnie, Feb: 10. 1629
Oliphant con. Peebles. Decemb: 4. 1629
Oliphant con: E: Mariſhal, March 23. 1630
Oliphant con: E: Mariſhal, Novemb. 26 1631
Oliphant & Ochterlonie con. Tennents, Feb: 19. 1633
Creditors of Oliphant, July 12. 1634
Oliphant con: Tennents, Jan: 19. 1636
Oliphant con: Oliphant, Feb: 24. 1636
Or contra watſon, Feb: 15. 1634
Ord contra Duffs, Feb: 15. 1630

P.

Paipe con: L: wolmet, Feb: penult, 1623
Paipe con: Keith, March 27. 1624
Patterſon con. Hope, Jan. 30. 1622
Patterſon contra Executors of Patterſon, March 18. 1626
Patterſon con: Robertſon, March 7: 1627
Patterſon con: Howart, Novemb: 27. 1629
Patterſon con: Captain Alexander, Decemb: 15: 1629
Patterſon contra B: B: of Stirling. Decem: 3. 1635
Patterſon con: Murray, March penult, 1637
Paton contra Stuart, Decem: 4 & 5. 1623
Paton contra Caddel, Feb: 15. 1627
Peacock contra Peacocks, July 18. 1628
Peebles Exec: con: Town of Perth, Decem: 23. 1626
Peebles contra Knight, June 18. 1629
Peebles con: Lo: Roſs, Jan: 23. 1630
Peebles contra Scot, June 10. 1631
Town of Peebles con: Scot, &c. March 7. 1627
Philip contra L: Roſyth, Feb: laſt, 1628
Pilmuire contra Gagie, Feb: 24. 1637
L: Pinkill contra Kenndy, March 8. 1639
L: Pitfirrin con: the La: his Mother, June 19. 1629
L: Pitmedden & Lo: Elph: con: Smith, July 7. 1627
Lo: Pitſligo con: L: Muckhal, Jan: 26. 1622
Lo: Pitſligo con: Davidſon, July 23. 1630
Pollocks con: Muir & Semple, Feb: 24. 1629
Pollocks con: Fairholm, July 13. 1632
Pool contra Moriſon, Decem: 2. 1628
L: Polwart con: ——— June 29. 1642
Portteous contra Elliot of Stobs, July 2. 1625
Portteous cor: Veitch & Hay, Decem: 7. 1627
Portteous contra Lo: Herreis, Decemb. 11: 1632
Porter contra Baillie, Novemb. 28. 1628
Porter contra Baillie, Decemb. 4: 1628
Porter contra Law, Jan: 29. 1631
Porterfield contra Cunninghame, June 18. 1629
Preſtoun contra Miniſter at ——— Decemb. 20. 1622
Preſtoun contra Executors of Patterſon, July 8. 1634
L: Preſtoungrange con: E. Lothians Heirs, July 22. 1626
L: Preſtoungrange & Dick con: Hamilton, Nov. 8. 1626
Pride contra Thomſon, March 20. 1630
Pringle contra Ker & E. Hume, June 23. 1625
Pringle contra Ker of Lintoun, Feb. 7. 1628
Purves contra Smith, June 13. 1628
Purves contra Purves, June 18. 1628
Purveyance contra L. Craigie, July 2. 1629
Pyronnon con. Executors of Ramſay, Feb. 14. 1627
E: Queensberry con: L: Calderwood, July 20. 1636

R.

Rachelet contra Lawder, July 4. 1628
Rachelet contra Lawder, July laſt, 1628
Rat contra Douglas, Nov: 19. 1628
Rate of Halgreen contra ——— Feb. 24. 1635
Raith con: L: Buckie, March 19 & 22. 1628
L: Ramorney contra Law, July 21. 1636
Ramſay contra E: Rothes, March 23. 1622
Ramſay contra M'kitſon, March 5. 1624
Ramſay contra Hay, Novemb: 19. 1624
Ramſay contra her Curators, Novemb. 25. 1624
Ramſay of Edingtoun contra Hume, Nov. 27. 1629
Ramſay contra L: Canbeath, Decemb. 1. 1630
Ramſay contra Conbeath, Decemb. 18. 1630
Ramſay contra Weir, June 15. 1631
Ramſay contra Pyronon & Edgar, July 12. 1632

Lo: *Ramſay* contra E: *Lothian*, *July* 25. 1623
L: *Randifoord* con: his Tennents, *Feb.* penult, 1623
Rankin contra *Williamſon*, *Feb.* 14. 1633
L: *Raploch* con: Tennents of *Letbem*, *July* 2. 1625
Ratrat contra *Grahame*, *Feb.* 14. 1623
Ratrat contra *Wedderburn*, *March* ult. 1624
Redick contra *Maxwels*, *Jan:* ult. 1632
Redick contra *Dalbatie*, *March* 6. 1632
Reid contra *Brown*, *Decem.* 5. 1628
Reid contra *Gibſon*, *March* 17. 1636
L: *Rentoun* contra La: *Rentoun*, *Jan:* 24. 1629
La. *Rentoun* contra her Son, *July* 7. 1629
L: *Rentoun* contra L: *Wedderburn*, *July* 7. 1632
L: *Rentoun* contra L: *Blackader*, *March* 19. 1633
L: *Rentoun* contra La: *Aiton*, *June* 25. 1634
L: *Rentoun* contra L: *Wedderburn*, *Jan:* laſt, 1635
L: *Rentoun* contra L: *Wedderburn*, *July* 22. 1635
L: *Rentoun* contra L: *Lambertoun*, *Dec.* 20. 1638
Richardſon contra *Hay*, *July* 8. 1624
Richardſon contra *Maxwel*, *June* 18. 1634
Richardſon contra *Sinclar*, *July* penult, 1635
Richie contra *Patterſon*, *Feb:* 23. & *March* 4. 1630
Riddoch contra *Younger*, *March* 9. 1639
Rig contra *M'kenzie*, *Novemb.* 28. 1623
Rob contra *French*, *Feb.* 25. 1637
Robertſon contra *Fleming*, *Feb.* 1. 1622
Robertſon contra *Jameſon*, *Decemb.* 2. 1628
Robertſon contra *Dalmahoy*, *June* 27. 1629
Robertſon contra *Seton*, *Jan:* 19. 1637
Robertſon contra *Brown*, *July* 11. 1637
Robiſon contra her Debitors, *Feb.* 16. 1628
Robiſon contra *White*, *Decemb.* 3. 1635
Rollock contra *Corſbies*, *Nov:* 20. & *Dec.* 5. 1627
Rollock contra *Murray*, *March* 26. 1629
Ronald contra *Strang*, *Jan:* 22. 1625
Roſs contra *Fleming*, *Jan:* 20. 1627
Roſs contra *Blair*, *Jan:* laſt, 1627
Roſs contra *Roſs*, *Feb.* 13. 1627
Roſs contra *Kello*, *Feb.* 27 1627
Roſs contra *Butler*, *Jan:* 13. 1629
Roſs contra B: B: of *Inverneſs*, *June* 25. 1629
Roſs contra ——— *Jan:* 26. 1630
Roſs contra *Hume*, *Jan.* 27. 1630
Roſs contra *Eliot*, *Feb.* 11. 1630
Roſs contra T. of *Perth*, *July* 2. 1630
Roſs contra *Dick*, *Decemb.* 12. 1634
Roſs contra *Dick*, *Feb.* 3 & 6. 1635
Roſs contra *Robertſon*, *June* 25. 1642
L. *Roſlin* contra L. *Haltoun*, *June* 15. 1622
L. *Roſlin* contra his Tennents, *Jan.* 19. 1627
L: *Roſyth* contra *Wood*, *March* 23. 1631
La. *Rothemay* contra *Ogilvie*, *July* 20. 1633
E: *Rothes* con: *Gordon* & *Cuſhney*, *Dec.* 10. 1622
E: *Rothes* contra L: *Grant*, *Decemb.* 13. 1626
E: *Rothes* contra *Balfour*, *March* 8. 1627
E: *Rothes* contra *Wardlaw*, *Jan:* penult, 1629
E: *Rothes* contra *Leſlie*, *December* 9. 1635
L. *Rowallan* contra *Muir*, *July* 25. 1626
L. *Rowallan* contra Relict of *Boyd*, *Feb.* 13: 1630
L. *Rowallan* con: *Boyd*, *July* 2 & 9. 1630
Rowan contra *Schaw*, *July* 12. 1627
Rowan contra *Wardlaw*, *Decemb.* 12. 1635
Rowan contra *Colvil*, *July* 21. 1638
Rough contra *Ker*, *Jan.* 22. & *Feb.* 11. 1631
E. *Roxburgh* contra L. *Langtoun* &c. *Jan.* 26. 1628
E. *Roxburgh* & *Colmſtie* contra — *March* 12. 1629
Ruchead contra Executors &c. *Decemb.* 5. 1623
Rule contra L: *Aiton*, *Jan.* 11. 1628
Rule contra L. *Aiton*, *June* 13. 1628
Rule contra L: *Aiton* & his Tennents, *July* 26. 1628
Rule contra L. *Billie*, *July* 24. 1632
Rule contra *Hume*, *June* 19. 1635
Rule contra ——— *Feb.* 22. 1639
Ruſſel contra L. *Kerſe*, *July* 26. 1626
Ruſſel contra *Patterſon*, *March* 19 & 25. 1629
Ruſtel contra *Dick*, *March* 24. 1632
Rutherfoord contra *Halcro*, *Novemb.* 20. 1630
Rutherfoord &c. con. their Creditors, *Feb.* 26. 1633
Ruthvens contra *Naſmith*, *Jan.* 18. 1628
La. *Ruthven* & *Roſs* contra *Naſmith*, *Feb.* 23. 1628
Rynd contra E. *Dumfermling*, *March* 22. 1634

S.

S *Almond* contra *Lindſay*, *July* 19, 1623
S *Salmond* contra *Orr*, *July* 22. —— 1630
Salmond contra *Orr*, *Jan.* 13. 1631
L: *Saltcoats* contra *Brown*, *Feb:* 14. 1623
Samuel contra *Samuel*, *Feb.* 13. 1627
Sandilands contra *Robertſon*, *Feb.* 7. 1624
Scarlet contra *Patterſon*, *Feb:* 27. 1630
Scarlet contra *Paterſon*, *Decemb.* 7. 1631
Scarlet contra *Paterſon*, *Jan.* 25. 1631
Schaw contra *Auchinleck*, *Feb:* 5. 1623
Schaw contra *Maxwel*, *Novemb.* 28. 1623
Schaw contra *Gray*, *Jan.* 7. 1624
Schaw contra *Balfour*, *Decem.* 5. 1626
Schaw contra *Kinroſs*, *March* 10. 1629
Schaw contra L: *Dunipace*, *June* laſt, 1629
Schaw contra D: of *Lenox*, *July* 10. 1630
Schaw contra her Son in Law, *Decemb:* 11. 1632
Sclaiter contra *Roſs*, *Novemb.* 22. 1631
Scot contra *Livingſtoun*, *Decemb:* 5. 1623
Scot Advocat contra *Suitie*, *July* 28. 1625
Scot of *Bonningtoun* contra *Scot*, *Decemb:* 20. 1626
Scot contra *Cockburn*, *March* 6. 1627
Scot contra *Banks*, *March* 4. 1628
Scot contra Tennents of *whitſted*, *March* 5. 1628
Scot contra Creditors of *Diſhingtoun*, *March* 21. 1628
Scot contra Lo: *Drumlanrig*, *July* 3. 1628
Scot contra *Turnbul*, *Jan.* 21. 1629
Scot contra *Deans*, *July* 16. 1629
Scot contra *Rae*, *Decemb.* 1. 1629
Scot contra Feuers of *K. Barns*, *Jan.* 29. 1630
Scot contra *Scot*, *July* 2. 1630
Scot contra ——— *July* 24. 1630
Scot contra *Dickſon*, *March* 19. 1631
Scot contra *Brown*, *Jan.* 29: 1633
Scot contra *Lindſay*, *July* 22. 1635
Scot contra *Eliot* of *Stobs*, *March* 11. 1636
Scot contra *Scot*, *March* 28. 1637
Scot contra *Drummond*, *June* 16. 1637
Scot contra *Hart*, *Jan.* 24. 1642
L: *Scotſtarbet* contra *Boſwel*, *March* 6. 1639
Scougal contra *Binnie* &c. *Jan.* laſt, 1627
Scougals contra *Binnie* &c. *Feb.* 1. 1627
Scrimzeour contra *Lawſon*, *Jan.* 22. 1629
Scrimzeour contra L. *Denmiln*, *June* 24. 1630
Seaton & *Elcis* con: Creditors of *Acheſon*, *Dec.* 11. 1622
Seaton of *Meldrum* Supplicant, *Novemb:* 16. 1626
Seaton contra *Seaton* of *Schelin*, *Jan.* 18. 1628
Seaton contra *Hume*, *March* 26. 1631
Seaton contra *Hepburn*, *Jan.* 15, 1634
Seaton contra *Clerk*, *Decemb.* 12, 1635
Lo. *Semple* contra *Blair* of *Halvie*, *Feb.* 16. 1627
Semple contra *M'niſh* & *Dobie*, *March* 17 & 24. 1630
Semple &c. contra *Brown*, *Feb.* 15. 1631
Service contra *Chalmers*, *Feb.* 23. 1627
Shanks contra *Eiſtons*, *Jan.* 15. 1635
Sharp contra *Sharp*, *Jan.* 14. 1631
Sibbald contra *Wallace*, *Feb.* 11: 1636
L. *Silvertounhil* contra his Father, *Jan.* 18. 1622
L. *Silvertounhil* contra his Sifters, *June* 29. 1624
Simpſon contra L. *Balgonie*, *Feb.* 16. 1627
Simpſon contra *Boſwel*, *Feb.* 9. 1628
Simpſon contra *White*, *March* 20. 1633
Sinclar contra *Sinclar*, *Feb.* 13. 1624
Sinclar contra *Bruce*, *June* 23. 1627
Sinclar contra *Murray*, *July* 16. 1635
Skeen & *Forbes* con: L: *Blyth*, *July* 16. 1629
Skeen contra *Betſon*, *Jan.* 17. 1632
Skeen contra ——— *July* 15. 1637
Slewman contra *Wardlaw*, *July* 24. 1629
L. *Smeton* contra *Spiers* Relict, *Novemb:* 29. 1626

L. Smeton con: Vaſſals of Dunfermling, March 15. 1631
L. Smeton contra L. Innerweek, July 19. 1637
La: Smeton contra the L. Smeton, Jan. 29. 1639
Smith contra Wood, Decemb. 20. 1621
Smith contra Ellis, Feb. 1. 1622
Smith contra B: B: of Elgin, March 27. 1623
Smith contra Andersons Relict, June penult, 1624
Smith contra —— a Cautioner, July 8. 1626
Smith contra Gray, July 14. 1626
Smith con: B:B: of Northberwick, July 25: 1626
Smith contra Gray, Novem. 23. 1630
Smith contra Gray, Decemb: 8. 1630
Smith contra Miller, March 8. 1634
Smith contra Hepburn, March 2. 1637
Somervail contra Creditors, June 25: 1624
Somervail contra L: Edmiſtoun, March 22. 1626
Somervail contra Halcrow, July 7. 1626
Somervail contra Stirling, Feb. 2. 1627
Somervail contra Heriot, March 13. 1628
Somervail of Drum contra Somervail, March 11. 1630
Somervail contra Gordon, June 19. 1630
Somervail contra Somervail, March 23. 1631
Souter contra —— Decemb. 9. 1628
Souter contra Cramond, Decem: 5. 1635
L. Spot contra Kellie, July 22. 1631
Stalker contra Nemo, July 8. 1625
La. Stanybil contra her Son, July penult, 1625
La: Stanypath con: her Sons Relict, &c. July 27. 1624
Stark contra Thom, March 20. 1630
Stark contra L: Airth, Decem. 18. 1630
L: Steel contra —— Feb. 23. 1622
Stuart contra L. Weſtnisbet, Jan: 30. 1622
Stuart contra Lo: Gray, Jan: 29: 1623
Stuart contra Scot, March 25. 1623
Stuart contra Fleming, July 24 & 29. 1623
Stuart contra Hume, Feb: 21 1624
Stuart contra —— March 6. 1624
Donatar of Stuarts Eſch. con: Ten: July 24. 1624
Stuart contra Mayne & Smith, Jan. 15. 1625
Stuart of Barey contra Bruce, Feb. 4. 1625
Stuart contra E: Hume, &c. July 12. 1626
Stuart contra E: Hume, July 14. 1626
Stuart contra Achanna, July 22. 1626
Stuart contra ſeverals in Glaſgow, July 25. 1626
Stuart contra Commiſſar of Dunkel, Decemb: 19. 1626
Stuart contra Feuars of Coldingham, Jan. 25. 1627
Stuart contra Eoſdem, Feb. 7. 1627
Don. to Stuarts Liferent con: a Debtor, Feb. 10. 1627
Stuart contra Fleming, March 9. 1627
Stuart of Coldingham con: L: Widderburn, June 29. 1627
Stuart contra Tenn. of Coldingham, Jan. 30. 1628
Stuart contra Wilſon, Feb. 11. 1629
Stuart con: Sheriff Clerk of Bamff, Jan. 19. 1630
Stuart contra La: Samuelſtoun, March 10: 1631
Stuart contra Lundie, December 7. 1632
Stuart contra Bannerman, Feb. 16. 1633
Stuart contra Henderſon, March 8. 1636
Stuart contra Ged, Novem. 16. 1636
Stuart contra Stuart, March 17. 1637
Stuart contra Stuart, Decem: 1. 1638
Stuart con: Com: of St. Andrews, Decem. 15: 1638
Stuart contra Gordon, March 6. 1639
Stuart contra Stuart, March 23. 1639
Stevin contra Govan, Feb. 14. 1622
Stevins Relict contra Banks &c. Feb. 2. 1628
Stevin contra Paterſon, Feb. 14. 1629
Stevinſon con: Stevinſon, March 4 & 6. 1623
Stevinſon con: L. Craigmiller, Jan: 23, and 27. 1624
Stevinſon contra L. Craigmiller, Feb. 3. 1624
Stevinſon contra Job, July 25. 1629
Stevinſon contra Law, Jan. ult. 1633
T. Stirling contra L. Kerthil &c. June 24. 1625
Stirling contra La. Aulbar, June 15. 1626
Stirling contra Panter, March 8. 1627
Stirling con: Panter, Jan. penult. 1629
Stirling Weavers con: unfreemen, March 21. 1628
Stirling con: Panter & Ogilvie, July 25. 1628
Stirling con: M'Jederick, Novemb: 26. 1628
Stirling contra Tennents, Decem: 15. 1630
Stirling contra Hamilton, March 9. 1636
Stirling contra Cunninghame, Jan. 25. 1642
Pro. of Stirling contra Livingſtoun, Novemb. 20. 1638
Stoddart contra Cockleſerrie, July 13. 1632
V. Stormonth contra his Vaſſals, June 23. 1625
V. Stormonth contra Cheap's man, Decem. 1. 1626
V. Stormonth contra Hunter, June 10. 1630
Strachan contra Scot, June 8 & 15. 1624
Strairlie contra Lindſay, Decem. 16: 1628
Straton contra Lo. Balmerinoch, July 21. 1624
Straton contra his Mother, July 3. 1632
Straton contra L: Chirnſide, Jan. 27. 1636
Swinton contra Miniſters Relict, June 16. 1629
L. Swinton contra L: Weſtnisbet, Feb. 26. 1633
Symmor contra L. Balgillo, July 3. 1630

T.

Tailziſer contra Wilſon, July 16. 1629
Tailziſer contra Drummond, June 11. 1631
L: Tarbet contra Cunninghame, July 2. 1630
Temple contra L: Whittinghame, Jan. 20. 1636
Tennent contra Tennents, July 28. 1626
Tennent contra Futhie, July 4. 1637
K. Theſaurer contra Monteith, July 29. 1613
Thomſon contra L: Marthil &c. Decem. 13. 1622
Thomſon contra Edgar, July 8. 1623
Thomſon contra Law, Feb. 17. 1624
Thomſon contra Heriot, Jan: 19. 1627
Thomſon contra Merſtoun, Feb. 17. 1628
Thomſon contra Merkland, Jan: 15. 1630
Thomſon contra Rig, Novemb: 25. 1630
L. Thorntoun contra Keith, Jan. 10: 1627
Sheriff of Teviotdale con. Gladſtanes, Feb: 12. 1636
Lo. Torthorril con: E: Queensberry, March 26. 1636
L. Touch contra E. Hume, March 9 & 17. 1624
L. Touch contra E. Hume, June 9. 1614
L. Touch contra Hardenſmile, June 20. 1627
L. Touch contra L. Carnock, June. pen. 1627
Touris contra Dowglas, July 29. 1625
Traquair contra Blaſhiels, March 10. 1626
Troup contra Lo. Herris, Novemb: 16. 1624
Troup contra Lo. Herris, July 12. 1625
L. Tulliallan contra L. Clackmannan, July 28. 1626
Don. to E. Tullibarden's Eſt. con. Adinſton, July 5. 1622
E. Tullibarden contra Bar: Monetsk, March 2. 1636
E: Tullibarden contra Robertſon, March 24. 1637
Turnbul contra L: Blanern, July 11. 1622
Turnbul contra Ker, Novemb: 24. 1624
Turnbul contra Scot of Hartwoodmires, July 8. 1626
Turnbul contra Matheſon, July 12. 1626
Turnbul contra Scot, Novem. 25. 1626
Turnbul contra Colmſlie, Jan. 27. 1630
Turnour contra Ker, Novemb. 24. 1632
L. Tuſhilaw contra Scot, Decemb: 11. 1638

W.

Walker contra Polwart, June 19. 1635
Wallace contra Mcdougal, Feb: 12. 1623
Bairns of Wallace con. their Broth. Nov. 11 & 13. 1624
Wallace contra Walker, Novemb. 18. 1624
Wallace contra his Tennents, July 18. 1626
Wallace contra Harvie, July 11. 1627
Wallace contra Muir, July 7 & 9. 1629
Wallange contra Kincaid, July 17. 1630
Wardlaw contra Wardlaw, July 10. 1629
L. Wards contra L. Dinkinty, July 26. 1628
L. Wards contra T. of Dinkinty, Feb: 9. 1628
L. Wards contra L. Balcomy, July 2 & 14. 1628
L. Wards contra his Creditors. March 23. 1630
Warnock contra Anderſon, Novemb: 22: 1633
Warnock contra Hamilton, March 7. 1637
Wat contra Dobie, Jan. 18. 1625
Watſon contra Watſon, Feb: 6. 1623
Watſon contra Grinlaw, June 11. 1623
Watſon contra Lo: Kinclevin, July 2. 1624

Watſon contra *Reid* of *Aikenhead*, *Nov.* 21 & 22. 1628
Watſon contra *Orr*, *March* 21. 1634
Watſon contra *Aiton*, *Feb.* 7. 1635
L. *Wauchtoun* contra L. *Innerweik* 30. *Jan.* 24. 1627
L. *Wachtoun* contra *Hame*, *June* 26. 1635
Weir contra *Law*, *March* 26. 1628
Weir contra *Butler*, *Decemb.* 1. 1629
Weddel contra E. *Finlator*, *Feb.* 8. 1642
D. to L. *Widderburne* E. con. *Douglas* *March* 8 & 26. 1628
Widderburn contra *Stuart*, *Feb.* 4. 1634
L. *Weem* contra L. *Gairntully*, *Jan.* laſt, 1633
L. *Weem* contra *Stuart*, *Decemb.* 21. 1633
Weems contra *Davidſon*, *July* 23. 1625
Weems contra L. *Kincraigie*, *March* 21. 1629
Weems contra ——— *Feb.* ult. 1637
Weems contra *Maitland*, *March* pen. 1639
Weir of *Blackwood* contra *Durham*, *July* 20. 1622
Weir Relict of *Ker* contra *Ker*, *Decemb.* 16. 1630
Weir contra *Arnot*, *March* 17. 1636
Veitch contra *Hay*, *December* 13. 1627
Veitch contra *Robiſon*, *Jan.* 9. 1630
Relict of *Veitch* contra ——— *March* 15. 1622
Veitch contra L. *Horsburgh*, *Jan.* ult. 1637
Veitch contra *Medengal*, *March* ult. 1637
Veitch contra *Veitch*, *Feb.* 16. 1642
Welwood contra *Taylor* & E. *Dumf.* *July* 19 & 28 1625
La. *Weſtmerland* con. La. *Hame*, *Decem.* 4. 1638
La. *Weſtmerland* contra La. *Hame*, *Jan.* 29. 1639
L. *Weſtruſbet* contra *Morriſon*, *March* 27. 1627
L. *Weſtruſbet* contra L. *Swinton*, *Feb.* 21. 1635
Wiſſon contra *Stuart*, *Novemb.* 20. 1628
White contra ——— *June* 28. 1623
White contra *Douglas*, *March* 5. 1629
White contra Miniſters Relict, *Decemb.* 16. 1629
Whiteſword contra *Johnſton*, *Decemb.* 2. 1628
Whiteſword contra *Cleland*, *March* 9. 1630
Whiteſword contra L. *Johnſton*, *June* 19. 1630
Whiteſword contra L. *Cruchlaw*, *March* 5. 1634
Whitelaw contra Lo. *Ruthven*, *July* 10. 1630
Lo. *Whittingbame* contra *Spence*, *Jan.* 29. 1628
L. *Whittingbame* contra the La. *Decemb.* 13. 1631
E. *Wigtoun* contra parochioners of *Stobo*, *Dec.* 11. 1623
E. *Wigtoun* contra E. *Caſſils*, *March* 5. 1630
E. *Wigtoun* contra E. *Caſſils*, *June* 17. 1630
Wilkie contra *Muirhead*, *March* 7. 1629
Williamſon contra *Law*, *March* 1. 1623
Williamſon contra *Tennent*, *Feb.* 22. 1627
Williamſon contra L. *Balgillo* *Feb.* 17. 1631
Williamſon contra *Hagit*, *Novemb.* 28. 1635
La. *Williamſon* contra *Caſſny*, *Nov.* ult. 1630
Wilſon contra *Aitkin*, *March* 3. 1626
Wilſon contra *Lindſay* *Feb.* 17. 1627
Wilſon contra Lo. *Drumlanrig*, *March* 7. 1628
Wilſon contra *Hay*, *July* 2. 1628
Wilſon contra *Stuart*, *July* pen. 1629
Wilſon contra *Tinto*, *July* 9. 1631
Wilſon contra *Nicolſon*, *Jan.* ult. 1633
Wilſon contra *Williamſon*, *Jan.* 24. 1642
Winram contra *Danſken's* Executors, *Decemb.* 6, 1626
Winram contra Relict of *Winram*, *Decemb* 4. 1629
Winram contra *Williamſon*, *March* 26. 1631
E. *Winton* contra ——— *Decemb.* 14. 1621
E. *Winton* contra Tennents of *Touch*. *July* 29. 1625
E. *Winton* contra La. *Dumfermling*, *July* 12. 1626
La. *Winton* contra *Scot*, *June* 25, 1623
Wiſhart contra *Falconer*, *June* 23. 1625
Wolfe contra *Scot*, *Jan.* 18. 1637
Wood of *Craig* contra ——— *March* 4. 1623
Wood contra *Weddel* & *Wallace*, *Feb.* 5. 1624
Wood contra *Blair*, *Decemb.* 11. 1632
Wood contra *Stuart*, *March* 21. 1637
L. *Wrie* contra *Skeen*, *Jan.* 20. 1630
Wright contra *Stirk*, *Feb.* 13. 1629
Wright contra *Wright*, *Feb.* 18. 1630
Wright contra *Wright*, *March* 2. 1630
Wright contra *Lawder*, *March* 22. 1634
Urquhart contra E. *Caithneſs*, *July* 9. 1629
Urquhart contra *Barclay*, *March* 6. 1639
Wyllie contra *Ballantine* of *Braghtoun*, *Nov.* 15. 1626
Wyllies Balrnes contra *Hay*, *March* 29. 1626
Wyllie contra *Roſs* & B. B. of *Wigtoun*, *June* 25. 1612

Y.

Yair contra *Ramſay*, *Decemb.* 2. 1628
Yeoman contra *Stuart*, *March* 17 1629
Lo. *Yeſters* Heirs con. Lo. *Balclengh*, *March* 20 & 26. 1623
Lo. *Yeſter* contra E. *Balclengh*. *Feb.* 10. 1624
Lo. *Yeſter* contra E. *Balclengh*, *March* 2. 1627
Lo. *Yeſter* contra ——— *Decem.* 19. 1630
Lo. *Yeſter* contra L. *Innerweik*, *March* 21. & 25. 1635
Young contra *Murray*, *June* 26. 1629
Young contra B. B. of *Montroſs*, *Decem* 15. 1629

D A LIST

A LIST Of the Heads of the followving INDEX.

A.

ABbay-Lands.
Abyding-by.
Acceptation.
Accreſcing of Rights.
Active Title.
Acts of Parliament.
Adjudication.
Adminiſtrator.
Admiral.
Adultery.
Advocation.
Advocats.
Alienation.
Aliment.
Allanerly.
Allowance.
Alternative.
Annat.
Annexation.
Annexis Connexis.
Annua Præſtatio.
Annualrent of Money.
Annualrent of Lands.
Annus Deliberandi.
Apochæ.
Appearand Heir.
Appryſing.
Approbation.
Arbitration.
Arreſter.
Arreſtment.
Aſſignation.
Aſſiſe.
Aſtriction.
Auditors.
Authors.

B.

BAckbond.
Backtack.
Ballizies.
Bairn of the Houſe.
Bankrupt.
Barron.
Barrony.
Baſe Infeftment.
Baſtard.
Baſtardie.
Behaving as Heir.
Beneficed perſons.
Bill of Exchange.
Biſhop.
Blank Bonds.
Blench Duties.
Bloodwits.
Bona fide poſſeſſor.
Bona fide Conſumpti.
Bona fide payed.
Bond.
Erleves.
Burgeſſes.
Burghs.

C.

CAncelled Writs.
Caption.
Cauſe of a Bond.
Cauſe onerous.
Cautio Juratoria.
Caution.
Cautioner.
Cedent.
Chamberlain.
Chapland-Lands.
Chaptor.
Charge.
Charge to Enter Heir *&c.*
Charge of Horning *&c.*
Charter.
Children.
Chirographum.
Church-Lands.
Circumduction of the Term.
Circumvention.
Citation.
Clandeſtine Deeds.
Clauſe.
Clerk.
Coalziers.
Codicil.
Co-executors.
Cognitionis cauſa.
Collatio omnium bonorum.
Collation and Inſtitution.
Command.
Commiſſars.
Commiſſion.
Commiſſioners.
Commontie.
Common-good.
Compearance.
Compenſation.
Competent and omitted.
Compryſer.
Compryſing.
Compt-Books.
Concluſion.
Concurring in Proceſs.
Condition impreſtable.
Conductio & Locatio.
Confeſſion.
Confirmation by a Superior.
Confirm: of a Teſtament.
Confuſion.
Conjunct & Confident perſons.
Conjunct-fee-Lands.
Conjunctly and ſeverally.
Conqueſt.
Conſent.
Conſignation.
Conſuetude.
Contigue and Diſcontigue.
Continuation of Summons.
Contract.
Contract of Marriage.
Contravention.
Convent.
Corns.
Corrupting of Witneſſes.
Craft-men.
Creditor.
Crounrie.
Cumulatio actionum.
Curators.
Curiality.
Cum curiis.
Cuſtom.
Cuſtoms.

D.

DAmnage.
Date.
Dative ad omiſſa.
Deads-part.
Dean of Gild.
Deanrie.
Death-bed.
Debitor.
Debitor non præſumitur donare.
Declaration.
Declarator of Liferent *&c.*
Declinator.

De-

Decreet.
Decreet Arbitral.
Decreet *cognitionis causa.*
Decreet *in foro &c.*
Defender.
Deforcement.
Delivery.
Denunciation.
Depositation.
Designation.
Destination.
Duties.
Diligence.
Diminution.
Direction.
Discharge.
Disclamation.
Discussing.
Disparagement.
Dispensation.
Disposition.
Dissolution.
Distress.
Division of a Testament.
Divorcement.
Dolus.
Donatar.
Donatio omnium Bonorum.
Don. inter virum & uxorem.
Donatio mortis causa &c.
Double-poynding.

E.

Edinburgh.
Ejection.
Electio:
Emptio & venditio.
Entry.
Erection.
Error.
Escheat.
Eviction.
Excambion.
Exception.
Excommunication.
Execution.
Executor.
Exhausting of Testaments.
Exhibition.
Exoneration.
Extent.
Extinguishing of Rights.
Extrajudicial.

F.

Fact.
Factum antiquum.
Factor.
Fair.
Falshood.
Failzie.
Familia Paterna.
Farms and Duties.
Father.
Fear and Force.
Fee of Sums.
Feus.
Feu-duties
Fiscus.
Fishing.
Forsaulture.
Forraign Bonds & Writs.
Foris-familiation.
Fraud.
In fraudem Creditorum.
Fructus Consumpti &c.
Furlosity.
Furnishing.
Forthcoming.

G.

General.
Gift.
Gleib.

H.

Heir.
Heir of a second Marriage.
Heirs-portioners.
Helps of provision &c.
Heirship-moveables.
Heretable.
Herezeld.
Hesp and Staple.
High-wayes.
Holden as Confest.
Holograph.
Homologation.
Honour.
Horning.
Hospital.
Housemails.
Husband.
Hypotheq;
Hyrer, or conductor *Equi.*

I.

Idiot.
Impignoration.
Imployment.
Importance.
Imprisonment.
Improbation.
Incident Diligence.
Indefinitly.
Pro Indiviso.
Infeftment.
Inferior Judges.
Inhibition.
Injuria.
Innovatio.
Insisting.
Instrument.
Interdiction.
Interest.
Interruption.
Intertainment.
Intimation.
Intromettor.
Intrusion.
Invecta & illata.
Inventar.
Irritant Clause.
Ish and Entry.
Judge.
Juramentum in Litem.
Jurisdiction.
Jus superveniens.
Jus Tertii.
Jus Mariti.

K.

King.
Kings Vassal.
Kirklands.
Kirk Patrimonial.
Kirk Session.
Kindly Tennents.

L.

Lawborrows.
Lectus Ægritudinis.
Legacie.
Legal.
Legitima.
Leith.
Letters.
Licence.
Life.
Liferent-Escheat.
Liferenter.
Liferent-right.
Liquidation.
Litigious.
Litiscontestation.
Locatio & conductio.
Locus pœnitentiæ.
Lords of Erection.
Lords of Session.
Lousing.
Lyon King at Arms.

M.

Magistrats of Burghs.
Maills and Duties.
Majority.
Mala fides.
Malversation.
Mandatum.
Manse.
Marriage.
Masters.
In Meditatione fugæ.
Medium impedimentum.
Members of Session.
Messengers.
Metts and Measures.
Metus Causa.
Miln.
Minister and Session.
Minor.
Minor Restituitur.
Minor non tenetur placitare.
Minority.
Minut.
Missive Letters.
Molestation.
Money.
Mortification.
Mortis Causa.
Moss.
Mother.
Moveable.
Multures.
Mutual Contracts.

N.

Negative.
Nonentry.
Note.
Nottar.
Novatio.
Noviter veniens ad notitiam
Novo damus.
Noxa Caput sequitur.
Nullity.

O.

Oath.
Obleidgment.
Offer.
Office of Crowner &c.
Officers.
Officium nobile.
Examination *ex officio.*
Omissa & male appretiata.
Onerous Cause.
Order of Redemption.

P.

Action.
Parliament.

Parſon.
Parties Intereſt.
Partners.
Parts and Pertinents.
Paſſive Title.
Paſturage.
Patent.
Patron.
Patronage.
Payment
Penalty.
Pendente lite.
Penſion.
Perſonal.
Pignus.
Placitare.
Pleas.
Poynding of Goods.
Poynding of the Ground.
Portion natural.
Poſſeſſion.
Poſſeſſory Judgment.
Prebendary.
Precept of Seaſin.
Precept of *Clare conſtat* &c.
Precepts on Retours.
Preceptory.
Precognition.
Predeceſſors and Authors.
Preference.
Prejudicial.
Premonition.
Preſcription.
Preſentation.
Praſtatio annua.
Preſumption.
Prevention.
Price.
Prince.
Priority.
Priſoner.
Privat Infeftment.
Privilledge.
Probation.
Proceſs.
Procuratory.
Procuratorfiſcal
Production.
Profits.
Promiſe.
Proprietar.
Protection.
Proteſtation.
Provoſt.
Proving of the Tenor.
Proviſion.
Publick Infeftment.
Pupil.
Purging of Faillzies.
Purſuer.

Q.

QUallfied Oath.

R.

RAtification.
Real Rights.
Rebel.
Recept.
Recognition.
Reconvention.
Redemption.
Reduction.
Regiſtration.
Regreſs.
Relict.
Relief.
Relocation.
Removing.
Rental.
Renunciation.
Report.
Reprobator.
Requiſition.
Res inter alios acta.
Reſervation.
Reſignation.
Reſtitution.
Retention.
Retour duty.
Reverſion.
Reviving of Rights.
Revocation.

S.

SAtisfaction.
Seaſin.
Sequeſtration.
Service.
Servitudes.
Seſſion.
Sheriff.
Silver-plate.
Simulation.
Single-Eſcheat.
Singular Succeſſor.
Siſters.
Slaughter.
Society.
In ſolidum.
Solutio.
Sons.
Spuilzie.
Stante Matrimonio.
Steelbow-goods.
Stent.
Stipends.
Stipulatio.
Stranger.
Submiſſion.
Subſcription.
Subſidiary action.
Subſtitution.
Sub-Tack.
Sub-Vaſſal.
Succeeding in the vice.
Succeſſor.
Summons
Sunday.
Superior.
Suſpenſion.

T.

TAck.
Tackſman.
Tailzie.
Tailzier.
Taxation.
Taxative.
Teinds.
Tenor.
Tennent.
Terce.
Tercer.
Term.
Teſtament.
Teſtimonial.
Thirlage.
Titles of honour.
Titular.
Tocher.
Tolerance.
Town Clerk.
Transferring.
Tranſlation.
Tranſumpt.
Truſt.
Turpis cauſa.
Tutor.

U.

UN-free Craftſ-men.
Union.
Univerſal Intromettor.
Univerſal Legatar.
Univerſity.
Unlaws.
Uſe of payment.
Uſury.

V.

VAccance time.
Vacua poſſeſſio.
Valuation.
Vaſſal.
Vicecarage.
Viccars.
Vice.
Victual.
Violent profits.
Vis & metus.
Viciation.
Vitious Intromiſſion.
Voluntar Rights.

W.

WAird or Priſon.
Wakening.
Ward and Marriage.
Warning.
Warrandice.
Wife.
Witneſs.
Wodſet.
Wrack.
Writ.
Writer.

INDEX

INDEX

Of the Contents of the Lords Deciſions, Obſerved by the Lord Durie:

Wherein the Figure *Denotes, the* Page; *and the* Name *before it, the* Deciſion.

By *W. A.*

A.

A Bbay-Lands, how deſigned for Gleibs, *Nairn*, 467. *vid*: Deſignation.

Abiding by a Writ, *Ker*, 751. *vid*: Improbation.

Acceptation of a poſterior Inteſtment for a Bond, *Chiſholm*, 656. of a Tack for a Rental, *L: Strabrock*, 689. of a Sum for a Liferent, *Lyon*, 680. *vid*: promiſe.

Accreſcing of Rights, as of Bairns portions, *Wallace*, 146. by a Mother to a Pupil, *White*, 433. of the Office of Executry, *Young*, 451. *vid*: *Jus ſupervenions*.

Active Title, In an Improbation, Lo: *Teſter*, 59. and *Morits*, 435. as Seaſin by Heſp and Staple to an Heir E: *Melroſs*, 83. In real Actions, *Wylie*, 232. and a Teſtament Confirmed in *England* to a Purſuit here, *Lawſon*, 277. an Extract of a Compryſing, *Ker*, 311. It cannot be made up by Oath, *Maxwel*, 381. a Seaſin within Burgh for Maills and Duties, *Yeoman*. 437.

Act of Parliament anent Metts and Meaſures, L: *Barns*, 20. *Salvo Jure*, E: *Roibes*, 38. anent Compryſings, how extended *ad præterita*, Viſc: *Annand*, 98. anent Victual Annualrents, 1597. Lo: *Corvil*, 343.

Adjudication upon a Renunciation is only of Heretables, *Coupir*, 264 and of Heirſhip Moveables, 430. therein like to Compryſings. *Campell*, 862. upon a general Charge to enter Heir *Whittlaw*. 529. needs no ſpecial Charge as Compryſings, *Ibid*: In one Summons with Maills and Duties. *Corſer*, 867. abides continuation where there is no privilledge, and the Summons not inſtantly verified, *Mowat*, 133.

Adminiſtrator in Law, a Father to his Baſtard, L: *Touch*, 120. to a Son, *Lands*, 419. his power as ſuch, *Hume*, 781. a Bond granted by a Daughter *in familia* without his conſent, null, *Stuart*, 886.

Admiral how he has right to Shipwrack, *Hamilton*, 39. has the privilledge of cauſing find Caution *judicio ſiſti Judicatum ſolvi*, *Stuart*, 821. *vid*: Wrack.

Adultery, a Bond granted to a Woman and her Bairns in Adultery, not ſuſtained, *Weir*, 31.

Advocation of Brieves from one Judge prohibits all others, *Cranſton*, 74. of the Confirmation of a Teſtament, *Arthurs*, 228. of Slaughter, *Kincaid*, 413. of Deforcement *Lands*, 527. to a day, *Richardſon*, 776.

Advocation how to be Intimat, 311. Suſtained, though the uſer was thereafter debarr'd by Horning, *Charters*, 710. upon Conſanguinity, *Gemmil*, 412. from the Donatars own Court, Lo: *Lorn*, 498. from the Admiral, it doth not liberat the Caution found there, *Stuart*, 821.

Advocats muſt Depone in Exhibitions againſt their own Clients, *Beiſon*, 396.

Alienation, *vid*: Aſſignation, *vid*: Diſpoſition.

A.

Aliment refuſed againſt the Goodfir, *Hamilton*, 457. but Suſtained againſt Liferenters and Wardatars upon the Act of Parliament, *Hepburn*, 755. and againſt a Father *Jure naturæ*, L: *Ramorny*, 819. and againſt a Mother Liferenting all, *Davidſon*, 639. If ſhe be otherways competently provided, 754. even though the Heir has no Ward Lands, *Finnie*, 573. its granted only to Heirs, or apparand Heirs, Minors or Majors who want a Calling. *Sibbald*, 794.

Aliment granted to a Wife againſt her Husband out of the Countrey, or Divorced. La: *Buchannan*, 466. and Ls: *Foulis*, 251. not compenſable with his Debts. *Tenent*, 848. nor Arreſtable, L: *Weſtinisbet*, 295. but ſhe therein preferred to other Creditors *Walker*, 767. yet does not purge the Relicts vitious Intromiſſion, *Cochran*, 121. the Summons abides no Continuation, *Hepburn* 755. *vid*: Obligment.

Allanerly, how interpret, *Oliphant*, 603.

Allowance of a Compryſing how refuſed after the Debitors death, *Guthrie*, 185.

Alternative, in whoſe Election, *Brown*, 69.

Annat, how payed to the Miniſters Relict *notandum*, 89. It needs no Confirmation, *Ibid*.

Annexation of Lands how they muſt be diſſolved before they can be diſpon'd, L: *Wardis*, 394.

Annexis Connexis, how to be interpret and extended, Lo: *Berthwick*. 23.

Annua præſtatio, *vid*: Blench Duties.

Annualrent of Money not due *niſi ex pacto*, *Hamilton*, 123. *vel ex lege*, as by Act of Parliament after Denunciation, though *via ordinaria*, *Purveyance*, 455. *vel ex mora*, L: *Thorntoun*, 254. or for the price of Lands, *Durie*, 110 or elſe the Rents of the Lands, *Stirling*, 286. or out of a double *Engliſh* Bond, *Lawſon*, 283. or by uſe of payment, *Forreſter*, 353. or by bearing one years Annualrent, ſo continued till payment *Zair*, 403. but not found probable by Witneſſes, *Dalrymple* 639.

Annualrent how not due by a Father for Tocher, *Hamilton*, 123. nor by Magiſtrats for Rebels eſcapt, *Halyburton*, 205. nor by a Factor for his Conſtituent, *Hume*, 561. yet due by the Heir of a Rebel, L: *Cloberhil*, 559. by an Executor, L: *Moriſton*. 389. by vitious Intromettors, *Ibid*: by Tutors, *Goldman*, 168. by Curators, *Guthrie*. 281. and due to Cautioners paying the Debt, L: *Cockpal*, 473. & to Conjunct principals, *Black*, 312. and of an Heretable Bond when due to the Heir, and not to the Executors, *Col. Hendersons* Children, 96.

Annualrent out of Lands may be purſued againſt the Granter perſonally, *Hamilton*, 9. and againſt the Conſenter, *Grenlaw*, 198. and at the inſtance of a ſingular

gular Succeſſor, *Dunbar*, 315. and all the Tennents Goods are poyndable therefore, La: *Ednem*, 387. and any part of the Tenement for the whole, *Grieve*, 769. it preſcribes in 40 years, *Forreſter*, 730. Infeſtment of Annualrent, how clad with poſſeſſion, *Winrahem*, 220. how granted out of Ward-Lands, *Wyms*, 440. *vid*: Infeſtments.

Annus Deliberandi, *vid*: Heir.

Apoche trium Annorum Suſtained, though granted to divers perſons, *Williamſon*, 570. how qualified, L: *Mortſton*, 572. how not Suſtained, L: *Roſyth*, 585. Suſtained to take away a Bond, granted by a Tutor for his Pupils penſion, *Douglaſs*, 713.

Apparand Heir, allowed Exhibition *ad deliberandum*, even after year and day, *Nisbet*, 206. not allowed Inhibition againſt his Father, L. *Silvertounhil*, 10. he may compear alſo & ſtop Removing, L: *Roſlin*, 258. and may Acquire the Gift of his own Ward and Marriage, L: *Hempſfield*, 135. and may purſue for Mails & Duties, *Oliphant*, 675. and for Aliment, *Hepburn*, 795. and for Compt and Reckoning, *Hume*, 838.

Apparand Heir cannot purſue Improbation, La. *Borthwick*, 272. but may be called therein, L: *Lawriſtoun*, 286 nor can he purſue Reduction, *Muir*, 754. but may be purſued therein, E: *Kinghorn*, 290. and for his Fathers Debt within year and day, if he Renounce, *Blair*, 556. which he may do, though he has diſcharged the Heirſhip Moveables, L: *Meidhope*, 797. he muſt be cited in Declarators of Redemption, *Fiſher*, 527. his Eſcheat affects his Father, the Liferenter's Lands, *Muir*, 137. how he may have a general Suſpenſion to ſerve Heir, E: *Crawfurd*, 520. *vid*: Behaviour.

Appryſing, *vid*: Compryſing.

Approbation, *vid*: Improbation.

Arbitration, *vid*: Decreet; *vid*: Submiſſion.

Arreſter preferred to a Donatar, *Nisbet*, 519. *Pilmuir*, 830. and to a Wodſetter, *Brown*, 122. and to an Annualrenter without poynding. *Gray*, 197. and to a prior Arreſter upon a Gift of Eſcheat, *Halyburton*, 52. otherways the firſt Arreſter preferred, *Douglas*, 326. and to a Compryſer not Infeft, L: *Saltcoats*, 46: and to a Donatar's Aſſigney, *Ruel*, 354. and to an Heretable Security before Seaſin, *Warnock*. 693. not preferred to an Executor Creditor, *Muirhead*, 58. nor to a prior Aſſigney, *Craw*, 48. but preferred amongſt themſelves, according to a Bond by the Common Debitor, *Ker*, 750.

Arreſtment Suſtained upon an Heretable Bond, *Wilſon*, 355. but not of Sums due by Heretable Bonds, *Thomſon*, 39 except for the bygone Annualrents before the Term, *Ker*, 750. nor of Sums Conſigned upon Redemption, *Murray*, 203, nor Sums deſtinat for Aliment, L: *Wiſtnisbet*, 295. neither can it be Suſtained upon a Seaſin, E: *Annandail*, 688. nor upon the extract of an Horning, *Duff*, 442. but of a Sum deſtinat for Annualrent, while not imployed, *Simſon*, 681. and *Galbraith*, 846. it hinders not poynding, *Hunter*, 735. but ſtops an Executors Exoneration, *Couper*, 161. and a blank Bond to be filled up to its prejudice thereafter, *Crawfurd*, 270.

Arreſtment affects bygones, and the current Term, *Falconer*, 329. and not the following Terms, *Nicol*, 355. but ſo affects Goods, that if ſold, they may be repeated, L: *Innerweik*, 96. and Moneys Arreſted pays no Annualrent, but this ſtopt, *Hume*, 93. when loſed, the common Debitor is free, Lo. *Balmerino*, 204. and if the principal Debitor die, it muſt be transferred, *Somervail*, 360. and is equivalent to an Intimation, *Binnie*, 354.

A forthcoming upon an Arreſtment Suſtained before the Term *Declaratorie*, *Brown*, 112. or Suſpending Execution till after the Term, *Ibid*: and after Decreet no ſecond Arreſtment *de novo*, *Nicol*, 355. not Suſtained by an inferiour Judge in another's Court, *Smith*, 710. yet Suſtained upon an Admirals Precept before the Lords, *Finnie*, 842. it abides not Continuation, *Purves*, 375. and not Suſtained until the Debt be Conſtitute, *Douglas*, 864. but Suſtained though it be Suſpended, *Stirling*, 888.

Aſſignation, *vid*: Diſpoſition. *Aſſignatio omnium bonorum* Suſtained, *Paterſon*, 12. even to a Wife againſt the Debitors, *Robertſon*, 346. but otherwiſe in ſo far as it is onerous only, *Skein*, 611. made by a Bankrupt, the onerous Cauſe thereof muſt be proven, *Dennifloun*, 17. otherways *Livingſtoun*, 160. not found null upon the Act of Parliament 1592. L: *Edmiſton*, 108. but upon the *Act* of *Parliament* 1621. L: *Conheath*, 678.

Aſſignation to ſums upon Infeſtment not Suſtained, L: *Anſtruther*, 230. nor alters it the nature thereof, *Falconer*, 319, nor to a Brother *in fraudem*, &c. *Auld*, 418. nor to a Tack by a Father as Adminiſtrator, 419: but Suſtained by an Heir of his Heritage, *Lichtoun*, 643. and by a Tutor, *Weir*, 805. and by a Daughter with conſent of her Father, *Lockhart*, 832. and to any thing not yet extant, *Douglas*, 864.

Aſſignation not Intimat before the Cedents death, no Summar Execution can follow thereupon, *Stevinſon*, 100. otherwiſe if it be Intimat, *Idem*. 104. which is done by Treaty, for payment, L: *Dunipace*, 127. and by a Miſſive Letter and anſwer, 484. and thereupon preferred to an Arreſter, otherways not, *Davidſon*, 420. though the Arreſtment was in the Cedents Name, *Douglas*, 864. *vid*: Intimation.

Aſſignation upon Truſt probable by the Witneſſes Inſert, La: *Stanipath*, 141. but ordinarly even the Cedents Oath cannot be taken to prejudge the Aſſigney, *Cunninghame*, 274. nor is compenſation of his debt allowed, if not extant in Writ, *Black*, 312. far leſs upon his Deed, *Hamilton*, 452.

Aſſignation made out of the Countrey Suſtained, without the Writers Name or Witneſſes, *Falconer*, 319. when preſumed Simulat, L: *Halcartoun*, 329. how excluded by Compryſing, *Hamly*, 408. and by a Donatar, L: *Conheath*, 604. *ſecus* if it be before Declarator, *Kinnoway*, 860. *vid*: Backbond, *vid*: Arreſtment.

Aſſiſe, *vid*: Blood-wit, *vid*: Furlofity.

Aſtriction, *vid*: Thirlage.

Auditors, three of four Subſcribing is ſufficient, *M'math*, 97.

Authors, *vid*: Predeceſſors; *vid*: Reduction and Improbation.

B

Back-bond by a Donatar to the Theſaurer, E *Kinghorn*, 227. upon an Aſſignation not Suſtained to the Debitor, *Falconer*, 326. yet Suſtained for a Deed againſt an Aſſigney, *Cuming*, 396. but not Suſtained againſt an Appryſer, *Schaw*, 435. nor againſt a Singular Succeſſor, *King*, 820. *vid*: Order of Redemption.

Back-tack, *vid*: Wodſet.

Baillies, a Competition betwixt their two Depuis, L: *Clunie*, 19. B: E: of Burghs Royal are obliged to Execute all Letters of Caption, againſt all perſons without exception, *Forbes*, 22. Baron Baillies not ſo, *Baillies* of *Duns*, 59. they are bound conjunctly and ſeverally for any Deed or Malverſation, and has their Relief, *Brown*, 736. *vid*: Subſidiary Action.

Bairn of the Houſe, though Married, may purſue *pro virili*, *Smith*, 14. and it affects the Defuncts whole Moveables, *Frazer*, 861. the Clauſe *ſaiſeying of Bairns* how purged, *Lattſoot*, 890. Bairns part of Gear, or their Legittime and Portion Natural when due, *Finlaſon*, 16. is not due by the Mother, *Paterſon*, 12. but by the Father, though he be a Baſtard, L: *Halcro*, 215.

Bankrupt, cannot Affign in prejudice of his Creditors, *Craw*, 48. nor ſet a Tack, *Glen*, 235. though they have done no Diligence, *Kilgour*, 347. nor grant Bond without an onerous Cauſe, *Hoppringle*, 484. but a true Creditor may take payment from him, or an Aſſignation, *Seougal*, 267. though he be his Good-Son, or *in meditatione fugæ*, *Jack*, 618. or his own Son, but he muſt prove the onerous Cauſe, *Riddoch*. 882. only by his Oath, if he be not a Conjunct-perſon, *Niſbet*, 895. and Creditors may purſue Exhibition of his Writs, *Hepburn*, 830.

Baron may hold Courts without Diſpenſation, *Richardſon*, 138. but the Witneſſes and Parties muſt be *infra territorium*, L: *Haddo*, 653. *Simil Baro ſemper Baro*, *Dumbar*, 383.

Barony may be Erected by the King, or Diſponed by another and Confirmed, L: *Clackmannan*, 538. and Seaſin taken in any place affects the whole, *Ibid.*

Baſe Infeftment, though to a Wife, not Suſtained without Poſſeſſion, *Murray*, 25. but a baſe Infeftment of Annualrent upon a poynding of the Ground, preferred to a publick Infeftment, 109. two baſe Infeftments competing, the firſt preferred, L: *Raploch* 169. one clad with poſſeſſion of a part of the Lands, preferred as to the whole, *Hunter*, 480. not clad with Poſſeſſion, will not defend againſt a ſingular Succeſſor, *Roſs*, 491. *vid:* Poſſeſſion.

Baſe Infeftment, though for love and favour, preferred to a poſterior publick Infeftment for an onerous Cauſe, L: *Garthland*, 575. and once clad with Poſſeſſion, though long interrupted by a Liferenter, preferred to a publick poſterior thereto, *Charters*, 672. but granted by a Father to a Son, not preferred to a publick, though poſterior, *Bruce*, 721. nor granted to the firſt Wife in Liferent, and to her Son in Fee, ſuſtained againſt a publick to a ſecond Wife, *Durie*, 722.

Baſe Infeftment how made publick, *Oliphants* Creditors, 726. Baſe Infeftment of Annualrent, *Monttith*, 892 made to a Wife *ſtante matrimonio*, in place of her Conjunctfee-Lands, preferred to a publick *in favorem Matrimonii*, L: *Corſinday*, 19. Suſtained, if flowing from one publickly Infeft, to Reduce another publick Infeftment, *Stuart*, 213. eſpecially if they proceed from the ſame Author, Lo: *Teſtrs* Heirs, 284.

Baſtard is not in Blood, and ſo may be a Witneſs, L: *Bonnington*, 143. having Children he has *Teſtamenti factionem*, *Muir*, 356. but his Son dying, the King ſucceeds *duplici modo*, *Somervail*, 215. his Relict has Right to the half of his Goods, and the Donatar to the other half, *Wallace*, 457. and to Heretable Bonds without Infeftment, upon a general Gift, *Ochiltrie*, 717 neither has he *Teſtamenti factionem*, but from the King, *Wallace*, 457.

Baſtardie, Eleſded by the Co-habitation of the Mother and Father, and their being repute Married, *Somervail*, 210. and by an Heir Served, *Mculloch*, 224. and no Proceſs will be Suſtained thereupon after 30 years, *Crawfurd*, 894. the exception of Baſtardy from the Act of Parliament how underſtood, L: *Corsbie*, 415. It ſhould be proponed the time of the Service, Lo: *Ochiltrie*, 717.

Behaving as Heir, & Succeſſor &c. are two different paſſive Titles, *Bennet*, 582. It's inferr'd by taking and purſuing an Aliment againſt the Liferenter, *Hepburn*, 755. not inferr'd by bruiking upon a Reſignation, nor by a Tack, nor by acquiring a new Right, nor by Subſcribing himſelf Heir, *Dumbar*, 383. nor by a Decreet againſt him as ſuch, *Murray*, 463. unleſs it be upon ſpecial probation, L: *Gadgirth*, 595. nor upon a Right from the Goodfir, *Corſer*, 820. nor after an expired Appryſing againſt the Father, *Straton*, 791. nor by being Curator to his elder Brother, to whom he ſucceeded, *Irwin*, 252. nor by paying the Defuncts Debt, Commiſſar *Dunkel*, 333. nor by entring to Poſſeſſion, after Improbation of his Authors Right, 367.

Benefited perſons underſtood to have Heirs, as well as Biſhops, *Rig*, 84

Bill of Exchange how payable by the Drawer thereof, *Lindſay*, 467.

Biſhop, *vid:* Preſentation; *vid:* Deanry; *vid:* Chaptor.

Blank Bonds how Arreſted, *Crawfurd*, 270. how they may be filled up by an Aſſigney, or a Truſty, *Hamilton*, 37. and by Judges, *vid:* Decreets Arbitral. blank in the date, *Keith*, 159. *vid:* Date.

Blench Duties, *Si petantur*, not due until required, Lo: *Stempel*; 276. Blench-holding, *vid:* Non-entry.

Bloodwits competent to the King's Vaſſal, though no Baron, *Johnſton*; 12. being done within his bounds though by a ſtranger, L: *Freeland*; 536. without an Aſſiſe, *Sandilands*; 107. *vid.* Unlaw, & found probable by Oath or Witneſſes, B: B: *Melroſs*; 704. modified from 50 pounds to 27. *Johnſton*; 12.

Bona fide poſſeſſor, *vid:* payment; *vid:* Contracts. Procurator-fiſcal *bona fide poſſeſſor*, *Thomſon*; 111.

Bona fide Conſumpti, *vid:* *Fructus*.

Bona fide payed, Sir *William Stuart*; 141. *vid:* payment.

Bond of 100 pounds ſubſcribed by one Nottar and four Witneſſes, not ſuſtained, nor allowed to be reſtricted, *Marſhal*; 79. but thereafter allowed, *Elliot*; 476 and ſuſtained, though ſubſcribed by two Initial Letters only, *vid:* Writs of Importance.

Bond for preſenting a Priſoner, is *ſtricti Juris*, L: *Aiton*; 81. forraign Bonds Suſtained, though without our Solemnities, *Galbraith*; 232. and ſtrangers of *Middleburgh*, 242. and double *Engliſh* Bonds, how ſuſtained in *Scotland*, *Lawſon*; 277.

Bond Cancelled how made up, *Hope*; 238. *vid:* proving the Tenor. Bond to pay the Creditor, or the preſenter found due to the Executor preſenting the ſame *Rowan*; 308. and found due to Heirs, though not expreſt, *Hume*, 371. Bond for the uſe of a third party ſuſtained, Col: *Cunninghame*; 880. *vid: jus tertii*. Bond by Coal-hewers, though to ſerve all their lifetime ſuſtained, L: *Capringtoun*; 632.

Brieves may be Advocat or Reduced, *Cranſtoun*; 74. how proclaimed, *M'culloch*, 229. though the Defunct died Rebel, *Seton*; 234. but if the Heir be Rebel, he muſt be relaxt, E: *Crawfurd*; 520. Brieve of Idiotry, *vid:* Idiot, *vid:* Tutors. Brieve of Lyning Reduced, *Wright*; 425. Brieve of Tutory how ſerved, *Stuart*; 801

Burgeſſes may not urge Caution upon a Debt aſſigned, *con:* Town of *Edinburgh*; 186. and an honorary Burgeſs has no Heir, *Dumbar*; 383. they may conveen one another before the Sheriff of the Shire, *M'corinoch*; 650. how they may feu the Burghs Common-Good, E: *Galloway*. 567.

Burghs of Barony cannot urge Caution as Law will, *Salmond*; 75. nor ſell and top Wine, Town of *Edinburgh*; 489. the Magiſtrats of Burghs Royal how compelled to receive ſingular Succeſſors without Compoſition, *Hay*; 730. *vid:* Removing. *vid:* Seaſin.

C.

Cantelled Writs, how made up, *Herris*; 438. how purſued, *Lawſon*; 476. *vid:* proving the Tenor, *Caption*; *vid:* Baillies; *vid:* Magiſtrats; *vid:* Subſidiary Action; *vid:* Rebels.

Cauſe of a Bond proven by Witneſſes, *Davidſon*; 33. ordinarly not ſo. *Seton*; 38.

Cauſe onerous how proven, and how preſumed, *vid:* Bankrupt, *vid:* Aſſignation and Diſpoſition *in fraudem Creditorum*.

Cautio juratorid, *Bennet*, 530. *vid:* *Item*. 89.

Caution for Mailis & Duties, *vid:* Spuilzie. Caution for a Tack-duty, *Stevinſon*; 468. and Sheriff *Galloway*; 473. *vid:* Tack. *vid:* Removing. Caution *Judicio ſiſti Judicatum ſolvi*, *Kirkhead*; 343. *vid:* Reconvention; *vid:* Admiral. Caution to underly the Law, Lo: *Levat*; 371. Caution for a Tutor, *vid:* Tutor Dative. Caution for a Minor, *vid:* Renunciation. for a Curator, *Rollock*; 317. *vid:* Curator; *vid:* Tutor.

Cautioners in Teſtaments, *habent privilegium diſcuſſionis*, *Arnot*; 45 the like in Cautioners for Factors, *Smith*; 211. not admitted to prove what the Executors ſuccumbed in, *Wood*, 54. *Sepas* if omited only, *Arnot*; 71. they may be purſued without calling the Executors, *Rochhead*; 87. and cannot purſue the Executors for Relief before diſtreſs, *Thomſon*; 259.

Cautioner for a Husband to Infeft a Wife, *Hamilton*; 382. to adhere, *Hackſtoun*; 816. Cautioner for a Wife how lyable, *Schaw*; 83. and for violent profits, *Craigy* 84. for Liferenters, *Foulis*; 196. a Cautioner may Charge for Relief upon Regiſtration of his Bond. *Vaus*;

372. purſuing for Reſſef, *Maxwil*, 660. his Heir purſuing, *Menzies*, 611. getting Right for Reſſef, and intromitting, *Kirkwood*, 695. *vid*: Reſſef. Cautioner to preſent a priſoner, *Lindſay*, 694. *vid*: Bond.

Cedent how he may be Witneſs in his own Aſſignation, Lo: *Dunipace*, 856. *vid*: Aſſignation.

Chamberlain how he may prejudge a Spuilzie, but not a Removing, at his Maſters inſtance, E: *Linlithgow*, 271.

Chapland Lands, *vid*: Deſignation of Glebs, Chaplandry, *Marſhal*, 436.

Chapter their Number, Lo: *Dramlanrig*, 365 Reſtored without prejudice to Miniſters Stipends, *Lindſay*, 300 are conſenters to Biſhops Tacks, B: *Iſles*, 601. *vid*: Tacks.

Charge to enter Heir in general muſt expire before Summons, L: *Machal*, 15. though it may be raiſed within year and day, *Mcculloch*, 376. If Aſſigned, no neceſſity to Transfer it, Prior of *Ardchatton* 591. ſpecial Charge when to be uſed, E: *Caſſils*, 274.

Charge of Horning at a Wifes inſtance againſt her Husband, *Mariſchal*, 40. It is a ſufficient Diſtreſs, Tenents of *Haining*, 182. Suſtain'd upon a Decreet of Thirlage, L: *Inarweek*, 736.

Charge againſt the Superiour, *Beg*, 322. and againſt his Heir upon a Supplication, L: *Corsbie*, 405. Charge againſt Magiſtrats to Execute Caption, and how lyable for the debt, *Rachillis*, 382. *vid*: Caption; *vid*: Subſidiary action.

Charter without Seaſin is no real Right, *Harris*, 85. yet is not *nudum pactum*, *Campbel*, 732. for though it will not without Seaſin exclude the Granters Donatar, *Herris*, 85. yet it is effectual againſt the Granter himſelf and his Heirs, L: *Hadde*, 181. Charter with parts and pertinents how a Title in an Improbation, L: *Striviling*, 166. It muſt be conform to the Contract of Alienation, L: *Rentoun*, 775. and is null if it be *Ame*, and not Confirmed, *Patton*, 85.

Children, *vid*: Bairns.

Chirographum apud debitorem repertum, &c. *Carmichael*, 66.

Church-lands Inferr'd by 30 years poſſeſſion, L: *Kerſe*, 208.

Circumduction of the Term, Wood, 55.

Circumvention of a Major by him who had been his Curator, L: *Monymuſk*, 770. *vid*: Minor, *vid*: Reduction.

Citation by a Town Officer muſt be before Witneſſes, *Crawfurd*, 129. how of a Minor and his Tutors and Curators, L: *Rankillor*, 181. of abſents out of the Countrey, *Chriſtie*, 588. *vid*: Summons; *vid*: Declarator.

Clandeſtine Deeds how probable, *Baillie* of *Melroſe*, 704. *vid*: Poſſeſſion.

Clauſe, *vid*: Conjunctly and ſeverally: *vid*: Alternative; *vid*: *Cum curiis*: *vid*: Taxative: *vid*: Irritant.

Clerk no member of a Town Council, L: *Dramlanrig*, 97. yet an Act ſubſcribed by him obliges the Magiſtrats, *Peebles* Relict, 253. and his ſubſcription makes more Faith than the Judge's, *Lawder*, 385. and may be charged to Extract Decreets, *Ibid*: *vid*: Compryſing.

Coalheirs may bind to ſerve during life, L. *Carpingtoun*, 632.

Codicil to a Teſtament ſuſtained, *Dundas* 873. *vid*. Legacy.

Co-executors, *vid*. Executors.

Cognitionis cauſa, *vid*. Decreet.

Collatio omnium bonorum, *Corſan*, 573. *vid*: Forisfamiliation.

Collation and Inſtitution, *vid*: Preſentation.

Command how proven, 703. *vid*: Direction.

Commiſſars of *Edinburgh* not competent to Transferrings, L: *Greenock*, 5. nor to civil matters above an hundred merks, *Gordon*, 107. and other Commiſſars not above 40 pounds, Lo: *Lindſay*, 328. except they be ſeveral ſmall ſums, *ibid*: but in matters of Teſtament or Legacy above it, *Trunkul*. 212. nor to Actions upon Charges to enter Heir, *Irwin*, 295. they cannot make Procurator Fiſcals, B: *Galloway*, 309. and alledged in uſe to retain all the Inſtructions of Decreets of Exoneration, L: *Ladquhan*, 628. neither are they competent Judges to Doctors Salleries, *Liddel*, 35. but may Reduce all Inferior Commiſſars Decreets, Lo: *Herris*, 140.

Commiſſion for taking a Rebels Oath, *Strachan*, 127. and the party compelled to produce the report of the Commiſſion, *Barclay*, 552. *vid*. Witneſſes, *vid*: Precept of *clare conſtat*, *vid*: Poſſeſſion, *vid*. Teinds.

Commonty of a Moſs divided proportionally to the property of the Heretors, *Irvin*, 53.

Common good, *vid*. Burgeſſes.

Common, vid. Paſturage.

Compearance cannot be divided, Lo: *Kildrimmy*, 205. nor Reſiled from after Litiscontestation, *Irwin* 766. *vid*. Inſiſting.

Compenſation is *de liquido in liquidum*, L: *Balbegno* 240. of a moveable Bond with an Heretable, *Keith* 672. competent to a Creditor againſt a Donatar, *Davidſon*, 33. againſt an Aſſignoey, *Paton* 255. and *Keith* 785. Captain *Copland*, 885. but not againſt a Factors Aſſignoey, *Inglis*, 592. nor againſt the Compriſer of a Wodſet, E: *Buccleugh*, 441. but once againſt a Bond to a Wife, not bearing to be for Aliment, L: *Kilcadram*, 880. and to a Tutor for Deburſments, *Watſon*, 45. *vid*. Aliment: not ſuſtained, if omitted, after Sentence, Vicount of *Stormont*, 240.

Competent and Omitted, *Crawfurd*, 311. *vid*: Compenſation, *vid*. Exception.

Compryſer only comptable for actual Intromiſſions Tutor *Balmaghit*, 698. and may let the Debtor poſſeſs, Tennents of *Dryup*. 320, yet muſt do exact Diligence for recovery of Poſſeſſion, *Colquhoun* 794. and muſt compt for the whole Rents after Recovery *Dickſon*, 478, to all perſons having Intereſt, L. *Eſſils*, 479. and is liable for waſte Lands, *Hamilton*, 874. and has full right to the Malls and Duties after Citation, *Moncrief*, 833 *vid*. Arreſtment, and upon Tryal will get allowance of Reparations, *Livingſtoun*, 402. is not perſonally lyable for bygone Feu-duties. Lo. *Erſkin*, 531. but is for Stipends out of the Teinds, *Preſtoun*, 40. not bound to give eaſe to the Debtor for debts bought in, *Hamilton*, 874. he may Charge upon an Heretable Bond Compryſed as an Aſſignoey, Lo: *Teſter*, 763. muſt inſtruct the Debitor was Infeft, *Ramſay*, 23.

Compryſing is only of Heretables, E. of *Errol*, 77. or Sums to be employed Heretably, as Tocher, though for the Husbands Debt, *Graham*, 870. and affects the Money of Wodſets after they are redeemed, *Dickſon* 478, It cannot be allowed after the Debitors death, *Guthrie*, 185. It may be led againſt the appearand Heir, as well for his own Debts as his Fathers, L: *Kerſe*, 294. or upon a Decreet of Declarator of Nonentry, E: *Kingborn*, 557. or upon a Decreet of poynding the Ground, *Moncrief*, 746. it expired in ſeven years, before the Act of Parliament extending it to ten, L: *Limitlaw*, 538.

Compryſing hinders not perſonal execution *Rebus integris*, *Smith*. 7. and after Poſſeſſion it may be Renunced. L: *Cloberhil*, 557. Is no real Right without Seaſin, L: *Saltcoats*, 46. ſo will not prevail in *Poſſeſſorio*, *Erskin*. 156. nor carry bygone Rents, nor be a Title for Exhibition of the Writs, *Mybie* and *Dick*, 289. nor for Malls & Duties, *Scot*, 354. though he has done Diligence, *Lockhart* of *Bar*: 370. except againſt the Debitors ſelf, *Monscrief*, 460. but a Charge againſt the Superior is equivalent, *Dickſon*, 469 after *C*. Is exped the Debitor can do no Deed to its prejudice, *Erſkin*, 196. and betwixt a Charter and Confirmation it is *medium impedimentum*, *Paton*, 86. Appryſing before *Martinmaſs* how it affects the Rents, *Harper* 674. how after *Martinmaſs*, but before Tale, *Moncrief*, 460. *vid*. Improbation:

A firſt Compryſing for the ſame Debt not extinguiſhed by a ſecond, L: *Faldounſide*, 6. but the ſecond carrys the Reverſion of the firſt, Doctor *Kincaid*, 148. not preferred to a Diſpoſition upon the ſame day with the Denunciation, *Hamilton*, 337: though the firſt Infeftment, *Logan*, 404. a firſt preferred to a ſecond, *Ferguſon*, 616. and preferred to a Tack, L: *Muchal*, 2. though upon an Extract only, *Kyr.* 311. and to a prior Infeftment with Clandeſtine Poſſeſſion, though granted to Creditors, *Moriſon*, 780. & a ſecond *doloſe* hindred, preferred to the firſt, *Berthwick*, 401.

Compryſing null upon a Bond without a preceeding Charge, *Cranſtoun*, 31. the contrair followed thereafter, *Finlaſon*, 56. null if not execute upon 15 days, Act Sederunt, 65. or upon a Denunciation prior to the Term of payment, *Nicolſon*, 78. or prior to ſearching, *Ibid*: and that upon the Ground of the whole Lands, *Hoppringle*, 103. which is not neceſſary when Superiority is Appryſed, *Ibid*:

Compryſing null without Requiſition, *Cunninghame*, 90. and if led for the whole Sum when a part is payed, Doctor *Kincaid*, 148. but not if the Denunciation be only for more, *Edgar*, 304. So upon a Non-entry for the whole Rents before Declarator, E: *Kinghorn*, 597. and ſo null if without a ſpecial Charge, E. *Caſſils*, 274. except it be of a Tack, or any Heretable Security without Infeftment, *Rule*, 767.

Compryſing extinct by Intromiſſion, Viſcount *Annand*, 98. *ipſo facto* by exception, L. *Rankillor*, 133. and *Gilhagie*, 701. or that it's ſatisfied and payed *aliunde*, Lo: *Lovit*, 226. but not extinguiſhed by a poſterior Aſſignation to Sums for payment thereof, Lo: *Blantyre*, 362. *vid.* Allowance.

Compt-Books being Subſcribed by the Debtor, Suſtained without Witneſſes, *Rule*, 324. yet a Debt therein acknowledged, but not Subſcribed, not Suſtained; Creditors of *Brown*, 556.

Concluſion of a Declarator of Redemption, how Suſtained, *Murray*, 573. and ſeveral Concluſions in one Summons, *Lawſon*, 476, *vid*: Summons, *vid. Cumulatio actionum.*

Concurring in Proceſs, *vid*: Removing.

Condition Impreſtable, L: *Clunie*, 213. Condition in a Tack, *Hume*, 474. how purg'd, and how proven, *vid*: Probation.

Conductio & Locatio, *vid*: Hyrer.

Confeſſion Extrajudicial, *Livingſton*, 2. Judicial not Subſcribed, *Richardſon*, 138. upon Death-bed, *Nicolſon*, 810. holden as confeſt, upon contumacy, *Hume* 669. A party without the Juriſdiction cannot be holden as confeſt, *Dickſon*, 690. and being holden as confeſt, he cannot defer the Oath in a Suſpenſion, L: *Coil.* 445. and a Debt once confeſt, how taken away, *Lindſay*, 469. one out of the Countrey being holden as confeſt Repon'd, *Grahame*, 606.

Confirmation by a Superior betwixt a General and Special Declarator, *Sibbald* 51. a baſe Infeftment before C: L: *Aiton*, 421. C: of a Baſe Infeftment, L: *Clackmannan*, 314. of a Baſe Charter, L: *Glengarit*, 564. of one granted by the Superiors ſelf, B: *Glaſgow*, 762, by his Sub vaſſal, L: *Craigivar*, 782. of one after the Granters Death, L: *Johnſton*, 727. of a Seaſin of Kirk-lands, *vid*: Kirk-lands, *vid*: Feues, *vid*: Barony.

Confirmation of a Teſtament before Litisconteſtation, *Cochran*, 121. within year and day, *Smith*, 216. of an Heretable Bond, *vid*: Heretable; *vid:* Advocation.

Confuſione tollitur Obligatio, *Hart*, 509.

Conjunct and Confident perſons, *vid*: Aſſignation and Diſpoſition, *in fraudem.*

Conjunct Fee Lands; *vid*: Excambion. Conjunct Fiar; *vid*: Wife; *vid*: Factor.

Conjunctly and ſeverally, lik one for their own parts how Interpret, *Farquhar*, 861. how in a Bond by Magiſtrats, T: *Invernes*, 566. how Conjunctly only, *Sinclar*, 109. *Muir*, 356, *vid*. Tutors, Conjunctly for an Indiviſible thing, L: *Urr*, 482.

Conqueſt, *Minor tenetur placitare* therein, *Pringle*, 165. the Liferent thereof, E: *Damſemling*, 302. what it is, L: *Reuteun*, 417. Conqueſt during the Marriage *Oliphant*, 423. to the Heirs of the Marriage, *Skein*, 464. *vid*: Obligment. *vid*: Curiality.

Conſent of a Chapture, L: *Drumlanrig*, 21. of a Wife *Irwin*, 89. to a Diſpoſition of Land, *Chiſholm*, 368: to the uplifting a Sum. L: *Humbie*, 729. her Conſent *ex metu* reduced, *Caſſit*, 634. Conſent of a Wyneris, *Wilwood*. 183. of a Conjunct-Fiar, 198. to a Sub-Tack, E: *Galloway*, 245. to delivery of Corns, *Raſſil*, 228.

Conſent of a Minor without conſent of his Curators, *Simpſon*, 277. and *Gondlet*. 400. of a party principally Diſponing, *Chiſholm*, 368. of an appearand Heir, *Straiton*; 791. a Wifes conſent not proven by an Act of Court without her Subſcription. *Bell*; 743. to a Diſpoſition, *Grant* 898. *qui tacet, conſentire videtur. Hume*; 474. and *Johnſton*, 617.

Conſignation of a Wodſet and whole Annualrents, *Cunninghame*; 49. not Arreſtable, *Murray*; 203. Suſtained without the Annualrents, L: *Haddo*; 580. bears no Annualrent thereafter, *Grierſon*, 604. Inſtrument of Conſignation; 479. Money conſigned, *Griſſon*; 604. Bonds Conſigned, *Leſlie*; 891.

Conſuetude or Cuſtom in Rentals, E: *Galloway*; 300, of other countreys in Bonds, *Harper*; 493. and other Writs, *Gordon*, 679. in *England*, *Sinclair*; 817. *vid*: uſe and wont; *vid*: Stranger; *vid*: Uſe of payment.

Contigue and Diſcontigue, *vid*: Parts and Pertinents; *vid*: Barony.

Continuation of Summons, L: *Preſtoun Grange*; 231. *Purvis*, 375. *vid*: Summons; *vid*: Declarator.

Contract Heretable, L: *Edmiſtoun*; 108. how Compryſed, *vid*: Compryſing: Contract in favours of a Third Party, L, *Whittinghame*; 334. *vid*: Regiſtration.

Contract of Marriage Suſtained, though Subſcribed by one Nottar, *Grieve*; 201. Is *bonæ fidei*; *vid*: Marriage. How it preſcribes, *Hamilton*; 18. Suſtained though made during the Marriage, *Gib*; 712. and by way of Minut, *Wolfe*, 823.

Contravention before inferior Judges, *Marſhal*; 21. how purſued *ad vindictam & intereſſe*, *Fithy*; 59. Contravention of Lawborrows, *Semple*; 385. Suſtained without violence, L: *Whittinghame*; 607. how not Suſtained for Tennents. *Grant*; 615. Elcided by Diſſimulation, K: Advocat; 662. by fourtie years Poſſeſſion, *Ibid*: by Conſent, L: *Lym*; 666. not Tryed Summarly, *Eliot*; 829. *vid*. Paſturage.

Convent how Subſcribing, L: *Drumlanrig*, 21. *vid*: Chapter; *vid*. Chaplandry.

Corns once removed not Hypothecat, *thereafter ſtopt*, *Stuart*; 156. if Sowen by a third partie after Decreet of Removing againſt another, they are the Sowers, *Roſs*; 414. *vid*: Hypotheque.

Corrupting of Witneſſes, *vid*. Reprobators.

Craftſ men, *vid*. Unfree-men.

Creditor, one preferred to another, *Douglaſs*, 90. not to be ſtopt in his Diligence by another, *Scot*; 249. *vid*: Debitor.

Crownit Rents how preſcribed, L: *Skelmorlie*. 73.

Cumulatio actionum, *vid*: Adjudication, *vid*: Reduction. *vid:* Concluſion; *vid*: Exhibition; *vid*. Improbation.

Curators conſenters are not Cautioners, *Drummond*; 131. nor are they to be at the Horn, *Corbet*, 456. nor to be choſen before Tutory expire, *Ramſay*; 151. they muſt be lawfully Removed, *Adam*, 314 Their Heirs are lyable for Annualrents, *Guthrie*, 284. Cautioners for Curators how lyable, *Kelloch*; 317. not allowed till after pupillarity, *Chalmers*. 742. they are lyable *in ſolidum*, *Guthrie*; 491. *vid*. Tutor; *vid*: Minor.

Curiality of *Scotland* in Conqueſt, *Forbes*; 597. not due after 30 years forbearance, *M'Caula*: 788.

Cum Curiis how interpret, B: *Aberdeen*; 506: *vid.* Diſſolution; *vid:* Vaſſal.

Cuſtome, vid: Conſuetude.

Cuſtomes not due upon the Kings High way, T: *Linlithgow*; 3. Kings Cuſtoms preferred to other privat Debts, *Peebles*, 589. may be conſtitute by a Charter without Seaſin, Sheriff of the *Forreſt*, 640: *vid:* King.

D

Damnage and Intereſt, *vid:* Contravention.

Date of a Bond or Aſſignation being falſe, it's falſe *in totum*, *Keith*; 199. how allowed to be keeped up in an Improbation, L: *Cliſh*; 605. and ſuppliſed by Witneſſes, *Hamilton*; 5.

Dative ad omiſſa null without citing the principal Executor, *Bain*. 17. *vid:* Executor, *vid.* Tutor.

Deads part pertains to the Bairns, *Finlaſon*, 16. and the third thereof to the Executor, if not exhauſted, *Forſyth*, 239. *vid:* Death-bed.

Dean of Gild's Court no Subaltern Court to the *Baillies*, *Adamſon*; 399.

Deanrie how mortified, Colledge *Aberdeen*. 443.

Death-Bed only proponed by the Heir, L: *Cragie-Wallace*; 214. but not by way of Exception, *Courtey*; 256. Suſtained againſt all Deeds, except for Furniſhing or other onerous Cauſes, *Pollocks*; 645. otherways Suſtained againſt all Bonds, whether Heretable or Moveable, *Schaw*; 95. even Bonds of Proviſion, *Cranſtoun Riddel*; 847. though going thereafter to Kirk and Mercat, if he was ſupported, *Maxwel*, 457. and againſt a Wife's Infeftment of Liferent, *Robertſon*; 13. only Deads part can then be diſponed upon, *Donaldſon*; 113. and neither the Wifes nor Bairns parts can be prejudged, *Cant*; 386. a Declaration of payment then not Suſtained, *Nicolſon*; 810 *vid:* Diſcharge.

Debitor needs not be called in a Subſidiary Action, *Sclaiter*; 3. Is preſumed *ſolvendo*, *Watſon*; 45. Is in *bona fide* to pay before Intimation, L: *Weſtraw*; 192. even to an Executor, though there be an *ultimus Hæres*, *Paterſon*: 193. but is in *mala fide* after Special Declarator, *Ramſay*, 117.

Debitor non præſumitur donare, *Wallace*; 145. though betwixt Father and Son, *Carmichael*, 431. and *Kinnaird*, 624.

Declaration proves not. *nam Teſtibus, non Teſtimoniis &c. Hume*; 642.

Declarator of Liferent bides no Continuation when inſtantly verified, L: *Lochinvar*; 632. Is upon 21 days, *vid*: Summons; muſt be ſpecial when Libelled at a Subjects inſtance, L: *Muckhal*. 3.

General Declarator no compleat Diligence, *Sibbald*; 51. but ſpecial Declarator is equivalent to an Intimation, *Ramſay*; 117. bides no Continuation, L: *Touch*; 119. not Suſtained without a Horning, *Weſton*; 397. *vid:* Redemption, *vid:* Non-entry, *vid:* Feu, *vid:* Thirlage.

Declinators when to be received, *Servict*, 280.

Decreet Is null if Subſcribed by the Judge only *Medougal*; 41. If pronounced in time of Parliament, L: *Barns*; 703. If not bearing the relevancy, L: *Dirletoun*, 41. If at an Heirs Inſtance for Moveables, *Naſmith*, 350. If againſt Perſons *extra territorium*, 44. If after Advocation, *Charters*, 710. Suſtained though the Judge be Rebel, *Kellie*; 419.

Decreet Arbitral Suſtained, Subſcribed by a Nottar if one of four Judges, *Gibſon*; 419. though the whole Articles ſubmitted be not determined, *Stark*, 511. though without Claims given in, Dr. *Kincaid*; 609. though by the Overſman, and one for each Party only of four Judges, *Hunter*; 655. though the blank be not Subſcribed by the Submitters, *Beaty*; 678. yea though ſet down in a ſeparat Paper, L. *Alter* 799. and though Subſcribed by way of Minute before the day expire, and extended thereafter, *Forreſter*; 684. yea though pronounced after year and day, *Stephurn*; 883. Suſtained alſo againſt the Father and Son, though he be not Subſcribing, L: *Hartwoodmires* 716. ſubmitted legally thereafter, *Ibid*: Suſtained without witneſſes, but all written and ſubſcribed by the Judges own hand, E: *Rothes*; 784.

Decreet Cognitionis cauſa how led, *Muirhead*, 58. and how Adjudication paſſes thereupon, *Inglis*, 102. who muſt be called, *Thomſon*; 71. Suſtained though within year and day, *Blair*; 596.

Decreet upon a Defenders being holden *pro Confeſſo* Reduced, *Hume*, 669.

Decreet in foro preſcribes, L: *Lawers*; 854. but interrupted by a Tranſferring, *Ibid*.

Defender how not Debarr'd by Horning, *Dickſon* 138.

Deforcement not competent for the penalty in the Act of Parliament before inferior Judges, *Lands*; 527. nor Suſtained if before the Suns riſing, L: *Halcartoun*; 338. *vid:* Poynding.

Delivery of Writs how proven, E: *Rothes*, 245. Delivery of Victual how probable, *Biſſet*; 152. L: *Aberzeldie*, 689, *Porteous*, 657. Delivery of a Legacy Dr: *Monro*; 526. an Aſſignation not delivered to the Defunct, but to a third party. Suſtained without proving Delivery, *Fairly*, 516. Writs not Delivered how Suſtained, *Wallaces*; 145. and *Byres*; 247.

Denunciation of Lands firſt, but laſt Compryſing, Dr: *Kincaid*; 148. Suſpended, *Borthwick*; 401 after D: the Debitor cannot ſet Tacks, *Blaickburn*; 427. D: hinders not Liferent-Eſcheat, Lo: *Cranſtoun*, 569. the Witneſſes therein only deſigned by the Meſſenger, *Murray*; 587. D: at the Croſs of *Edinburgh*, *Peter* and *Shore* of *Leith*, *Chriſtie*; 588. D: of a Rebel without three Blaſts, *Somervail*; 195. D: of a Bond, *Smith*; 834.

Depoſitation of a Bond only probable by the Creditors Oath, *Hay*; 116. the Terms by the Depoſitars Oath, *Lermonth*; 100 probable againſt the Depoſitar by Witneſſes, *Farquhar*; 426. D: of Lock't Coffers, E: *Caſſils*; 193. of a Diſcharge, *Dickſon*; 323.

Depoſitar not obliged for Annualrents, *Douglaſs*; 103. he may be Charged and Denounced, *Grierſon*; 613. Money Depoſitat by a Wife, *Fenton*, 779.

Deſignation of a Gleib found Informal, *Hamilton*; 375. out of what Lands Is to be made, *Haliburton*, 814.

Deſignation, *vid:* Witneſſes.

Deſtination of Money, L. *Hardin*, 239. to a Liferenter, *Naſmith*, 380.

Duties, *vid:* Mailh. *vid:* Blench. *vid:* Feu.

Diligence of Tutors and Curators, Compryſers, Donatars, *vid: Ibid: vid:* Diſpoſition. *vid:* Exoneration. *vid:* Incident. Diligence perfected and inchoat, and accordingly preferred, L. *Lag*: 33. *Muirhead*, 58. & *Haliburton*, 52. Diligence poſterior preferred *Livingſton*, 160. Relict of *Lindſay*, 365. Diligence before the Term of payment, *vid.* Arreſtment. Diligence for Probation, *Stratton*, 140. Diligence ſometimes not reſpected, Creditors of *Brown*, 556 but brought in *pari paſſu*, *Rutherfurd*, 678. *Nimia diligentia*, how conſidered, *Winraham*, 586.

Diminution, *vid:* Rental.

Direction only probable *Scripto vel juramento*, *Turner*; 652. 703. *Brown*; 802. *Murray*; 889.

Diſcharge by a third party, Collonel *Cunninghame*; and not read. 880. by a Chamberlain before the Term, K: *Theſaurer*; 78. by a drunk perſon, *Schaw*; 241. by one of more Executors, *Stmpil*; 514. by a perſon interdicted; *Ibid:* after a Capital Crime, *Schaw*; 530. by an Executors Aſſigney, *Miller*; 617. of a particular Debt with a general Clauſe, *Halyburton*; 673. by a Father & his Son a Minor, *Hume*; 795. Suſtained though granted of the Wifes Tocher on Death-bed, *Brown*; 713. not Suſtained of 200 merks without Witneſſes, L: *Kinaldy* 162. nor Subſcribed by one Nottar unleſs reſtricted; 809. Diſcharge upon the back of a Bond, though delet, and not Subſcribed, Suſtained, *Nevkat*; 142.

Diſclamation, L: *Wedderburn*, 372.

Diſcuſſing of Heirs, L: *Craigmillar*; 293. *Cowan*; 10.

Lyon; 50. Diſcuſſing of principal Debtors, *Arnot*; 45. *Mathiſon*; 443.

Diſparagement in Marriage, *French*; 28.

Diſpenſation not neceſſary to Baron Courts, nor to Sheriff Courts, nor to Brieves, *vid*: *Ibid*:

Diſpoſition to a Conjunct and Confident perſon, *Duff*, 123. to a Daughter, *watſon*; 714 D: without Inſefment, *Inglis*; 124. no Title to Maills and Duties, *Forreſter*; 896. without a ſpecial Aſſignation to the Maills and Duties, *Ronald*; 158. D: *Retenta poſſeſſione*, *Strachan*; 128. *Traquair*, 150. *Calderwood*; 488. D. with a Reſervation to grant a Charter of Annualrent, *Hamilton*; 131. D: of a Liferent not Subſcribed by two Nottars and four Witneſſes, *Roſs*; 485. not delivered, *Andrſon*; 841. and *Byres*, 247. D: of an Annualrent by a Goodſir to his Oy, L: *Garthland*; 626.

Diſpoſition of Moveables for Relief of Cautionry, *Kirkwood*; 686. by a Bankrupt after Rebellion, bearing for onerous Cauſes *Lockhart*; 755. of ſome Teind Bolls, L: *Halgreen*; 758. *ex titulo lucrativo*, how far Suſtained, *Kilgour*; 347. D: prior to the Denunciation of a Compryſing, *Robertſon*; 850. *vid*: Aſſignation *vid*: Maills and Duties; *vid*: Bankrupt, *vid*: Rebel. D: with a Clauſe Irritant not to ſell, not Suſtained *Ker*; 491. according to I: *ult*: *Cod*: *de pactis inter Empt*: & *Vendit*: *ſecus*. L: *ult*: *ff de pactis*. D: by one Bankrupt to another, *Robertſon*, 850.

Diſſolution of the Property, Diſſolves not the Juriſdiction, *Douglas*; 599. *vid*: Annexation.

Diſtreſs ſufficient upon Regiſtration of the Bond againſt the Cautioner, L: *Wauchtoun*; 162 Diſtreſs of a Tenement for a Ground Annual *Grieve*, 769. *vid*: Cautioner; *vid* Warrandice.

Diviſion of a Teſtament tripartite, *Sibbald*; 375. *Roſs*; 282. *vid*: Teſtament.

Divorcement, *Johnſton*; 154.

Dolus only probable *Juramento*, *Borthwick*; 401.

Donatar of Liferent preferred to a Compryſer. E: *Tullibarden*. 29. to an Arreſter. *Halyburton*; 52. and to an Aſſignay, L: *Halgreen*; 758. preferred to an Annualrenter, *Cochran*, 865 D: of Liferent has right ſince his Denunciation, L. *Foulis*; 247. *vid*: Inſefment; *vid*: Intromiſſion: dying after general Declarator, how the Duties are tranſmitted to his Heirs and Executers, *Douglaſs*; 464. and *Coulter*, 111. Donatars Back-bond to the Theſaurer, *vid*: Back-bond.

Donatars to the ſingle and Liferent-Eſcheat competing. *vid*: Liferent-eſcheat; two Donatars to a Superiors Liferent-eſcheat competing. L: *Renton*; 748.

Donatar lyable to the Debt in the Horning *Fletcher* 581. compelled to produce the Superiors Inſefment, *Johnſton*; 679 *Voluntar* payment to a Donatar, *Kennoway*; 860. *vid*: Compenſation.

Donatio omnium bonorum in fraudem, *vid*: Diſpoſition; *vid*; Aſſignation: *Donatio inter virum & uxorem*, Suſtained, L: *Lawriſton*; 764. *vid*: Tercer: a Tack to the Husband and Wife found ſuch: L: *Craigmiller*, 869. not Revocked is valid, *Robertſon*; 346. *Glaſſoord*; 717. *vid*: Penſion. *Donatio propter nuptias*, *Walker*; 767. *Donatio remuneratoria*, *Cochran*; 522.

Donatio Mortis cauſa, *Lawder*, 826. If it expreſs an onerous cauſe not Revockable, L: *Carribil*; 115.

Double poynding upon a Summons, *Watſon*; 135. In a Suſpenſion, *Bruce*; 480.

E.

EDinburgh, *Communis Patria*, *Chriſtie*; 588.

Ejection Suſtained only at the actual and natural poſſeſſors inſtance, *Bruce*; 400 ſuſtained againſt a Wife, *Caldwel*; 30. and againſt a Goodſir for his Oy, *Irwing*; though it preſcribe, it may be Reſtricted to Intruſion for Reſtitution, *Hay*; 252. how it preſcribes, L: *Lowdoun*; 609.

Electio eſt Creditoris ſometimes, *Carnagie*; 281. *vid*: Alternative.

Emptio & venditio eſt contractus bonæ fidei. L: *Cluny*; &c. 223. of Lands how Reſiled from, *Oliphant*; 406 of Goods in a Mercat, they muſt have Burgh and Hamhald, *Fergaſon*, 885. Suſtained though the price be referred to the Buyers ſelf, E: *Montroſe*, 883.

Entry, *vid*: Heir, *vid*: Tack.

Erection of Kirk-lands how null, *Campbel* of *Ardchatton*; 593. *vid*: Barony.

Error of Confirming an Heretable Bond, does not prejudge it. *Dickſon*; 849. *vid*. Writ.

Eſchaet, *vid*: Liferent, *vid*: Baſtard, *vid*: Declarator.

Eviction how Suſtained, *Murray*; 431. *vid*: Excambion.

Excambion imports real Warrandice, E: *Melroſe*; 83 how a Declarator of Regreſs muſt be intented, L: *Warden*; 461. *vid*: L: *Abbotſhall*; 689.

Exception of payment in a ſorthcoming, *Hamilton*; 8. Ex: not received after Litiſcontestation, L: *Cluny*; 26. eſpecially if conſiſting *in facto*, La: *Wintoun*; 65. except againſt the Relevancy, L: *Thornton*; 254. Ex. proponed by the Principal, not allowed to the Cautioner, *Wood*; 54 *ſecus* when only omitted, *Arnot*; 71. Ex: of not Regiſtration of a Seaſin to whom competent, *Marſhel*; 79. Ex. of Incompetency againſt the Secret Council not Suſtained, Lo: *Drumlanrig*; 97: *vid*: Declinator. Partial Exception hinders not *Juramentum in litem* in a Spuilzie, *Chein*, 146.

Exceptio in facto, how proven, *Job*, 154. Ex: proponed by the Author *Competit ſucceſſori*, La: *Glengarnock*, 205. Ex: againſt a poynding how probable, *Hay*; 207. Ex: upon a promiſe when competent, *Muir*, 283. Ex: Relevant againſt the Maſter, not Relevant againſt the Tennent, *Hepburn*; 320. Ex: Competent and omitted, not received by way of Suſpenſion, *Cranſurd*; 311 and *Lamb*; 364. Ex: *Noviter veniens ad notitiam*, *Hamilton*; 667. Ex: contrair to the Libel, or not Relevant, muſt be admitted or repelled, *Hume*; 669. Ex: admitted to probation, and the Term circumduced, *Glen* of *Bar*; 351. Ex: *alibi*, *Montgomery*; 651.

Excommunication does not Exclude *jus ſanguinis*, but deveſtes the Right upon the King. Lo: *Colvil*; 276 Excand their Tennents may be conveened *in ſolidum* for the Duties of the Lands, E: Advocat; 451. and though they cannot purſue, they may defend, not being at the Kings Horn, L: *Colſtoun*; 812.

Execution, *vid*: Decreet; *vid*: Horning; *vid*: *Charge*. Ex: not bearing the Meſſengers Stamp affixt null, *Stuart*; 224 may be improven though a Dilator only *Hume*; 523. Ex: by Officers in Towns ſhould be in Writ *Dickſon*; 227. Real Execution without poſſeſſion hinders not perſonal, *Sinclar*; 299. with poſſeſſion it does, *Scarlet*; 605 Execution at the Dwelling-houſe, *Montgomry*; 651.

Executor dative ad omiſſa, *Hallyday*; 37. *vid*: *Gourlay*; 316. he cannot purſue the Husband for his Wifes *male apprætiata*, *Melvil*; 799. Ex: Creditor preferred, *Muirhead*; 58 Ex: may be purſued for a Deed preſtable by the Heir, *Drummond*; 99. is lyable *in ſolidum* if the reſt be called, *Peacock*, 391. or if the reſt be dead, *Aitkin*; 180. Excludes a Subſtitute, *Leitch*; 49. he cannot preſer one Creditor to another, *Rochhead*; 87. nor make voluntar payment, *Jaffrey*, 241. far leſs after Citation, *Lyll*, 402. how lyable for Intromiſſion, L: *Carryhill*; 125. how conveen'd for heretable Bonds, *Coulton*; 200. and by the Relict for Imployment of Sums for her Joynture, *Veitch*; 321.

Co-executor Charging, *Brown*; 210. how conveened, *Salmond*; 533. Ex: how ordained to pay upon Caution to reſtore, *Scot*; 285. Ex: omitting to proteſt for his own Debt, *Cranſurd*; 311. Ex: compelled to relieve the Heir, *Porteous*, 319. Ex: having Licence to purſue, *Seton*; 329. Ex: and Cautioner for the Defunct, *Adair*; 332. Defalcation how allowed the Husbands Executors, *Gordon*; 377. a Wife Executrix preferred to other Creditors, *Hamilton*; 382.

Executor how lyable for Annualrents, L: *Meriſton*; 389. how obliged to an univerſal Legatar, *Hog*; 444. may purſue though the other concur not, *Young*; 458. how exhauſted, *White*; 475. how lyable in warrandice

for the Defunct, *Salmond*; 533. Executor taking Aſſignation to the Defuncts Debts, *Dalgarno*; 508. a Cautioner may Confirm himſelf Executor for his own Relief, *Smith*; 546.

Executor Confirming a Debt of his own due by the Defunct, *Henderſon*; 564. and if he die, it accreſces to the Co-executor, *Ibid*: a Debt given up by the Defunct, cannot be miſken'd by the Executors, *Duff*, 577. when an Executor has no third of the Deads part, *Wilſon*; 593. is lyable to the price Confirmed, *vid*: price: may purſue Exhibition and Delivery of Moveable Bonds, *Lighton*; 643. not bound to relieve the Heir of Heretable Debts, *Schaw*; 657.

Executor to the Executor of both Father and Mother, *Wilſon*; 667. Four Executors getting Licenſe to purſue, L: *Lag*; 710. how one of them may purſue the reſt, *Hunter*; 890. if lyable upon private knowledge, *Crawford*, 734. if lyable to a Creditor who has done no Diligence, *Muir*; 939. when lyable *ultra vires inventarii*, *Inglis*; 870. Rent of a Miln how paid to the Executor, L: *Wriſhisbet*, 757. Executor and Heir both purſued for a Liferent, L: *Innerweik*; 853.

Exhauſting of Teſtaments, *Jaffray*, 241. and *Crawford*; 311. how not proponable by the Executors Cautioners, *Wood*; 54.

Exhibition who are to be called therein, *Fothringhame*; 89. how lybelled and proven, *Carmichael*; 66. and Captain *Crawford*; 420. not Suſtained againſt a Defender Inſeſt for Exhibition of his Writs, *Whitford*, 519. Exh: and Regiſtration Suſtained in one Summons, *Hay*; 576. Exh: of a Writ never delivered, *Reid*, 805.

Exontration how Suſtained, & for what Debts, *Couper*; 161. and *Guthrie*; 209. and upon what Decreets, *Scot*, 285. Suſtained though the Creditor not called. *Tailzifer*; 462. in general not Suſtained, L: *Hadd*; 580. Suſtained upon offer of the Defuncts Goods and Aſſignation thereto, *Rutherford*; 678.

Extent how valued upon Land, M. *Hamilton*; 258.

Extinguiſhing of Rights as of one Bond by another, *Aikman*; 114. and *King*, 201. a baſe Inſeſtment by a publick. E: *Annandale*; 136. an old Security by a new, L: *Raploch*; 169. but a Compryſing not extinguiſhed by a poſterior Tack, L: *Blantyre*; 362. and L: *Dumfermling*; 453. yet a Compryſing upon a Wodſet extinguiſhes it, ſo as he cannot return thereto, L: *Dowkill*; 43. and two Bonds without relation to one another, the poſterior takes not away the prior, *Stuart* 75. *vid*: Compryſing.

Extrajudicial, *vid*: Confeſſion.

F.

FAct, *vid*: Clandeſtine. *vid*. Nullity. *vid*: Cautioner. *vid*: Compryſer. *vid*: Diſpoſition.

Factum antiquum, *vid*: Declarator. *Factum impreſtabile*, *vid*: Condition. *vid*: Minor.

Factor for a Tutor, how far lyable, *Stewart*; 467. not lyable in Annualrent, *Hume*; 561. may not take a Tack to his own behove. L: *Ludquharn*; 633. compelled to anſwer a Reduction againſt him and his Conſtituent, *Ramſay*; 644.

Factory in rem ſuam, no real Right, La: *Berthwick*; 647. *vid*: Cautioner. *vid*: Wife. General F: to a Wife will not import the ſale of Goods *gratis*, *Purves*; 374.

Fair not Suſtained *in æmulationem vicini*, *Falconer*; 895.

Falſhood how it may be puniſhed by the Lords, and remitted to the Juſtices, *Dunbar*; 857.

Failzie how purged in a Bond for Preſentation of a Rebel, L: *Aiton*; 81. how in a Reverſion, *Pringle*; 341. not Suſtained in a Contract of Tailzie, *Ker*; 491. but found purgeable at the Bar by the Heir, Dr: *Scot*; 584. not purgeable by offering to find Caution, La: *Collingtoun*; 91.

Familia paterna, *vid*: Bond. *vid*: Diſcharge. *vid*: Diſpenſation. *vid*: Minor.

Farms and Duties how divided betwixt a Compryſer and a prior Arreſter, *Hamilton*; 54. probable by Witneſſes after three years, notwithſtanding the Act of Parliament, *Ja*: 6. *Roſs*; 260. *Maxwel*; 680. *vid*: Mails and Duties: *vid*: Donatar.

Father how obliged to the Sons Deed, *Lyon*; 50. not bound to aliment his Son, if Major, L: *Ramorny*; 819. is Adminiſtrator to his Son, L: *Lamond*; 847. & to his Baſtard Son, L: *Touch*; 120. may call for Exhibition of Bonds of Proviſion, L: *Monymusk*, 348. the Fathers Creditors in poſſeſſion of his Sons Eſtate are *bona fide* poſſeſſors, till interrupted, *Hume*; 781. how a Father may purſue his Son though a Minor, and *in familia*, L: *Bargany*; 56.

Ffar and Forct, *vid*: *Vis & Metus*.

Fee of Sums how it terminats, *Graham*; 870.

Feus Reduced for not payment of the Feu-duty, E. *Milroſs*; 83. though the Vaſſal be Minor, *Lennox*; 675. yet not competent to the Superior after he is Denuded, L: *Wedderburn*; 700. nor to the Donatar to his Liferent-eſcheat, *Ibid*: Feu of Kirk lands muſt be Confirmed, La: *Dumfermling*; 453. Vicars Manſe and Glebe Feued before, 1562. *Cook*; 754. Feu to the Feuers Heirs Maill, which failzying to his eldeſt Heirs Female without diviſion, L: *Edmonſton*; 838.

Feu Duties Recovered only by poynding of the Ground, *Rollock*; 442. not perſonally againſt a ſingular Succeſſor, *Cockburn*; 873. but Vaſſals may be purſued both the ways, B: *Galloway*; 624. a naked Diſpoſition may be a Title to purſue for Feu Duties, E: *Tullibardin*; 842. and the Superiors receiving payment thereof is no Approbation of the Feu, La: *Dumfermling*; 453. and does not preſcribe in 40 years, L: *Garntalie*; 867.

Fiſcus Its priviledge, and how it has *jus tacitæ Hypothecæ*, *vid*: Cuſtom. *vid*: Donatar. *vid*: Rebel. Procurator-fiſcal. *vid*: Commiſſar.

Fiſhing as in an Inſeſtment *cum piſcationibus*, *Maxwel*; 371. *vid*: Inſeſtment.

Forefaulture intervening betwixt Charter and Seaſin, E: *Nithiſdail*; 4. being Reduced, all other Rights fall in conſequence, *Finlaſon*; 229. *Stuart*; 301. Lo: *Balmerino*; 295. Baſe Inſeſtments fall with the Superiors Forefaulture, and revives with his Reſtitution, *Crawford*; 803. *vid*: Tack. though the Seaſin be taken after the Forefaulture, but upon a prior Cauſe, E: *Nithiſdail*; 4.

Forraign Bonds and Writs how Suſtained in *Scotland*, *vid*: Bond.

Foriſfamiliation of Children, *Smith*; 14. excludes not the Legittime, *Roſs*; 282.

Fraud: *vid*: Incident, *vid*: Compryſer. Fraud and Simulation betwixt the Donatar and the Rebel, *Reid*; 394. how it muſt be proven, *vid*: Compryſing. *vid*: Aſſignation. *vid*: Preſumption. *vid*: Circumvention.

In fraudem Creditorum, *vid*: Diſpoſition: *vid*: Aſſignation.

Fructus bona fide percepti. *vid*: *bona fides*: *vid*. Poſſeſſor.

Furioſity Reduction thereupon competent to the Perſons ſelf *in lucido intervallo*, *Alexander*, 623. and may be proven by Witneſſes without an Aſſiſe even after the parties death, *Loch*, 861. and deeds done *in intervallo*, Suſtained, *Ibid*.

Furniſhing of Bread how ſuſtained and proven, *Baxter* in *Leith*, 155. *vid*. Probation. *vid*: Wife.

Forthcoming, *vid*: Arreſtment, *vid*: Transferring.

G

GEneral, *vid*: Declarator, *vid*: Heir, General Clauſe, *vid*: Improbation, *vid*: Submiſſion. General Letters, *vid*: Horning: Suſtained with a ſpecial Charge being proven, *Jamiſon*, 243. and L. *Aitkin*, 280. General Licence not Suſtained, *Wems*, 179.

Gift taken to the Rebels behove or to his Bairns *unforis familiat* null, Lo: *Berthwicks* Bairns, 27. and likewiſe upon his Charges, *Inglis*, 27. or *retenta poſſeſſione*, *Bannatyne*, 94. *Hamilton*, 843. when there's place for

a ſecond Gift, *Somervail*, 267. and how far it extends, *ibid.*

General Gift of Eſcheat how far it extends, L: *Eſſilmonth*, 53. how far ſingle Eſcheat, E. *Kinghorn*, 237. *Mowat*, 592. Gift of a Fathers Eſcheat to his Son, *Dalgarno*. 59. and of the Mothers aſſigned to the Son, *Meſman*, 775. a firſt Gift Declared and Aſſigned, competing with a ſecond, E: *Annandail*, 305. *Keith* 367. Action how ſuſtained upon a Gift before it be Sealed, *Lyming*, 510. Gift of Prebendry how to be Subſcribed, *Hume*, 369.

Gleib, how deſigned and meaſured, L: *Kerſe* 208. Lo: *Dunfermling*, 425. *Lamont*. 813. out of what Lands *Nairn*, 467. two Kirks unite with two Gleibs, *Rough* 557. *vid*: Deſignation, *vid*: Manſe.

H.

HEir liable to the Defuncts Debt upon his own Oath conſtituting the ſame, L: *Touch*: 302. how lyable to the Relict and Executors for Relict, *Veitch* 321. how lyable for the Defuncts deeds, *Hay* 529. Heir purſuing muſt inſtruct his Title *Scripto Maxwel*, 381. a Decreet againſt him *paſſit à* does not inſtruct it *activè*, *Stuart*, 423. L: *Gadgirth*, 559. Heir by Halp and Staple, *Yeoman*, 437.

Heir of a ſecond Marriage, L: *Haddo*, 181. Heirs of the Marriage Interpret Bairns, *Turnbul*, 486. & *Veitch* 528.

Heirs portioners how they may purſue one another, *Pride*, 540. how they may be purſued, *Hume*, 619. how one of them may be purſued *in ſolidum*, *Orr*, 704 which of them ſhould keep the Principal Writs, *Denholms*. 858.

Heirs of Proviſion how lyable, *Lyon*: 50. Heir of Tailzie, Provoſt *Striviling*. 862. Heir of Line purſuing the Heir of Conqueſt, *Fairlie*, 533. and how called, *Ibid*. Heir of a Compryſer, *Gordon* 252.

Heirſhip Moveables Intromitted with by the Heir, *Dundaſs*. 33. how to be Inventar'd, *Johnſton*, 218. how they make the appearand Heir lyable, *Steven*, 426. Aſſigney to Heirſhip Goods, how lyable for Intertainment of the Heir, *Robertſon*. 452.

Heretable Sums not Arreſtable, *Forbes*. 139. how the Heir and Executor may be purſued therefore, *Falconer*. 423. an Heretable Bond without Infeftment, comes under a General Gift, and if Infeftment follow, under a ſpecial, *Wallace*, 459. they come not under Eſcheat, *Halyburton*, 207, where Seaſin has not followed thereupon, *Wright*. 715.

Heretable Sums become Moveable after a Charge of Horning, *Auſtine*, 225. and after a Decreet recovered at the Heirs Inſtance, *Naſmith*, 350. and after payment by the Cautioner, *Cant*. 386. but not after Confirmation in a Teſtament, *Crawfurd*, 734. Nor after Aſſignation, *Falconer*, 319. nor by Aſſignation to Victual for the Annualrent thereof, *Lindſay*, 469. nor after Conſignation upon Redemption untill Declarator, *Murray*. 203.

Any Bond after the Term of payment of the Annualrent is Heretable, L: *Lugtoun*, 735. though it bear no Infeftment, *Falconer*. 319. but this was altered by the Act of Parliament 1641. yet it was Arreſtable before the Term of payment, *Kyr*, 745. and found Moveable till then, though bearing Annualrent to the Term, *Porteous*, 319. Sums deſtinat for Annualrent are but Moveable, Captain *Watſon*, 753. yet Tocher deſtinat to be imployed upon Infeftment found Heretable, *Robertſon*, 824. So a Bond bearing the Clauſe as well not Infeft as Infeft, *Donaldſon*, 113. yea without that Clauſe, *Cauſton*, 200. but found Moveable, If the Creditor die before the Term of payment, *Smith*, 132.

Herezeld what it is, and when payed, Fields Removing, L: *Rowallan*, 227.

Heſp and Staple, *vid*: Seaſin, *vid*: Heir.

High wayes, *vid*: Cuſtomes.

Holden as confeſſt, *vid*: Confeſſion, *vid*: Oath.

Holograph how proven, *Pynnon*, 273. Suſtained without witneſſes, *Kinlochie*, 134.

Homologation of a Decreet Arbitral, by an illative qualification, not ſuſtained. *Hume*, 619. of a Teſtament how proven, *Hunter*. 890. *vid*: Executor. *vid*: Execution.

Honour, *vid*: Title.

Horning againſt a Magiſtrat to incarcerat a Rebel found null, L: *Drumlanrig*, 9. but not by way of exception, *Dumbar*, 288. not null for want of three blaſts if it bear *orderly and lawfully done*, *Dyſdail*, 116. null if not ſtamped, *Stuart*, 118. but not by way of Exception, *Maiſter*, 523. null upon leſs than 15 days be-north the Water of *Dee*, *Stuart*, 161. and not deſigning the parties Dwelling-houſe, *Adam*. 217. and ſuſtained after General Declarator, L: *Smeton*; 239. and upon the Parties not being Denounced at the Head burgh of the Shire, *Potter*, 404. Intimation of a Horning not equivalent to a charge. *Ibidem*.

Horning null if the Debt be payed before Denunciation, though not by way of exception, *Douglaſs*, 544. null againſt the Wife *ſtante Matrimonio*, by way of Exception, *Stuart*, 674. or for the Wife, if in her name only, *Napier*, 602. not null, though three years interveened betwixt the Charge and the Denunciation, L: *Lauchop*, 724. and though the Regiſtrat Execution bore not ſix knocks, the Principal being then margined therewith, and thereafter ſubſcribed by the meſſenger and proven, *Scot*, 843. and albeit Regiſtrat after the Rebels deceaſe, L: *Ley*, 250. Horning againſt an Executor, not ſufficient to make his Cautioner lyable, *Arnot*, 45.

Horning Suſtained to debar in Purſuing, L: *Barganie*, 56. and from defending, but not from Leponing, *Dickſon*, 138. and from propouning Improbation untill he be Relaxed, Donatar L: *Foulis* Eſcheat, 202. and to debar from Compt and Reckoning, *Rule*, 374. and to debar the Wife's Aſſigney to her behove, though being only againſt the Husband, *Chiſholm*, 577. and the principal Suſpender and his Cautioner being *inſolvent* till better Caution be found; *Reddicks*. 626.

Horning not ſuſtained ſummarly by a Miniſter's Executor for his Stipend, Miniſter of *Livingſtoun's* Relict, 53. But ſuſtained though neither bearing *Execute perſonally*, *nor at the dwelling-houſe*, If it bear a Copy deliver'd, *Stuart*, 224. & upon a Contract, after Charter and Seaſin, for Implement, L: *Renton*, 775. not Suſtained upon an Act of a Kirk-Seſſion, for Stent, not being ſubſcribed, Viſe: of *Stormonth*, 165. Suſtained upon general Letters, with a ſpecial Charge, *Troup* 147. and though execute at *Dance*, though it is not the Head-Burgh of the Shire, Prior *St. Bathans*, 202. Horning is neceſſary before Compryſing, *Cranſtoun*, 31. Is not a ſufficient diſcuſſing of an Executor whereupon to purſue the Cautioner, *Arnot*, 45. does not ſiſt the courſe of Annualrent, *Gray*, 187. granted by the Lords *Incidenter* for Configned Money, *Grierſon*, 613. Extract of a Horning no ground of Arreſtment, *Duff*, 442.

Hoſpital preferred to other Creditors, *Creditors of Brown*, 556.

Houſemailles, how payed betwixt the Relict and Executors, *Guthrie*, 209. Double Mailla, *Finlaſon*, 327. *vid*: Poynding, *vid*: Removing.

Husband, *vid*: Wife.

Hypotheque not Suſtained of Writs of Land, *Dundas* 252. *vid*: Seaſin, *vid*: Impignoration. Suſtained of the Tennents Corns and other Goods, L: *Polwart*, 897. and *Hay*, 76. *vid*: Tennents.

Hyrer or Conductor tqui, how obliged to the Lender, *Mowat*, 238.

I.

IDiot his neareſt Agnat preferred to be Tutor to a prior Tutor Dative. *Colquhoun*, 349.

Impignoration of the Writs of Lands Wodſet, *Hige* 463. *vid*: Hypotheque.

Imployment of Tocher not Suſtained at an Aſſigneys Inſtance, but in the Terms of the Contract of Marriage

Logan, 82. Impl: of money purſued by the Relict againſt the Heir and Executor, *Graham*, 361. as alſo againſt a Cautioner, *Naſmith*, 380. Suſtained at a Mothers inſtance for her daughter againſt her Daughters will, *Gray*:447. and being Imployed to the Wife in Liferent, and to the Bairns in Fee, belongs to the Heir, *Schaw*, 637. Deſtination to Imploy Money, *vid*: Heretable. *vid*: Obligment.

Importance, *vid*: Writs, *vid*: Obligment.

Impriſonment, *vid*: Ballzies, *vid*: Subſidiary Action.

Improbation how it muſt be Lybelled for production of Writs made by the Purſuers Authors; L: *Craigie*, 13. how the production excludes the Purſuers Title, E: of *Kinghorn*. 18. how after a Term taken to produce, the Defender may be abſent, E: *Queensberry*, 818. who may be called therein, Mr: *Lauderdail*, 63. A Charter with Parts and Pertinents Suſtained as a Title therein, Town of *Striviling*, 166. as alſo a Charter Confirmed without Inſeſtment, L: *Glengarit*, 564. and likewiſe a naked Seaſin, L: *Smton*, 581.

Improb: Suſtained at the Inſtance of a ſingular Succeſſor againſt his Authors Rights, *Hamilton*, 218. and upon a baſe Inſeſtment againſt Vaſſals, *Stuart*, 263. If their Authors and their Heirs be called, *Ibid*: but appearand Heirs need not be called, unleſs condeſcended upon, L: *Lawriſtoun*, 256. and E. *Mar*. 325. and Suſtained though the Purſuers Authors be not Inſeſt, *Baron* of *Achyl*, 334. and at the Inſtance of a General Heir, *Morits*, 435. and of a Titular or Lord of Erection, *Stuart*: 268. and of an Heir though not Inſeſt, E: *Kinghorn*, 490. not ſuſtained upon a perſonal Bond or Diſpoſition, *Ramſay*, 544. nor at the Inſtance of an appearand Heir, neither Retoured nor Inſeſt, though at an Appryſers Inſtance againſt him, L: *Johnſton*: 739.

Improb: of a Writ produced by the Regiſter ſuſtained in abſence, L: *Murdeſtoun*, 164. of a Compryſing and who are called therein, *Henderſon*, 378. of an old Seaſin, L: *Ley*, 630. of Charters, Retours, and Regiſtrat Papers: K: Majeſty, 682. of an Interdiction, La: *Borthwick*, 761. of a Bond upon a falſe Date, *Edmonſton*, 793. of an execution by the Son againſt the Father, *Thomſon*, 541. how far ſuſtained before Inferior Judges; *vid*: Judges; *vid*: Reduction; *vid*: Regiſtration; *vid*: Retoures.

Improb: by way of Exception being concluded, neither Articles of Approbation nor the Improvers Oath admitted, L: *Roſline*, 25. not Suſtained againſt the deſignation of a Gleib, L: *Carſe*, 208. and does not take away the Reduction of the ſame Writ, *Striviling*, 393. not Suſtained againſt a Regiſtrat Bond by way of Exception, *Ker*. 675. Imp: and Reduction Suſtained in one Summons, Lo: *Kildrimmie*, 205. Reduction of an Improbation and Action for making up the Cancelled Writ, ſuſtained in one Summons *Lawſon*, 476. how and when to abide by a Writ, *Ker*, 751. and how the Party granter is to be cited, if out of the Countrey, *Ibid*: how the Purſuers Title being eleided by a defence upon a prior Right, the Purſuer may Reply upon a Right prior to it, though not produced *ab initio*, E: *Kinghorn*, 18.

Incident Diligence refuſed for Writs pertaining to the Purſuer or his Authors, or preſumed in his hands *Gritr*, 14. and againſt a Pupil within 12 years of age, *vid*: Minors. Incident upon 60 dayes againſt perſons out of the Countrey, not ſuſtained, without a Warrand, *Mure*, 431. neither further Diligence upon other 60 dayes, not being proteſted for, *Roſs* 485. yet ſuſtained upon 60 dayes, upon the cravers declaring upon Oath, that the havers were out of the Countrey, *Dunbar*, 260.

Incidents muſt be ſpecial in Improbations, E: *Mar*, 64. and ſhould be raiſed at the Inſtance of the Kings Advocat, or with his Concurrence, E: *Hume*, 64. and he muſt be Cited with other Purſuers in the principal Cauſe, King's Advocat, 108. but it is not needfull to call the Granter of a Writ therein, *Inglis*, 313, how the Parties Called muſt Depone, *Ibid*: and if the Incident be not execute, the having of the Writs may be referred to the Defenders Oath, *Burnet*, 640. *ſitus* If it be execute, *vid*: Probation.

Indefinitly how Interpret, 186.

Pro Indiviſo, *vid*: Removing, *vid*: Tennent.

Inſeſtment cannot be taken away by way of Exception, *Stirling*, 286. granted by one Vaſſal to another prejudges not the Superior, Lo: *Ramſay*, 77. two Inſeſtments of one thing, the one derogats from the other, La: *Raploch*, 169, in full ſatisfaction, *vid*: Innovation. Poſterior Inſeſtment clad with Poſſeſſion, preferred to a prior, *Monnipenny*, 118. prior with Poſſeſſion preferred to a poſterior Confirmed, *vid*: Confirmation; Inſeſtment of Property preferred to a prior of Paſturage and Commontie, *vid*: Paſturage. Inſeſtment with 16 years proviſion, repelled in a Removing, L: *Drumquhaſſel*, 405. and with 20 years *Stuart*, 335. and with 40. La: *Glengarnock*, 220.

Inſeſtment of Annualrent to a ſecond Wife, and her Bairns precludes not the Husband from the Fee, and Diſponing thereupon, *Veitch*; 528. a Superiors Inſeſtment being Reduced in Parliament, all others falls in conſequence *per Exceptionem*, *Stuart*; 656. Inſ: diſconform to the Contract, L: *Renton*; 775. Inſ: in an Office of Forreſter, 730. in a Fiſhing in a Loch *per expreſſum*, *Scot*, 774. the cauſe of an Inſeſtment how probable, L: *Foulis*, 247. Inſeſtment upon a Contract of Marriage, La: *Corſinday*, 19.

Inferior, *vid*. Judges.

Inhibition affects only Heretable Rights, L: *Bruce*, 61. yet deduced upon a Moveable Bond, Suſtained to Reduce another, to far as it may be a ground to Compryſe, *Douglas*, 523. and will Reduce a Compryſing thereupon, unleſs the Compryſer offer to purge, *Idem*. 543. and L: *Corſbit*, 574. though it hinders not perſonal Execution, or againſt Moveables, upon the ſaid Bond, *Ibid*. and Reduces a Diſpoſition, though in ſatisfaction of a prior Bond, with an obligement to Inſeft in an Annualrent, *Scot*, 415. much more if the Bond carry no obligement to Inſeft, *Brown*, 537. and Reduces a Contract, though depending upon prior Debts, *Roſs*, 748. but not if the Bonds carry Obligements to grant Real Rights, *Roſs*, 752.

Inhibition affects not growing Corns or Moveables, L: *Bruce*, 61. Inhib. refuſed to a Son againſt his Father, young *Silvertounhill*, 10. and againſt an appearand Heir, *Methvin*, 10. altered, *Kirkwood*, 69. refuſed to a Wife againſt her Husband, *Hamilton*, 155. but allowed to her upon a particular Bond, L. *Glenbervie*, 857.

Inhibition Suſtained upon a Moveable Bond againſt a real Right, *Portеous*, 170. and upon a naked Gift of Liferent, *Troup*, 177. and upon a Contract of Marriage, *Law*, 188. when it takes effect, L. *Fairnits* Bairns, 310. and at whoſe inſtance it may be raiſed, Supplicants, 253. It hinders the Debitor to contract Debt, but not to Aſſign it, *Dickſon*, 418. *vid*. Reduction. *vid*. Improbation.

Inhibition of Teinds, how far it extends, Lo. *Blantire*, 363. paſt from by receiving the old Duties, *Idem*. 369. It interrupts *bona fides* in Tackſmen, *Stuart*, 301. Rental Bolls due after Inhibition, *Gordon*, 24. Inhib. upon 60 days no Warrant for Executing perſonally, *Erskin*, 262. *Secus* in Executions of ordinary Summons, L. *Kirkonnel*, 338. the Import thereof at the Mercat-Croſs of *Edinburgh*, *Peir* and *Shore* of *Leith*, *Lamb*, 364.

Inhibition at Dans and not at *Greenlaw* ſuſtained, *Dickſon*, 627. Inh: againſt an appearand Heir, *Kirkwood*, 69. Inh: againſt a party dwelling within a Regality, muſt be execute there, *Stirling*, 393. and that Nullity received by way of Exception, *Ibid*: but ordinarly not without Reduction, *vid*: Decreet. Inh: interveening betwix Charter and Seaſin, *vid*: Arreſtment.

ment; and betwixt a prior and posterior Contract, L: *Scotstarbet*, 879.

Injuria dissimulatione tollitur, vid: Contravention.

Innovation not Sustained upon acceptation of a new Bond from different persons, though for the same debt, *King*, 201. and *Lawson*, 689.

Insisting, a day with Certification, cannot be assigned to a Procurator without the Pursuers self be present for that effect, L: *Wardis*, 513. this matter fully cleared, E: *Queensberry*, 818.

Instrumtnt, vid: Requisition. *vid:* Marriage. *vid:* Premonition. *vid:* Confignation.

Instrumentum noviter repertum, Gordon, 556.

Instrumentum apud debitorem repertum, Gordon, 691.

Interdiction published at the Mercat-Cross Sustained, *Seton*, 38. and without Cognition, *Ibid:* but if not voluntar, it must be upon Cognition, *Campbel*, 40. otherways Reduceable, *Strachan*, 86. after Interdiction the party may give Bond to Work-men for their Fees, L: *Collingtoun*, 142. otherways Reduced, *Forbes*, 670. but will neither defend the person Interdicted from Caption, nor his Moveables from poynding, or other execution, *Bruce*, 725 but only receiveable by way of Reduction, *Harair*, 558.

Interest, vid: Parties. *vid:* Possession.

Interruption, vid: Ejection. *vid:* Prescription.

Intertainment, vid: Aliment.

Intimation puts the Debitor in *mala fide*, L: *Winton*, 36. and how qualified, *Murray*, 35. but the only producing an Assignation is not equivalent thereto, *Ibid:* nor is privat knowledge equivalent, *Adamson*, 128. but the receiving of Annualrents from the Debitor is, L: *Halkertoun*, 329. as also the Assigneys writing a Letter, and the Debitor promising to pay 484. and also the executing Summons against the Debitor upon the Assignation, *Smith*, 834.

Intimation made by a Procurator who was also Nottar, is null, *Scot*, 381. and at a parties Dwelling-house, with a Copy delivered to the Wife, doubted if it put the Husband (being out of the Countrey) in *mala fide*, but not decided, *Kinloch*, 412. but if intimat only at the Mercat-Cross of the Head-burgh of the Shire where the Debitor dwells, that is not sufficient, *Hunt*, 649.

Intromettor, vid: Tends. *vid:* Vitious intromission. *vid:* Universal Intromettor. *vid:* Executor. Intromettor with Heirship-goods, *Cunningham*, 454. with Malls and Duties, L: *Foulis*, 247. with small things, will not infer a passive Title, *Scot*, 86.

Intromettor conveenable by the Creditors as well as Executors, *Schaw*, 44. *Iecus* If there be an Executor Confirmed, *Tennent*, 230. thereafter only lyable *in quantum*, *Douglas*, 448. and so if the Intromettor Confirm within year and day, *Adie*, 330. yea a Relict admitted to Confirm two years after the Defuncts Decease. Relict of *Lindsay*, 365. but naked continuing in Possession will not infer Intromission, *Alans*, 327. Intromettor can only be pursued where he dwells, 44.

Intromettors decerned conjunctly, not lyable *in solidum*, *Chalmers*, 233. an Executor lyable though the Testament be exhausted, where there are other Pursuits depending before payment, *Jaffray*, 241. Intromettor lyable for Annualrents, not only before, but since the Defuncts Decease, L. *Moristoun*, 389. and may be conveened before a Decreet *Cognitionis causa*, and in one Summons, Lo: *Blantyre*, 244.

Intrusion not necessar after Removing, *Gretenlaw*, 103 but if the Intruder has been a year in possession, and his Author 6 or 7 years, it excludes Removing, *Hay*, 266. Sustained after three years, as to the ordinary Duties, *vid:* Removing.

Invecta & illata pay no Multure, *Keith*, 1. *vid:* Miln. *vid:* Multures.

Inventar, vid: Executor. *vid:* Exhausting.

Irritant Clause, vid: Back-tack. *vid:* Feu. *vid:* Offer. *vid:* Disposition.

Isle, vid: Tack. *vid:* Rental.

Judges of Inferior Courts may not Re-examine a party, *Strict*, 280. may not sit before lawful time of day, L: *Halkertoun*, 338. neither can they give warrant to cite parties out of the Countrey, *Salmond*, 413 nor Judge in a Brothers Cause, *Gemmil*, 412. nor Subscribe their own Decreets, *vid.* Decreets. nor transfer, or put others Decreets to execution, *vid:* Transferring.

Neither are they competent to Remove Tacksmen for not finding Caution, L: *Jerriswood*, 622. neither can he multiply Dyets or Sentences in one Lybel, *vid:* Decreet. and the Clerk in his Office by his Extract, makes more Faith than the Judge, *Lawder*, 385. Likeas a succeeding Clerk may Extract any Act out of his predecessors Books, *Stuart*, 287.

Inferior Judges how competent to Improbations, L: *Williamson*, 543. and after they are *functi Officio* how they may Discharge Fines for Contumacy, *Lindsay*, 694.

Juramentum in Litem, vid: Exception. *vid:* Violent profits.

Jurisdiction, vid: Rebellion. *vid:* Seasin. *vid:* Vassal.

Jus superveniens authori, E: *Dumfermling*, 453. *Jus superveniens venditori, Cunningham*, 756. *vid:* Forestaulture. *vid:* Union. *Jus superveniens uxori*, L: *Blairquhen*: 851.

Jus tertii, vid: Assignation. *vid:* Bond.

Jus Mariti falls under single Escheat, *Pollock*, 430.

K.

King is the Fountain of all Honour, *vid:* Title of Honour. King's Miln; *vid:* Miln. King's Feus; *vid:* Pension. King's Vassal; *vid:* Vassal. The King has the only power to unite Lands discontigue, *Stuart*, 213. but may not dispone upon the Princes Lands, *Hamilton*, 218. may give a Tutor Dative, *vid:* Tutor. How his Letters for interruption of Prescription are published, K: *Majesty*, 515. how preferred for the Impost of Wines, *Peebles*, 589. not prejudged by his Officers of State, *vid:* Dissolution. and may pursue improbation of Services, Retours, Charters, *&c.* K: *Majesty*, 683. and His Officers allowed to sit in His Cause, *Ibid.*

Kings Vassal may pursue for Blood, L: *Westinsbet*, 12. whose Liferent-escheat falls to the King, though not Infeft, *Douglas*, 119. and where the Holding is dubious, it is presumed to be of the King, *Halyburton*, 207.

Kirk Lands how mortified to a Colledge, *Cock*, 754 *vid:* Confirmation. *vid:* Mortification.

Kirk-Patrimonial or Mensal, Bishop of *Dunkeld*, 585 Kirks united, how disunited, *Christison*, 569. the Queer is the third part of the Kirk, and accordingly to be upholden, Kirk of *Selkirk*, 402. how the Bells to the Kirk are to be furnished, and the Kirk repaired, Parochioners of *Innerkeithing*, 893.

Kirk Session an act thereof not subscribed null, Visc. of *Stormonth*, 165. and Testimonials thereof how probative, *Wilson*, 187.

Kindly Tenants, L: *Lag*, 6. *vid:* Tack. *vid:* Removing. *vid:* Rental.

L.

Lawborrows how to be Suspended, and Caution found therein, L. *Clackmannan*, 318. *vid:* Contravention.

Lectus Ægritudinis, vid. Death-bed.

Legacy of an Heretable Bond sustain'd, *Drummond*, 99. by particular Tickets, though not in the Testament, Executor of *Scot*, 472. exceeding 100 pound, how restricted and proven, *Wallace*, 457. left to plous uses, Doctor *Monro*, 526. granted by way of Bond, not Revockable, by any deed probable by Witnesses, *Hous-*

ſloun, 571. of Heretable Bonds by the Laws of *England*, *Melvil*, 723. no Legacy due *niſi debitis deductis*, *vid*: Executor. Legacy to the Sifter, *Bells*, 805. left by way of Codicil, *Dundaſs*, 873. particular Legacies, *& Legata nominum*, *Pool*, 403.

Legal, *vid*. Reverſion. *vid*: Terms of payment.

Legatar or his Aſſigney can only purſue the Executors L: *Balnamoon*, 43. even though it be a ſpecial Legacy, he cannot purſue the Debtor therefore, *Forreſter*, 288.

Legitima non debetur liberis ex parte matris, *Patterſon*, 12. *vid*: Portion natural, *vid*: Baſtard.

Leith, moveable Tenements there may be Witneſſes for their Maſters, *Watſon*, 64. Seaſins there how to be Regiſtrat, *Edmonſton*, 72. being no Burgh Royal, its Baillies cannot Arreſt, Decern, or Incarcerat any to find Caution, to anſwer as Law will, *Salmond*, 75.

Letters of Diligence, *vid*: Incident. *vid*: Diligence. Letters conform upon a Penſion, D: of *Lennox*, 259. for a Miniſters Stipend, *M'kenzie*, 363. are not Diſcharged by the Act of Parliament againſt general Letters, *Inglis*, 427. Decreet and Letters conform, L: *Carrick*, 545 Letters of Supplement, *vid*: Removing, *vid*: Requiſition.

Licenſe not allowed in Datives *ad omiſſa*, *Halliday*, 7. Licence probable by Witneſſes, King's Advocat, 662. *vid*: General. *vid*: Decreets.

Lift, *vid*: Preſumption.

Liferent-Eſcheat of the Vaſſal falls under the ſingle Eſcheat of the Superior, *Sibbald*, 51. and belongs to the Superior after the Liferenters Death, Lo: *Ramſay*, 77. and pertains to the Immediat Superior only, *Meldrum*, 101. though the Vaſſal ſhould offer to diſclaim, *Douglas*, 372. and though the Vaſſals Seaſin be null, Lo: *Cranſtoun*, 571. and though an appearand Heir only, *Colmſlie* 436. and Lo: *Cranſtoun*, 569. and though his Father was not Inveſt, *Lindſay*, 738.

Liferent Eſcheat of a Vaſſal of Kirk Lands, falls to the Lord of Erection, *Ker*, 360. how bygones are divided betwixt Donatars, *Murray*, 513. and how Arreſtable, *vid*: Arreſtment. and how it accreſces to the buyer of the Lands, *Cunninghame*, 756. how the Horning thereof may be Reduced, *Kincaid*. 472. how Suſtained notwithſtanding of Inhibition, *Herris*, 85. to whom the Vaſſals Liferent falls after the Superior's is Gifted, *Douglas*, 357.

Liferenter dying after *Whitſunday*, *M'math*, 6. and before *Martinmaſs*, L: *Aiton*, 415. living till *Martinmaſs* day in the afternoon, La: *Bruntouns* Executors, 894. has the priviledge of Removing Intruders, without Warning, La: *Kincaid*, 9. but not againſt Tennents cloſed within Terms, *Thomſon*, 346. and after their death, Letters granted upon a Bill againſt the poſſeſſors of a Houſe upon ſix days Warning, L: *Hattoun*, 363. Charges to find Caution to maintain and uphold a Houſe, ſuſtained againſt a Liferenter, conform to the Act of Parliament, *Foulis*, 196. as alſo againſt a Liferent Tackſman, *Caddel*, 744. Liferenters Aſſigney in poſſeſſion, preferred to the Heretors, *Wright*, 715.

Liferent Right made *in læto* Reduced, *Robertſon*, 13. Conſtitute by Bond, not Aſſignable *in fraudem*, L: *Rattray*, 126. and by a Decreet Arbitral falls under Liferent-Eſcheat, *Murray*, 25. provided to a Woman though for Adultery, ſuſtained, *Roſs*, 896. Is Compryſable for the Husbands Debt, *Finlaſon's* Wife, 128. and ſuch Compryſing needs no Inſefment, *Maxwel*, 715. Liferent-Tacks falls not under ſingle Eſcheat, *Stuart*, 579.

Liquidation, *vid*: Diſtreſs. *vid*: Probation. *vid*: Qualified Oath.

Litigious, *Richardſon*, 776. *vid*. Lo: Seſſion.

Litiſcontestation, no exception receivable thereafter, *niſi noviter veniens ad notitiam*, *Crawford*, 296. and verified *ſcripto*, *M'millan*, 299. and in Improbations, neither the Improvers Oath, nor Articles of Approbation can be received thereafter, L: *Roſlin*, 25. *vid*; *Gordon* of *Cluny*, 26.

Locatio & conductio, *vid*: Hyrer: a Charge for a Chamber-Mail, Suſpended becauſe not entred thereto a Month after the Term, *Brown*, 687.

Locus pœnitentiæ before delivery of a Diſpoſition, *Byres*, 247. In a bargain of Land, *Oliphant*, 406. before delivery of a Bond, *Glendinning*, 733.

Lords of Erection, *Ker*, 360.

Lords of Seſſion are not Judges to Decreets of Parliament, Miniſter of *Kirkliſtoun*, 180. and *Stuart*, 301. neither can they buy Pleys, *Richardſon*, 776. and the Act of Parliament extends only to Deprivation, *ibid*. they are competent Judges to the queſtion of *Baſtardy*, *vid*: Service. neither can any Member of Seſſion buy Pleys, *Mowat*, 174.

Louſing, *vid*: Arreſtment.

Lyon King at Arms may convene the Meſſengers any where, *Meſſengers*, 601. *vid*: Caption.

M.

Magiſtrats of Burghs of Barony are not to execute Captions, L: *Langtoun*, 109. of Burghs Royal how lyable for the Rebels Debt, *Haliburton*, 205. not lyable *in ſolidum*, *Ker*, 265. In ſubſidiary Actions againſt them, It's not neceſſary to produce the Horning, *Baillie*, 401. nor to call the Rebel, *Roſs*, 448. not being able to apprehend the Rebel, they are abſolzied, *ibid*. being once Charged, ſtill lyable to apprehend the Rebel for the ſpace of a year only, *Hay*, 530. though Charged in the night time, and the Burgh was poor, *&c*. *Lyon*, 636 *vid*: Officers.

Maills and Duties, the Tennents Maſter needs not be called therein, La: *Corſindae*, 19. are not due before Declarator of Non-entry, Lo: *Leſly*, 24. nor in Warrandice Lands before Declarator of Fa'zie, *M'math*, 99. nor by the Defunct's Executor without production of his Seaſin, *Seton*, 329. but may be purſued before the Term of payment, *Edington*, 330.

Maills and Duties cannot be advanced before hand to the Heretor *in fraudem*, *Gray*, 445. a naked Compryſing is a Title thereto, *Rule*, 767. how Intromettors therewith are lyable, La: *Borthwick*, 790. Suſtained upon a Charter without a Seaſin, *Wood*, 839. Maills and Duties, and Adjudication in one Summons, *vid*: Adjudication. *vid*: Compryſing. *vid*: Reſignation. *vid*: Superior.

Majority preferred in the Probation to the Alledgance of Minority, *Stuart*, 112.

Mala fides how inferred, Executors L: *Duffus*, 339.

Malverſation of a Meſſenger, *Kello*, 345.

Mandatum tollitur Mortuo mandatore, L. *Duffus*, 339. *vid*: Payment. *vid*: Cautioner. *ſecus ſi in rem ſuam*, *vid*: Procuratory.

Manſe, *vid*: Glebe. *vid*: Miniſter.

Marriage how required by the Donatar, *French*, 28. wherein diſparadgment conſiſts, *Ibid*. with the formalities of the Inſtrument, *Ibid*: the Marriage of every appearand Heir is due, *Ibid*: the Inſtrument of Requiſition what it ought to bear, L: *Rothes*, 286. and how the Single and Double Avail is due, *Ibid*. The King preferred therein to other Superiors, Lo: *Balmerino*, 295. Marriage being Diſſolved within year and day, Suſtained to repeat the Tocher, *King*, 309. a Bond to Marry under ſuch a penalty Suſtained as to the penalty, *vid*: Bond.

Maſters, *vid*, Hypotheque, *vid*: Tennents.

In Meditatione fugæ, *Scougal*, 265. *vid*: Bankrupt.

Medium impedimentum, *vid*: Arreſtment. *vid*: Compryſing. *vid*: Confirmation. *vid*: Diſpoſition. *vid*: Forefaulture. *vid*: Inhibition. *vid*: Reſignation. *vid*: Tack.

Members of Seſſion, *vid*: *Lords*.

Meſſengers can only deſign Witneſſes in a Denunciation, *Murray*, 587. hinderers of Meſſengers to execute Caption, how they may be purſued, *Mitchil* 691. *vid*: Malverſation.

Metts and Meaſures how to be obſerved, *Burns*, 20.

Mitus Cauſa Suſtained to a Wife againſt a ſingular Suc-

Succeſſor to Reduce her conſent, *Caſſie*, 634. *metus reverentialis* not Suſtained, *vid*: Conſent, *vid*: *vis & metus*.

Miln the Seaſin thereof ſpecial, *Aitkin*, 41. yet Tradition of Earth and Stone ſuſtained, *Kennedit*, 429 *vid*: Multures, *vid*: Thirlage.

Miniſter and Seſſion cannot charge for a ſtent to a Reader unleſs the Act of Seſſion be Subſcribed by the Parochioners, and the partie charged. Viſe: *Stormonth* 165. they may purſue any poſſeſſor of Teinds for their whole Stipend *in quantum* &c. *Mortoun*, 174. how the Relict and Bairns has Right to the Stipend after his deceaſe, E: *Mariſchal*, 221. their Manſe and Gleib holds of none but the King, to whom their Eſcheat falls, *Fletcher*, 373. dying at *Whitſunday*, what falls for Stipend, what for Annat, *Swinton*, 446. he cannot be removed from the Manſe untill Reparations be payed, *Keir*, 521. a houſe already built by another, cannot be deſigned for a Manſe, but he muſt purſue therefore, or build one for himſelf, Miniſter of *Innerkeithing*, 568. how a Stipendiary Miniſter may ſet Vicarage Teinds, Tennents of *Hyndwood*, 812.

Minor in familia paterna is not obliged for Clothes, *Lamb*, 50. nor to give their Oath upon the Fathers Deed, *Kinniers*, 42 and are freed of all perſonal Execution, *Somervail*, 129. he cannot diſcharge a Decreet, recovered at his Curators inſtance, *Stoddart*, 645. Intromettors with his Money payes Annualrent, *Henderſon*, 728.

Minors may purſue their Tutors Heir with Curators named in *England*, *Naſmith*, 145. and may purſue them to accept or Renounce, *vid*: Tutors, and to Exhibite their Writs, without Concurſe of their Curator, L: *Haddo*, 448. but not for delivery, L: *Haddo*. 508. and may purſue them *in ſolidum*, *Guthrie*, 491. and for Redemption of his Lands from them, L: *Haddo*, 580.

Minors may redeem any Compryſing *intra annos utiles*, *Rule*. 876. and may mellorat his own condition by Submiſſion, &c. *Hepburn*, 883. they cannot be purſued as havers within twelve years of Age, *Aitkin*, 324. but are conveenable after 14. E: *Mar*, 375. and obliged to Depone though their Curators be abſent, *Forbes*, 379. the priviledge of a Minor ſucceeding to a Major; dying *intra annos utiles*, *M'math*, 361.

Deeds done by Minors without conſent of Curators are null, *Drummond*, 130. by way of Suſpenſion, though the Bond bore *he was Major*, *Bell*, 872. except it be for what is *in rem verſum*. *Gordon*, 473. as for Pedagogue-fees, *Drummond*, 298. and as for the price of a Horſe delivered, *Brown*, 412. and for Merchants Ware and Abuilziments furniſhed, *Inglis*, 565. having Charged a Party without his Curators conſent, the ſame Suſpended, Burgeſſes of *Glaſgow*, 283.

Minor Reſtored in integrum againſt a Diſcharge; *Lockhart*, 227. againſt a Decreet *cognitionis cauſa*, *Kennedie*. 331. and againſt a Diſpoſition of Lands, *ab initio*, being made without the Authority of a Judge; *Houſton*, 558. and againſt his Contract of Marriage *in quantum leſus*; *Davidſon*, 639. and againſt a Contract of Marriage with his Siſter, made without his Curators conſent; *Maxwel*. 660. and againſt a Diſpoſition of Lands upon Leſion, though with conſent of Curators, *Hame*; 763. and without calling his Curators, *Vernock*, 835.

Minor not reſtored againſt an Infeftment, whereto his Father was obliged, *Paton*, 275. nor againſt a Diſpoſition of Lands, except *intra annos utiles*, and upon Leſion, *Hamilton*, 488. nor againſt a Promiſe upon Oath, *Hepburn*, 697. nor againſt a Bond, though he Revocked *intra annos utiles*, but had not intented Reduction, *Murray*, 539. or had payed Annualrent after his Majority, *Johnſton*, 537. or, where he calls and ſwears himſelf to be Major, *Weyms*, 831. *ſecus* if he promiſe only not to Revock, or gave order, and direction only, *Ibid*.

Minor non tenetur placitare &c. *Hamilton*, 153. neither *primario*, nor *per conſequentiam*, *Pringle* 165. *Sed tenetur ſuper conqueſtu*. Mr: of *Jedburgh*, 345. and the Proviſo the Tenor of a Charter Suſtained againſt him *Ibid*: and *tenetur* in Subaltern Rights, *Stuart*, 216; & ſuſtained againſt his Mothers Liferent, though *in eodem corpore juris*, *Balmanno*, 366. and for non payment of the Feu-duty at his Superiors inſtance, *Lennox*, 675.

Minority, *teſtibus non teſtimoniis probatur*, *Wilſon*, 187. Receivable by way of Exception, L. *Lamond*, 847. *vid*: Majority.

Minut by way of Counſel or Advice, though ſubſcribed, not obligator, E: *Dumfermling*, 214. and ſubſcribed by Nottars, cannot be extended after their death, but Tranſumed, *Roſs*, 271. Implement of a Minut though Impreſtable, how purſued, *Murray*, 708. Minut of a Contract of Marriage, though defective, yet extended, *Wolſt*, 823.

Miſſive Letter not Suſtained, unleſs Holograph, *Pyrnon*, 273. If Holograph Suſtained of the Date, unleſs Improven, Lo: *Leſlie*, 424.

Moleſtation and Declarator of a Right, how to be purſued, Town of *Peebles*, 285. Suſtained at the Liferenters inſtance, though the Fiar was debarr'd, and the Superior not called, L: *weym*, 697.

Money conſigned ought not to be lifted and exhibited before the Judge 77. intromiſſion with Money how probable, *Biſſet*, 152.

Mortification how Conſtitute, L: *Kerſe*, 208. Mortification of a Deanry, Colledge of *Aberdene*, 443.

Mortis cauſa, *vid*: *Donatio*.

Moſs vid: Commonty, how a Diviſion thereof may be purſued, *Irwing*, 53.

Mother may diſpone her Moveables upon Deathbed, and exclude her Executors, *Paterſon*, 12. offering to maintain her Bairn. is preferred to the Tutor in the keeping of him; *Noble* 310. But thereafter altered, *Ibid*. and may purſue Implement of her Daughters Contract of Marriage: *vid*: Imployment.

Moveables; *vid*: Heretable.

Multures not due for Farms payed to the Maſter &c. *Keith*, 1. nor of Corns brought into Barns, or Barn-yards, *Brown*, 378. Knaveſhip, Bannock and Lock are due as well as the Multures, though not expreſt, *Adamſon*, 368.

Multures due upon a Contract, notwithſtanding of a poſterior Feu *cum Molendinis & Multuris*, *Hamilton*, 661. and upon an Infeftment in a Miln *cum aſtrictis Multuris*, and 40 years poſſeſſion, notwithſtanding of a prior Infeftment *cum Molendinis*, *Maxwel*, 810. *vid*: Thirlage.

Mutual Contracts purſued upon, though not delivered, *Crawfurd*, 167. *vid*: Contract, *vid*: Obligement.

N

Natural, *vid*: Portion.

Negative, in a Reduction againſt a Bankrupt, proves it ſelf, *Denniſton*, 17. *vid*: Probation.

Non-entry carries not the full Duties till after Declarator, but the Retoured Duty, except three Terms ſubſequent to the Ward, *Ker*, 44. and Lo: *Leſlie*. 24. and thereupon a Compryſing Reduced, E: *Kingborn* 597. how the Lands being full for 40 years, excludes all preceeding Non-entries, *Douglaſs*, 439. though proponed by a third party, where this point is fully cleared, *Murray* 449.

Non-entry excluded alſo by any Right that will defend from a Removing, with 15 years poſſeſſion, or contain a *novo damus*, *Ibid*: the Superior of Ward Lands may retain Poſſeſſion till he be payed of the Non-entries, otherwiſe he may purſue therefore, *Peebles*, 485. not purged by the Superiors Precept, nor Charter, unleſs Seaſin follow thereupon, *Hay*, 511. Non-entry in blench Lands, only the Retoured Duty is due, *Ogrie*, 564. till after General Declarator, and then the property may be compryſed there-

fore, none being called but the appearand Heir, *Moncrief*, 746.

Note of the receipt of Money upon the back of a Bond, though not ſubſcribed and delete, yet ſuſtained in part of payment, *Norkat*, 142: *vid*: Diſcharge.

Nottar cannot alſo be Witneſs to his own Subſcription, *vid*: Subſcription, nor a procurator in his own Inſtrument, *vid*: Intimation. a Nottar Purſued for Writs how Examined *ex officio*, *Stuart*, 482.

Novatio, *vid*: Innovation.

Noviter veniens ad notitiam, *vid*: Exception, *vid*: Litiſcontestation.

Novo damus, *vid*: Non-entry.

Noxa caput ſequitur, *Caldwell*, 30.

Nullity of an Horning conſiſting *in facto*, how received, E: *Wintoun*, 7. Nullity of a Decreet of the Admiral, *Hamilton*, 39. Nullity of a Seaſin for not Regiſtration, not competent to a Tennent, La: *Dunipace*; 61. nor to one who had no right, *Rowan*, 858. Nullity of a Compryſing, though inſtantly verified, not received by way of Exception, *Stirling*; 393. yet ſo received at the inſtance of one Compryſer againſt another in Maills and Duties, *Mitcheilon*; 395. as upon not being execute upon 15 dayes free, conform to an Act of Sederunt, 65.

Nullity of a Retour by way of Exception, *vid*: Advocation. Nullity of a Writ received upon Redaction after Improbation; *vid*: Improbation. Nullity of an Infeſtment of Annexed Lands how received, *vid*: Annexation. Nullity of an Infeſtment of Kirk-lands after a Decreet of Removing how received, *Hindt*, 652. *vid*. Decreet.

O

OAth of Verity, *Campbel*, 242. *Winraham*, *Ibid*. Oath of Credulity by a Purſuer; Lo: *Blantyre*; 68. Oath of Credulity notwithſtanding of Probation, Lo: *Duffus*, 156. and notwithſtanding the Suſpenders were not reponed to their Oaths, L: *Drum*: 331. Oath *in litem*, *vid*: Spulizie. A Wifes Oath *ſtante Matrimonio*, Lo: *Gray*, 335. only to operat againſt her ſelf, after her Husbands deceaſe, *Temple*; 789.

Oath of Calumny upon the whole Lybel, E: *Galloway*; 475. *vid*: Cautioner. Oath in Supplement; *Richardſon*; 718. after which the Defender cannot be reponed, *Ibid*. A party reponed to his Oath upon payment of the others Expences, *Duncan*; 831. and an Executor reponed being holden as conſeſt upon the promiſe of payment of an Heretable Debt, *Wilſon* 380. and Repon'd upon a parties offering to depone before Sentence, *Denniſtoun*; 487.

Oath, how a party may be ſummoned to give the ſame, *Hume*; 669. an Exception *in facto proprio & recenti*, being referred to a parties Oath, if he muſt depone *poſitive*, yea, or no, or be holden as confeſt, *Weyms*, 887. a party purſued upon a penal Statute, either *ob damnum & intereſſe*, or *ad vindictam*, is obliged to Depone, or be holden as confeſt without an Inqueſt, B: B: *Melvoſs*. 704.

Obligment to Infeft in an Annualrent, *Hamilton*; 9. *vid*: Conqueſt. Obligment to Infeſt himſelf and his Wife in Liferent, and the Heirs in Fee, If the Huſband can be compelled for Implement, L: *Grantoun* 410. oblidgment of importance for above 100 pounds *ſcots*, ſubſcribed by fewer than two Nottars, and four Witneſſes, is null, *Fotbringhame*, 43. except it be a Contract of Marriage, whereupon Marriage hath followed, *Grieve*, 201.

Obligment for 100 pounds or above ſubſcribed by one Nottar and four Witneſſes is null 169. but within 100 pounds ſuſtained, L: *Halkertoun*, 338. Obligement in a Tack ſubſcribed by two Nottars, but not at the ſame time, Is null: Mc. *Morran*, 101. Oblidgment to pay at a Term or Infeft, *electio non eſt debitoris*, *Brown*; 69.

Mutual Oblidgments in a Contract of Marriage, how performed, *Logan*: 82. Obl: therein to provide the Wife to the Conqueſt of all Heretable Sums, *Knock* 178. and of all Lands Conqueſt, E: *Dumfermling*, 302. and of all Lands and Teinds, but not extended to long Tacks, La: *Dumfermling*; 359. and of all Sums provided to him and his Heirs durlog the Marriage, but not to other Bairns, *Oliphant*; 423. of all Lands and Annualrents Conqueſt; *Douglaſs*; 428.

Oblidgment in a Contract of Marriage to intertain the Daughter and her Husband for a year, *Hunter* and *Forbes*, 890. Oblidgment to make Lands worth ſo much to a Wife, and the Rental proven accordingly, La: *Garlets*, 899 Obligment to imploy a Sum, and reimploy it to the Wife, how the Heir is lyable, *Cochran*; 425. Obl: to receive the Diſponer of the Teind duties, extended only proportionally to the Lands diſponed, L: *Leſmore*: 851.

Offer by a Tennent to purge the Clauſe Irritant of his Tack, *Durham*, 36. Offer without Conſignation ſufficient to ſtop a Declarator of Failzie, *Johnſton*; 392. Offer of the price for the thing purſued for, liberats not, *vid*: Executor; *vid*: priſoners; *vid*: Magiſtrat; *vid*: Teinds.

Office of Crowner and Duties belonging thereto, *vid*: Crowners. *vid*: Poſſeſſion; *vid*: Infeſtment. Gift of a Clerks Office to a Minor ſuſtained, *Ecder*, 899. Perſons in Office, *vid*: Declaration.

Officers, *vid*: *King*. Officers execution againſt a Magiſtrat for refuſing to incarcerat a Rebel, proves not, *Haliburton*, 205. Execution of Officers within Burgh; *vid*: Executions.

Officium nobile judicis, *vid*: Exception; *vid*: Depoſition. Examination *ex Officio*, *vid*: Witneſſes, *vid*: Nottar.

Omiſſa & male appretiata; *vid*: Executor; *vid*: *Dative ad omiſſa*; a Teſtament *ad omiſſa* is null, if the Executor of the principal Teſtament be not cited, *Bain*; 17. *& e contra*, *Whitt*, 68. how the Executors may be purſued by the Relict and Bairns for their parts of the Goods omitted, *Peebles*, 446. how the Relict may be purſued by a Creditor, *Schaw*; 44.

Onerous Cauſe, *vid*: Diſpoſition; *vid*: Aſſignation.

Order of Redemption in legal and Conventional Reverſions, E: *Deſmont*, 32. Conform to the Act of Parliament, 12. *Ja.* 6: *Cap.* 135. *Cunninghame*, 49. does not loſe the ſecurity without a Decreet of Redemption, *Murray*, 203. how Suſtained after Compryſing of a Wodſet, E: *Buccleugh*; 439. It needs not be uſed againſt the Appearand Heir; *vid*: Declarator; the Aſſignation thereto needs not be Regiſtrat, E: *Marſchal*; 78.

Order of Redemption uſed at *Edinburgh*, though the Lands lay at *Peebles* ſuſtained, *Murray*, 573. Aſſigned with a Reverſion, the Aſſigney lyable to the Cedents Back-bond thereupon, *Bennet*, 606. uſed upon the firſt day of the Term not Suſtained, where the Reverſion bore eight days thereafter, Lo: *Balmrino*; 725 as alſo Suſtained notwithſtanding ſeveral Informalities in the Inſtrument of Premonition, L: *Earlſtoun*; 757. uſed againſt the Defunct, ſuſtained againſt the appearand Heir, *Finlaſon*; 866. albeit not made at the Kirk Door after Sermon, conform to the Reverſion, and by a Meſſenger upon the Lords Deliverance, and not by a Procurator, *Ibid*.

P.

PAction found probable by Witneſſes, *vid*: Witneſs. *Pactiones Uſurariæ* Suſtained, *vid*: Order. *vid*. Uſury. Paction anent the ſetting of Land, how proven, *Lawrie*, 487.

Pactum Legis Commiſſoriæ ſuſtained, not being inſtantly purged; *Nairn*, 178 *ſecus* If the Failzie be offered to be purged inſtantly, *Cleghorn*; 811.

Pactum de reciproca ſucceſſione, *Fairlie*, 533. *vid*: Bond. *ſuper hæreditate viventis*, *Aikenhead*; 525. *de futura ſucceſſione*, *vid*. Tailzie. *extra corpus reverſionis*, *vid*. Order. *in continenti adjectum*, *vid*: Back-Bond. *vid*. Bond. *Nudum pactum*, *vid*. Charter.

Parliament, all Courts ſhould be ſilent during the ſitting thereof, L: *Barns*, 703. *vid.* Lords of Seſſion.

Parſon may have an Heir, *Rig*; 84. a Parſon may ſet Tacks for more than five years after his death, *Hope*; 144.

Parties intereſted may purſue though the principal party be debarred, Lo. *Barganit*, 56. *vid.* Summons.

Partners, *vid.* Society.

Parts and pertinents contigue preferred in the probation to diſcontigue, L: *Boys*; 310. both equal, the purſuer preferred in the probation in a Removing, L: *Lugtoun*, 391. not neceſſary to prove it *in Initio* in an Improbation, L. *Wigtoun*, 518. nor in a Declarator of Non-entry, Lo: *Teſter*, 548. both Purſuer and Defender admitted to prove it in a Removing, L. *Tuſhilaw*, 866. part and pertinent of Land diſcontigue, *Forſyth*, 626. *vid.* Poſſeſſion. *vid.* Probation.

Paſſive Title, *vid.* Heir. *vid.* Behaviour, *&c.*

Paſturage of Goods *in Confinio* no Contravention, L. *Grange*, 217. Infeſtment *cum paſcuis & paſturis & communi paſtura*. Sheriff of *Cavers*, 449. paſturage of a Horſe and two Kine to a Miniſter, *Hamilton*, 489.

Patent, *vid.* Title of Honour.

Patron of a Prebandry, *Hume*; 369.

Patronage conſtitute by Charter without Seaſin, Sheriff of *Forreſt*, 640.

Payment made to the Wife notwithſtanding the Husbands intimation ſuſtained, *M'math*; 22. payment upon a Miſſive Letter, L: *Duffus*, 339. before the Term of payment, L: *Lauchop*, 352. payment of Feuduties not probable by Witneſſes, *Calpit*; 562 payment made to the Son of his Tocher, due to the Father in his preſence, and not reclaiming, *Johnſtoun*; 617. partial payment of a Back-tack-duty, *Barclay*; 438.

Penaltie againſt a deed no Nullity thereof, *Hope*; 144. how conſidered in Bonds, L: *Halcartoun*; 338. penalty for Contumacy belongs to the Judge, *vid:* Judge. penalty in a Tack of five years how divided, *Johnſton*; 877.

Pendente, a Right cannot hang *in pendente*, *Finlaſon*; 16. *pendente lite*, *vid:* Litigious.

Penſion of Coals or Victual how payed, *Paip*; 53. pention out of Teind-ſheaves, *Scrimzour*; 521. penſion by a Biſhop *cum poteſtate transferendi*, Miniſter of *Kirkliſton*; 180. and Letters conform in the Aſſignees name, *Maule*; 351. and with power to the Aſſigney to Tranſter, Biſhop of St: *Andrews*; 696. *cum poteſtate transferendi etiam in articulo mortis*, *Chalmers*; 410. Penſion Aſſigned, and not Intimat before the Cedents Death, is null, Biſhop of *Aberdene*; 27.

Penſion not clad with poſſeſſion before the year 1587. though by Act of Parliament 1592. it be declared null, yet poſſeſſion of a part preſerves the whole, *Chalmers*; 410. Penſion granted to one ſerving the Cure during his Lifetime, Lo: *Cooper*; 441. Penſion granted by a Laick patron, with an Aſſignation to the Maills and Duties, no real Right, *Urquhart*; 459 Penſion quarrelled upon the Act 101. Parl. 7. *Ja.* 6. L: *Fretland*; 574.

Perſonal Bond or Rights does not oblige a ſingular Succeſſor, L: *Barnbarrow*; 7. *vid:* Bond. *vid:* Right. *vid:* Back-bond, Perſonal and Real, *vid:* Execution. *vid:* Teinds, *&c.*

Pignus, *vid:* Impignoration.

Placitare, *vid:* Heir.

Pleas, *vid:* Litigious. *vid:* Lords of Seſſion.

Poynding of Goods the ſuperplus how repeated, 85. not ſuſtained before the Term of payment, *Hay*; 207. not probable by Witneſſes, *Hamt*, 255. pleugh goods how poynded, *Gallan*; 212. Poynding of other mens goods, L: *Halkertoun*; 338. Poynding of Tennents Goods how ſtopped by the Maſter, *Ibid.*

Eſtimation of poynded Goods how Cancelled, L: *Gibſt*; 350. Poynd: ſuſtained to Eleid a Spuilzie, though two hours after Intromiſſion, *Maſtertoun*; 416. Poynding upon a new Sheriffs precept, *Ibid:* upon the Decreet of a Baron Court, without ſeveral Formalities, *Downie*; 468. and in uſe to be done at ſuch a place, probable by Witneſſes, *Chiſholm*; 515. *vid:* Hypotheque.

Poynding of the Ground real againſt the Poſſeſſors, *Keir*; 132. Suſtained for a Penſion, though none was called but the appearand Heir, *Moncrieff*; 746. and a Seaſin on a Precept of *Clare Conſtat* not ſuſtained as a ſufficient Title, nor yet for perſonal payment, except the Precept be produced, *Wyllie*; 232. and the Summons raiſed *Declaratorie* before the Term of payment, Suſtained againſt the Tennents Goods and all others upon the Ground, L: *Edam*: 387. and the Act Parl. 5. *Ja.* 3. *cap.* 36. ſo interpret *Ibid:* Suſtained againſt the Sons Lands, though not Infeft, *Striveling*; 548.

Poynding not Suſtained at the Heirs inſtance, for Intervening Rents betwixt the Defuncts Deceaſe and his Retour, *Philip*; 352. L: *Edam*; 377. It is needleſs to Summon one who has Right to the Reverſion, *Cunninghame*; 562. not Suſtained upon a Wodſet with a Back-Tack, L: *Garthland*; 575. nor at the inſtance of an Annualrenter becoming Superior, *Somervail*; 585.

Poynding on a Sheriffs Precept Suſtained without a preceeding Charge, on Letters from the Lords, *Suter*; 784. the preſent Heretor muſt be always cited, *Oliphant*; 787. and Poynding execute at the Head-Burgh of the Regality, of Goods found within the Regality Suſtained, though the owner dwelt within the Royalty, *Broun*; 859. *vid:* Compryſing.

Portion Natural due at the Fathers Deceaſe before the Mothers, *Finlaſon*; 16. *vid:* Deads part. *vid:* *Legitima*. *vid.* Bairn.

Poſſeſſion of Forefaulted Eſtates for five years tryed after *Litiſconteſtation*, without Precognition, *Maxwel*; 74. Poſſeſſor nine or ten years preferred to the Heretor, *Hamilton*; 80. *Poſſeſſor pro indiviſo* Suſtained againſt a Removing, 88. not received by way of Suſpenſion againſt it, L: *Johnſton*; 411.

Poſſeſſor bona fide facit fructus ſuos, *Monipenny*; 118. Interruption makes him *male fidei poſſeſſor*, *Ibid:* *vid:* Wife. *vid:* Wodſet. Poſſeſſion in Moveables preſumes property, *Turnbul*; 151. and preferred to the probation, *Ibid.* Poſſeſſion not Suſtained after the Title is reduced, *Finlaſon*; 229.

Fourty years Poſſeſſion Elelded in a Removing, *Wilſon*; 278 four years Poſſeſſion nor Suſtained, *Douglas*; 278 nor five years Poſſeſſion, *Robiſon*; 850. nor ten years poſſeſſion upon a null Right, *Forſyth*; 626. yet ſix years poſſeſſion Suſtained *in poſſeſſorio*, *vid:* Removing. Retaining of poſſeſſion of the Defuncts Goods, Infers not vitious Intromiſſion, *Allans* Executors, 327.

Poſſeſſor precarius or by Tollerance, Suſtained againſt a Removing, and how proven, L: *Maxwel*; 385. not ſuſtained to qualifie poſſeſſion, *Mitchelſon*; 394. nor againſt a publick Inſeſtment, *Maxwel*; 786. Poſſeſſion upon a Wodſet, L: *Collingtoun*; 387. upon an Aſſignation with ten years, Suſtained *in poſſeſſorio*, *Hamilton*; 80.

Poſſeſſion of a part above the half will defend *pro toto*, *Hunter*; 480. Immemorial poſſeſſion of four Alkers of Land without meiting, Suſtained againſt Removing from the ſuperplus if it were met, *Douglas*, 489. Poſſeſſion upon a Right probable by Witneſſes, *Roſs*; 491. Poſſeſſion upon a Compryſing preferred to a Tack-man and his Aſſigney, *Roſs*; 524.

Commiſſion to try poſſeſſion of part and pertinent upon a probation *hinc inde*, L: *Rowallan*; 528. Delivery of Goods *retenta poſſeſſione* purges not vitious Intromiſſion, *Dalrymple*; 637. even though he have the Gift of his Fathers Eſcheat declared, *Ibid.* Poſſeſſion cannot be Inverted, as from a Tack to a Compryſing,

fing, *Blackburn*; 420.

Liferenters Poſſeſſion not accounted the Fiars, nor the Husbands Poſſeſſion the Wifes, *vid:* Publick Infeftment. Twenty years Poſſeſſion not Suſtained againſt a baſe Right upon a Contract of Marriage, *vid:* baſe Infeftment. Poſſeſſion not qualified by holding of Courts without Infeftment, L: *Forreſter*, 896.

Poſſeſſory judgment, L: *Glengarnock*: 220. *vid:* Poſſeſſion. *vid:* Removing.

Prebendary, *vid:* Gift. *vid:* Procuratory. *vid:* Superior. *vid:* Patron.

Precept of Seaſin to the Vaſſal after Rebellion, prejudges not the Superior of his Eſcheat, Lo: *Ramſay*; 77.

Precept of Clare Conſtat from a Lord of Erection, and Seaſin of Kirk-lands, Suſtained a Title to Remove without Confirmation, *Maxwel*; 154. Precept of *Clare Conſtat* and Seaſin after Warning, no Title in a Removing, but a Retour is, *Elphingſton*; 157. and is a ſufficient paſſive Title, but not an Active, *Ibid:* precept of *Clare Conſtat* by a Commiſſioner from a Superior, how Suſtained as an Active Title, *Wyllie*; 232.

Precept &c. excludes Non-entry, but only probable by the Superiors Writ or Oath, E: *Rotbes*; 245. After Warning, but 40 days before the Term, Suſtained in a Removing, L: *Drumquhaſtel*: 391. without Seaſin, it does not purge Non-entry, *Hay*; 511. Seaſin thereupon is an Active Title in Reduction and Improbation, *Carnagie*; 655. and in Mailis and Duties ſince the Defuncts Deceaſe, *Grant*; 692.

Precepts on Retours muſt be obeyed *Salvo Jure*, T: of *Edinburgh*; 250.

Preceptory vid: Preſentation.

Precognition of Forefault Lands, *vid:* Poſſeſſion, *vid:* Liferenter. *vid.* Compryſer. Precognition of a Tenement before the Liferenter find Caution, *Foulis*; 196.

Predeceſſors and Authors, *vid:* Reduction, and Improbation.

Preference, *vid:* Maſters and Tennents, Compryſers and Aſſigneys, Arreſters and Aſſigneys *&c.*

Prejudicial Queſtions do not obſtruct the principal Cauſe, *Fernie*; 112.

Premonition, *vid:* Inſtrument, *vid:* Order.

Preſcription Interrupted by Action once Intented, Captain *Herring*; 11. by regiſtration of Bonds, *vid:* Regiſtration. by Reduction *intra annos utiles*, *Hamilton*; 488. by publication of the Kings *Letters*, *vid:* King. by transferring of a Decreet, L: *Lawers*; 854. Preſcription not extended againſt Contracts of Marriage till after Diſſolution, *Hamilton*; 18. Extended to perſonal Obligations after 40 years, and to Teſtaments and Debts therein contained, *Lindſays*; 297.

Fourty years Preſcription upon a quarrellable Title, Suſtained, L: *Monymusk*; 93. Suſtained againſt one of the parties in a Contract of Marriage, though interrupted by the other, L: *Lawder*; 542. Interpret not Preſcribed, where the Date in the Moneth was blank, *Ogilvie*; 551. runs not from the Date of a Contract, to go to anothers Miln, but only from the laſt Act of going thereto, *Hamilton*; 661. runs againſt the Church for a Bell, parochioners of *Aberchirder*; 695.

Runs not againſt Thirlage for a liberty or freedom for Multures, *vid:* Miln. runs againſt a Decreet *in foro*, L: *Lawers*; 854. Back-tack Duties and Feu-duties preſcribe only *ultra* the fourty years, two men in *Glaſgow*; 288. three years preſcription of Warnings, *vid:* Removing. Preſcrip: of Compts begins only from the Date of the laſt current Article, *Herris*; 522.

Preſentation of a Preceptory Suſtained without Collation, L: *Lagton*; 657. but Repelled for not Delivery after 30 years poſſeſſion, *& decennalis, & triennalis poſſeſſio*, *Ibid.* Preſentation by a Biſhop without Collation and Inſtitution Suſtained, being conferred *pleno jure*, *M'Kenzie*; 303.

Præſtatio annua. vid. Blench-duties.

Preſumption, *præſumitur de vita niſi probetur mors*, *Erſkin*; 26. Lawfully born Eleids the preſumption of Baſtardy, though *in favorem Fiſci*, *Somervail*; 210. Bonds preſumed Moveable until produced, L: *Weſtmuirland*; 863. Preſumption of Fraud *transfert onus probandi*, *vid:* Bankrupt, Preſumption of Simulation *vid:* Aſſignation. *vid:* Gift. preſumption of payment, *vid: Apochæ. vid:* Receipt. *vid:* Compenſation. *nemo præſumitur donare*, *vid:* Donation.

Prevention, L: *Weſtnisbet*; 12. *vid:* King's Vaſſal.

Price of Lands how Suſtained, *Cumming*; 396. Price of Drogs, *Liddel*; 35. of Lands, *vid:* Annualrents. *vid:* Infeftment. it carries Annualrent from the Liferenter, L: *Rentoun*; 417. price of a thing indiviſible how divided, *vid:* Debitor. *vid:* Victual. Price of Corns and other Goods given up in Teſtament, how rated, L: *Ludquharn*; 628.

Prince his Lands, *vid.* King. the Feu of Ward Land holden of him, is null without Confirmation, L: *Cathcart*; 456.

Priority of Rights. *vid:* poſſeſſion.

Priſoner, paying Jaylors for Booking is an abuſe, *Smith*; 888. impriſonment not probable by the Meſſengers Execution, or the Jaylors Book, but by the Witneſſes, *Ibid:* a Rebel cannot be ſet out of priſon, without a Charge to put at liberty, *Wyllie*; 897. priſoner breaking the priſon without the Servants acceſſion, makes not the Magiſtrats lyable, *Lockit*; 398. if they ſeek and purſue him thereafter, *Brown*; 736.

Meſſengers impriſoning a Rebel in a privat Houſe, and eſcaping, makes them lyable, *Kello*; 345. Bond to Re-enter to priſon ſatisfied, by offering the priſoner long after the day, *Scrimzeour*; 417. yet it is found to be *ſtrictî juris*, *Aiton*; 81.

Privat Infeftment; *vid:* Baſe.

Priviledge of ſelling and topping Wine belongs only to Burghs Royal, Town of *Edinburgh*; 489. Priviledge of Brewing is real and follows the Ground, *Stuart*; 226. *priviligiatus contra priviligiatum*; &c. *vid:* Minor. *vid:* Fair.

Probation allowed both to purſuer and Defender, in proving Part and Pertinent, Maſter of *Jedburgh*; 53. the ſame allowed in a Removing, where the matter was perplexed, *Butler*; 561. Probation by Oath refiled from, and the party admitted to prove by Witneſſes, *Strachan*; 127. Silver-Work proven by Witneſſes, *vid:* Silver-plate.

The condition of an Infeftment only probable *ſcripto vel juramento*, *vid:* Infeftment. Mailis and Duties by Witneſſes, *vid:* Intromiſſion. payment of Money in a Ticket only *ſcripto*, but the prices of the Seck therein by Witneſſes, *Finlaſon*; 248. *vid:* poynding. Witneſſes cannot prove above 100 pounds, *Dawlings* Bairns; 256.

The filling up of a blank Bond only proven *ſcripto vel juramento*, *vid:* Bond. Rental Suſtained to be proven in a Suſpenſion, L: *Garlis*; 899. Exception proven before one Judge, will prove before another, *Finlaſon*; 327. how ſupplyed by Oath, *Cairns*; 373. Toleration probable by Writ or Oath, *vid:* Poſſeſſor. uplifting both Stock and Teind, by Writ or Witneſſes, *Arbuthnet*; 386.

Purſuer offering to prove vitious Intromiſſion, and the Defender that he bought the ſaids Goods, the Purſuer preferred to the probation, L: *Moriſtoun*; 389. the Purſuer offering to prove that the Defender had taken Lands of him, only probable *ſcripto vel juramento Bruce*; 400. a Miſſive Letter found probative, Lo. *Leſlie*; 424. a Negative does not always prove it ſelf, *vid:* Bankrupt.

Delivery of a Roum with the plenifhing thereof not found probable by Witneſſes, but by Writ or Oath, tho *in facto*, *Straton*; 638. payment of Annualrent, though

of

of a ſum within 100 pound conſtitute by Writ, not probable by Witneſſes, *Dalrymple*; 639. Furniſhing of Malt and the like, probable by Witneſſes, *Pollocks* 645. Direction to furniſh Abuilziments, not probable by Witneſſes, *Turner*; 652. but by Writ or Oath of party, 703.

Probation, a Maſter purſuing a Taverner for the price of Bear and Ale what is reſting, owing only, probable by Writ or Oath, *Coutis*; 789. the quantity of Goods in a Locked Coffer how probable, *Stuart*; 821. Cauſe of a Bond found probable by the Cedent and his Servant, Lo: *Dunnipace*; 856.

Probation, Direction and Delivery of Victual how proven, *Brown*; 862. not by the Oath of the Receivers, *Murray*, 889. an Alledgance to be proven *ſcripto vel juramento*, the party at the firſt Term muſt choiſe which of the two probations he will make uſe of, La. *Weſtmuirland*, 871.

Proceſs, *vid*: Transferring.

Procuratory of Reſignation of a Benefice, *Hope*; 147 how it muſt be ſubſcribed, *Ibid*: procuratory of Reſignation before the Term, *Caldwell*, 465. procuratory *in rem ſuam*, ſuſtained after the Conſtituents Death, *Schaw*, 452. *vid*: Premonition, *vid*: Order.

Procuratorfiſcal becoming Commiſſar, cannot be procuratorfiſcal, Biſhop of *Galloway*; 309.

Production how ſatisfied, *Heirs*, Lo: *Yeſter*; 63. how a Writ being produced may be taken up again, or paſt from, Colledge of *Aberdene*, 294. Writs called for muſt either be produced, or Extracts thereof, it Regiſtrat, *Ker*; 344. and no Certification granted for not production of Retours before the year 1546. E: *Nithiſdail* 352. nor of Compryſings which remain at the Signet, *Ibid*.

Profits, *vid*: Violent profits, *vid*: Maills and Duties; the profits of Graſs how they fall to Executors, E: *Haddingtoun*; 855.

Promiſe of 100. pounds proven by Witneſſes, *L: Ernock*, 798. promiſe made and not accepted, is not Obligator. *Hepburn*; 697. promiſe to a third party for a Wife by a Husband, not ſuſtained, *Johnſton*; 154 for payment though of 99 pounds, not probable by Witneſſes, *Raſtel* 441. nor made by an Executor, *Dails* 665. nor of a yearly Duty of two Bolls of Victual, *Duncan*; 831.

Proprietar is bound to Diſpute his Right *in poſſeſſorio*, after Rehabilitation, *Findlaſon*; 229.

Protection, *vid*: Caption.

Proteſtation for not inſiſting, L: *Wards*; 513.

Provoſt though one of the Chaptour of St. *Andrews*, may ſet Tacks without their conſent, *Hope*; 144. *vid*: Chaptour.

Proving, *vid*. Tenor.

Proviſion in a Contract of Marriage, *vid*: Obligment in a Bond, *Monro*; 189. in a Teſtament contrary to Law, *vid*: Tutor: proviſions of the Bairns of the firſt Marriage affects the whole moveables, *Fraſers* Bairns; 861. proviſion to entertain the Daughter and Goodſon for a year, *vid*: Obligment, *vid*: Heir.

Publick Inſeſtment extinguiſhes a privat Inſeſtment in the ſame perſon, E: *Annandail*; 136. preferr'd to a prior baſe Inſeſtment *in favorem Matrimonii*; *Law*, 188. and to one in favours of a Son, reſerving the Fathers Liferent, Lo: *Craigha*l, 772. and by the Husband to his Wife, though in Implement of their Contract of Marriage, *Mowat*, 779. preferred to an Inſeſtment upon a Compryſing Regiſtrat and Confirmed, *Oliphant*, 796. and to a baſe Inſeſtment to the Oye in Fee, and the Goodſir in Liferent, E: *Annandail*, 809.

Pupil appointed to Choiſe Curators, and proceſs to ſiſt in the mean time, *Henderſon*; 379. The Tutor may purſue the Mother for Delivery after his Infancy, *Campbel*; 742.

Purging, *vid*: Intromiſſion, *vid*: Failzie, *vid*: Non-entry.

Purſuer cannot Reduce a Decreet in his own Proceſs, *Mawer*; 421. *vid*: Oath.

Q.

Qualified Oath in the Intromiſſion with the Duties of Lands ſuſtained, *Gall*; 444. not ſeparable from the Oath, where the Libel cannot be otherwiſe proven, Lo: *Fentoun*; 641. *vid*: Oath.

R.

Ratification not equivalent to an Intimation, *Stevinſon*; 102. a poſterior Bond Ratifying more than what was contained in the former Contract was ſuſtained *in tantum* only, *Grahame*; 560. *vid*: Wife.

Real Rights, *vid*: Charter *&c*. *vid*: Compryſing. *vid*. Perſonal.

Rebel may Diſpone upon Heretables, but not Moveables, *Cunninghame*; 60. and before Declarator of Liferent Eicheat may give Inſeſtment of his Lands, *Muir*; 137. unrelax'd he may do nothing in prejudice, of his Superior, *Wallace*; 260. albeit the Rebellion has layen over ten years, *L: Lochinvar*; 623. nor Diſpone upon Telnds, *L: Caprington*; 476. nor prejudge the Fliſque, *vid*: Aſſignation.

A Rebel may deliver goods to a Creditor before the Gift, *Moſman*; 753. and make payment, *Moſman*: 893. and Aſſign and Diſpone, notwithſtanding the Act of Parliament 1592 *L: Pinkel*, 881. Intromettor with a Rebels Goods only lyable to the Donatar, *Fullertoun* 542. and is in *bona fide* until Interrupted, *Cunninghame*; 756.

Receipt in part of payment, *vid*: Note. *vid*: Duties. Receipt of a part upon the back of a Ticket, preſumes the ſuperplus reſting owing, *Barrens*; 566.

Recognition not valid without a Declarator, *L: Hunthill*. 61. Inhibition will reduce any Deed of the Vaſſal or Superior, to make the Lands Recognoſce *ad hunc effectum*, that it may be payed and purged, *Lo: Balmerino*, 288. Oblidgment to procure the Superiors Conſent to the ſale of Ward-lands, will only make the Seller lyable for what was paid for the Recognition, *Glendinning*, 723.

Reconvention ſuſtained againſt a Strangers procurator purſuing here, *Kirkhead*, 343.

Redemption of a Compryſing, allowing what the Compryſer really Intrometted with, Doctor *Kincaid* 170. But the Redeemer muſt Conſign the ſuperplus, and a years Duty for Entry, though the Compryſer got it *gratis*, *Ibid*.

In a Declarator of Redemption not only the Heirs of Tailzie, but the Heirs of Line muſt be cited, Lo: *Cathcart*, 363. but a Compryſer Redeeming Lands, Compryſed from a Wodſetter, needs not call the Wodſetter, nor his Heirs, L: *Cairnonſit*, 475. neither in the uſing the Order of Redemption, needs the Reverſion to be read, nor is it null, though uſed upon a *Sunday*, L: *Newmark*, 377.

An Aſſigney to the Order of Redemption and Conſigned Money, may purſue the Depoſitar or his Heir for it, he Renuncing all right of Reverſion, *Lawrie*, 477. In a Declarator of Redemption of a Wodſet, no perſonal Right will operat againſt a ſingular Succeſſor to the Wodſetter, *Hunter*, 547.

A Compryſer declaring upon Death-bed the Lands to be Redeemed, only found probable *ſcripto vel juramento*, *Nicolſon*, 810. Reverſion likewiſe found probable by Inſtruments taken thereupon, Subſcribed by two Nottars and four Witneſſes, *Wood*, 839. may be purſued by an appearand Heir, *vid*: Order.

Reduction, *vid*: Inhibition, *vid*: Improbation, *vid*: Horning; *vid*: Purſuer, &c. All Reductions of Retours ordained to be in Latine, *Scot*, 535. In Reductions of Compryſings, the whole Proceſſes and Executions are called for, L: *Ley*, 92.

a Wife though Liferentrix by the principal Diſpoſition, needs not be called in the *Reduction* thereof, *Balmanno*, 366.

Reduction and Improbation, how the production may be ſatisfied in the one, and Certification granted in the other, Lo: *Craighal*, 772. Reduction of writs not flowing from the ſame Author, not ſuſtained L: *Monymuſk* 93. of a Sub-tack not ſuſtained till the Tacki man or his Heirs be called, *Murray*, 511. Reduction Reductive how not ſuſtained, La: *Borthwick*, 758.

In Reductions of Infeftments, the appearand Heir and ſeveral others muſt be called, E: *Kingborn*, 290. ſuſtained upon a Back-bond, *Dundaſs*, 342. all ſubaltern Rights and Infeftments fall *in conſequentiam*, L: *Clunie*, 570. Reduction by the Lords *ſuper eodem medio*, though *in jure*, how ſuſtained, *Hume*, 706.

A Right Reduced *ex capite Inhibitionis* ſuſtained againſt all others, La: *Borthwick*, 790. and Reductions upon Inhibitions and Interdictions, they muſt be produced *in initio litis*, Lo: *Torthodrel*, 808. General Clauſes calling for all Writs ordinary in Improbations, not ſuſtained in Reductions, *vid*: Improbation. Reduction of a Regiſtrat Bond, not ſuſtained for not production, *vid*: Transferring, yet a Horning Regiſtrat Reduced, Commiſſar *Dunkeld*. 490.

Regiſtration, *vid*: Diſtreſs, *vid*: Reverſion, *vid*: Decreet. Suſtained at a Wifes Executors inſtance, *Dougal*, 58. ſuſtained at an Executrix inſtance, *Wallace*, 148. both againſt the Heirs of Line, Heirs-male, and Heirs of Tailzie, *in eodem libello*, *Edgar*, 216.

Regiſtration of a Contract at the inſtance of a third party therein, though not ſubſcribing, *Mcduff*, 270. and at an Heirs inſtance againſt the other Contracter, *Bruce*, 291. Regiſtration of a Contract after one of the parties Deceaſe, cannot be ſummarly upon conſent, but by way of Action, *Shanks*, 742.

Regiſtration of a Bond againſt an Intromiſſatrix, though there were Executors Confirmed, *Kneeland*, 272. not ſuſtained of a Bond bearing Annualrent to an Executor, *Dryſdale*, 301. Regiſtration within 40 years interrupts preſcription, *Morits*, 465.

Regreſs, *vid*: Excamblon.

Relict prefered to the Husbands Creditors upon her Contract of Marriage *Hamilton*, 382. ſhe may purſue the Debtors and her Husbands Heirs and Executors, for Implement of her Contract of Marriage, and Imployment: conform, *Grahame*, 361. but can only purſue the Executors for her part of the Executry, *Mackie*, 407.

Reliefs, *vid*: Heir, *vid*: Executor, *vid*: Cautioner. Obligment for Relief of Telnds, how interpret, L: *Leſmore*, 851. how regulat, *Forbeſſes*, 35.

Relocation is no active Title, L: *Lag*, 6. Tacit Relocation not interrupted by a ſupervenient Right, La: *Rothemay*, 687.

Removing at the inſtance of a Compryſer, with the concourſe of a prior Right, L: *Barnbarrow*, 7. Decreet of Removing not obeyed, if the Lands and Houſes be not left void of any Poſſeſſor, *Greenlaw*, 103. Removing ſuſtained upon a Summons of ſix dayes without Warning, E: *Lothian*, 42.

Removing upon an Infeftment of Superiority, and Seaſin upon a Compryſing after the Term, to which the Warning is made, L: *Lag*: 149 and 150, ſuſtained at a Compryſers inſtance, with Poſſeſſion year and day againſt the Heretor, Clandeſtinly poſſeſt thereafter, *Lawder*, 318.

Removing for a Terce, though the Land be poſſeſt *pro indiviſo*, 330. Suſtained againſt 20 years poſſeſſion, without Infeftment, *Stuart*, 335. Elelded upon a Tollerance without any Right, La: *Maxwel*, 385. Tutors and Curators needs not be Warned, but only cited in the Removing, *Bennet*, 388.

Removing ſuſtained againſt a Minor and his Father as Adminiſtrator, without citing any other Tutors or Curators, L: *Lit*, 532. ſuſtained three years after the Warning, but not three years after the Term, La: *Borthwick*, 422. Suſtained againſt a Husband brooking *Jure Mariti*, at the inſtance of a Compryſer, and againſt his Relict, *Blackburn*, 428.

Removing ſuſtain'd though the Tackſmen after Warning made payment of the Taxation due for the Land, La: *Borthwick*, 432. & at a ſingular Succeſſors inſtance, againſt a Wodietter not Infeft, *Hunter*, 474: and againſt the Son upon a warning made to the Father, *vid*: Warning.

Removing Suſtained from Fortalices and Towerhouſes upon 6 dayes Citation without Warning, *Ramſay*, 549. & the Heretor after the Liferenters Deceaſe, may Charge the poſſeſſors ſummarly to Remove, *Ibid*: & ſo may a ſecond Liferenter, La: *Kincaid*, 9. and at the inſtance of a Minor without Seaſin, againſt his Curator, *& ante redditas rationes*, L: *Haddo*, 587.

Removing ſuſtained at the inſtance of a Compryſer, before he Charged the Superior to Infeft, *Dalrymple*, 659. Suſtained within Burgh againſt a party living without it, upon a Supplement, *Williamſon*, 779. Suſtained againſt Infeftments clad with 40 years Poſſeſſion, La: *Glengarnock*, 220.

Removing not ſuſtained againſt an Heretable Right and 40 years poſſeſſion, L: *Lag*, 147. nor upon a Seaſin and Retour after the Warning, *vid*: Seaſin, nor at the Heirs inſtance upon his own Retour, and the Defuncts Seaſin, L: *Touch*, 298. nor ſuſtained againſt a Tennent, unleſs his Maſter be called, without alledging him to be lawfully Infeft, L: *Bamff*, 318. *ſecus* if it be an Infeftment of Kirk lands, not Confirmed, Lo: *Balclugh*, 244. and without alledging his Maſter to be Tackſman for years yet to run, *Whitefoord*, 402. and without alledging ten years poſſeſſion, Captain *Annand*, 333.

Removing not ſuſtained againſt a Rentaller to repoſſeſs the Maſter, *vid*: *Rental*. nor againſt a Compryſer ſix years in poſſeſſion, *Foord*, 836. nor againſt one Heretably Infeft, and in poſſeſſion, if he was not warned, L: *Johnſton*, 837. nor at the inſtance of an Heir, or one behaving himſelf as Heir againſt a perſonal Right from the Defunct, to bruik till it be paid *Gethin*, 391. *ſecus* if he be a Compryſer or ſingular Succeſſor, L: *Muckall*, 2.

Caution in a Removing not ſuſtained where it proceeded upon a Back-tack, Suſpended upon Obedience, *Douglaſs*, 351. a perſon warned to Remove before his Right be Reduced, is *bona fide* Poſſeſſor until the Decreet of Reduction, L: *Pitmedden*, 306. and one Removing in obedience to a Warning, needs not Renounce, *Keith*, 834.

Rental, is Conſtitute by Inrolling in the Heretors Rental Books, and not prejudged by putting in of Sub-tennents, L: *Aiton*, 172. Rental without an Inſ ſuſtained for his Lifetime againſt the ſetters Succeſſor *Ibid*: not bearing a certain Duty is null, L: *Aiton*, 174. *vid*: Tack.

Rental bearing an obligment not to remove the Rentaller nor his Bairns, Suſtained not only againſt the Setter, but his Heirs, *Agnew*, 263. Tennent to a Rentaller, cannot be Removed till his Maſter be called, though it carry to expire *ipſo facto*, if he put in a Tennent, La: *Nithiſdale*, 293. the contrair, La: *Maxwel*, 390.

Rental to one and his Heirs *ad perpetuam Remanentiam*, ſuſtained upon the Cuſtom of the place to maintain the Appearand Heir of the firſt Rentaller, but the ſaid Cuſtom only probable by a Decreet *in foro*, E: *Galloway*, 300. Kindly Rentaller to the keeping of a Houſe, *vid*: Removing.

Rental bearing a Clauſe to receive the Rentallers Bairns,

Bairns kindly Tennents, Suſtained to Defend the eldeſt Son, L: *Rowallan*, 523. Rental with a Clauſe not to Diſpone the Lands, otherwayes to be null, not underſtood of the Rentallers own Bairns, but ſtrangers, La: *Maxwel*, 536.

Rental to a Man and his Heirs extended only to the firſt Heir during his Lifetime, E: *Galloway*, 582. Extinguiſhed by Excambion if poſſeſſion followed, *Ibid*: and by a Diſpoſition or Sub-tack, L: *Johnſton*, 622. whether of the whole or moſt part, L: *Craigie*, 60. Diminution of the Rental, *vid*: Tacks, proving of the Rental, *vid*: Obligment.

Renunciation to be Heir, not a ſufficient diſcuſſing of him, *Cowan*, 10. admitted *poſt ſintentiam*, to liberat from perſonal Execution, *Harvie*, 221. not after Litiſcontestation, *Wood*, 657. and may be Reponed, ſatisfying the Compryſer, *Ibid*: It muſt carry no reſervation, La: *Ogilvy*, 261.

Renunciation may be uſed by a Cautioner in a Suſpenſion after the Minor is dead, and thereupon Reponed, *Kennedy*, 331. *Dumbar*, 349. yea Suſtained in a Suſpenſion, though he be Major, *Nisbet*, 413. how the heir of Conqueſt may hinder the Heir of Line to Renunce, *Cleghorn*, 481.

He may Renounce in another Proceſs, though decerned in a prior, Lo. *Ruthven*, 529. allowed to reſile from his offering to Renounce, *Ker*, 675. Stops all perſonal & real Execution againſt the appearand Heir, *Gilbagie*, 701. not allowed after conſenting to a Diſpoſition of the Defuncts Lands, *Johnſton*, 891.

Renunciation of an Annualrent Right, is not *habilis modus*, to Denude the Annualrenter, *Dumbar*, 315. Renunciation of a Redeemable Right, though quarrellable, ſuſtained after 40 years poſſeſſion, *Durie*, 458 at the uſing of an Order of Redemption, no neceſſity to produce a Renunciation, Lo: *Balmerino*, 725.

A voluntar Renunciation of a Wodſet, *Mowat*, 779. of a Tack not probable, but *ſcripto vel Juramento*, L: *Craigmiller*, 874. *vid*: Curators, *vid*: Order. *vid*: ſingular Succeſſor.

Report, *vid*: Auditors. *vid*: Commiſſion.

Reprobators ſtops Sentence in the principal cauſe, and may be intented after Sentence, if proteſted for, *Cochran*, 67. as alſo an Action of Corruption, which differs, *Ibid*: and if purſued by way of Reduction, competent without proteſtation, *vid*: Witneſs.

Requiſition uſed in legal Reverſions upon ſix dayes only, E: *Deſmont*, 32. made by vertue of Letters raiſed upon the Lords Deliverance, and without a procuratory produced and inſert in the Inſtrument, not ſuſtained, *Ibid*: the like in other Requiſitions, L: *Baſs* 34. paſt from by retaining Poſſeſſion of the Wodſet, *Henriſon* contra E: *Linlithgow*, 176.

Requiſition to a perſon out of the Countrey, not ſuſtained, not bearing the place of of payment, *Maxwel*, 341. and becauſe the Procuratory was not produced and read, *Ibid*: Requiſition to be made with advice of ſeveral perſons, though it affect the Requirer, it will not affect a Compryſer, or ſingular Succeſſor, *Maxwel*, 514.

Requiſition does not looſe the real Right, but the party may return thereto, *Hamilton*, 745. an Aſſigney to a Wodſet and Requiſition, may require the Heir of the Debitor, and his Tutors and Curators, without Letters of Supplement, *urquhart*, 878. *vid*: Compryſing.

Res inter alios acta alteri non præjudicat, *Murray*, 463. *vid*: Decreet, *vid*: Forefaulture.

Reſervation of a Liferent, *Maxwel*, 715. and L. *Craigivar*, 782.

Reſignation does not denude till Infeftment follow thereupon, ſo that the firſt Infeft, though upon the laſt Reſignation, is preferred, 225. though upon the firſt Reſignation, the parry was divers years in poſſeſſion, and Infeft within four dayes after the ſecond, and in a poſſeſſory Judgment, *Thomſon*, 331.

Reſignation made by a Party not Infeft, *vid*: Superior. Reſignation in favours of Heirs-Mail without Infeftment, hinders not the Heirs of Line to call for Exhibition of the Writs, *Aiton*, 621. Magiſtrats compelled to receive Reſignation, *vid*: Burgh.

Reſtitutions of Chaptors, *Lindſay*, 300. Reſtitution *vid*: Forefaulture, *vid*: Minor.

Retention, *vid*: Poſſeſſion, *vid*. behaving as Heir, *vid*: Requiſition, *vid*. Compenſation.

Retour-duty only due to the Superior before Declarator, *vid*: Non-entry, Retour with the Defuncts Seaſin, a ſufficient Title in an Improbation; Lo: *Yeſters* Heirs, 59. and with a Seaſin for Maills and Duties from the Defuncts Deceaſe, *Maxwels*, 110. and a Summons of Reduction ſuſtained upon a Retour, though the Service was poſterior thereto, *Cunninghame*, 117.

Old Retours before the year 1550. no Certification granted againſt them, Lo: *Elphingſtoun*, 111. a Retour being improven, the Lands are in Non-entry, E: *Nithiſdail*, 352. a Daughter being Served and Retoured Heir to her Father, excluded upon the Procurators offering to prove her Brother alive, without Reduction, *Muirhead*, 619.

Retour taken away by Exception, referred to the parties Oath; *Murray*, 793. one purſuing another as Heir upon a Retour, without prejudice to quarrel it, cannot purſue him for behaving as Heir, *Muir*, 828. *vid*: Briefs, *vid*: Services, Retoured Duties of a part of a Barony how regulat, *Ker*, 44.

Reverſion is a Writ of importance, & muſt be ſubſcribed by two Nottars & four Witneſſes, Sheriff of *Cavers* 70. is perſonal & may be Aſſigned with the order, which Aſſignation needs not be Regiſtrat as the Reverſion, E: *Mariſchal*, 78. yet a Bond obliging to Diſcharge a Reverſion muſt be Regiſtrat, *vid*: Bond.

Reverſion by the Son to the Father, though not mentioning Heirs, yet ſuſtained againſt the Sons Heirs *Muir*, 490. Reverſion only of a four Merk Land, and the Wodſet of ſeven Merks and an half, but both being of one date, and before the ſame Witneſſes, the Redemption ſuſtained for the whole, *Hunter*, 547.

Redemption refuſed and Proceſs upon a Reverſion, whereof the date was covered, and ſealed up to prevent the forging of a Diſcharge, L: *Cliſh*, 605. *vid*: Date, *vid*: Order. A Bond obliging to pay a Sum, or to Diſcharge a Reverſion, effectual againſt the Granter, but not againſt an Aſſigney to the Reverſion, unleſs it be Regiſtrat, *Bennit*, 606. *vid*: Seaſin, *vid*. Confirmation.

Reviving of Rights, La: *Borthwick*, 432.

Revocation of a Donation *inter virum & uxorem*, *Glaſsford*, 717. L: *Lawriſtoun*, 764. and L: *Craigmiller*, 872.

S.

Satisfaction of a prior Bond, *Chiſholm*, 656. Lo: *Cardroſs*, 875. Captain *Wishart*, 112.

Seaſin after Warning, no Title in a Removing, *Stevinſon*, 55. though the Precept of *Clare Conſtat* be before, *Wallace*, 220. not Regiſtrat within 60 dayes is null, except in Burghs Royal, *Edmiſtoun*, 72. Seaſin by Haſp and Staple a paſſive Title, *Marſhal*, 79. upon a Compryſing, will be drawen back to the date thereof, and carry the preceeding Maills and Duties, Lo: *Frendraught*, 133. and may be taken after the Debitors Death, L: *Lag*: 150.

Seaſin upon a Retour is drawn back to the Date, *ſecus* upon a Precept of *Clare. Conſtat*, *vid*: Precept, Seaſin of Lands lying diſcontigue, except unite by the King, is null, *Stuart*, 213. Seaſin upon a Retour a ſufficient Title in Maills and Duties, *Calderwood*, 246 Seaſin of a Salmond Fiſhing, *Maxwel*, 365. Seaſin in

Lands holden of the King *cum piſcationibus*, and Poſſeſſion of a Salmond Fiſhing, *Maxwel*, 371.

Seaſin of an Annualrent at any part of the Barony will affect the whole, L: *Ednem*, 393. Seaſin with two years poſſeſſion, bearing *to be given in Contemplation of Marriage*, Suſtained againſt a Compryſing, without any other Adminicle, *Clappertoun*, 399. Seaſin within a Burgh of Barony upon a Retour, without any Precept ſuſtained, *Scot*, 463.

Seaſin of a Juriſdiction is not neceſſary, and if at one place it will extend to all, though not united, *Bruce*, 482. Seaſin ſuſtained, though it bore not Delivery of Earth & Stone, E: *Wigtoun*, 518. a Tranſumpt thereof a ſufficient Title in an Improbation, *ibid:* Seaſin of Lands and a Tower ſuſtained, though the words (*Acta erant &c.*) mentioned not the Tower, L. *Harmeſtoun*, 525.

Seaſin upon a Cognition, or Precept of *Clare Conſtat*, a Title in Mailis and Duties, Removing and Reduction, *Houſtoun*, 527. Seaſin may be taken at any part in one Barony lying contigue, *ſecus*, if diſcontigue, and the like thought of Tenements, L: *Clackmannan*, 538. and E: *Galloway*, 567.

Seaſin of a Miln without delivery of Clap and Happer ſuſtained, L: *Smeton*, 581. Seaſin of Annualrent without ſaying *per Traditionem denarii* not nul, *Somervail*, 585. Seaſin upon a Contract of Marriage ſuſtained in Mailis and Duties againſt a Compryſing publickly Infeft, La: *Monquhannit*, 615.

Seaſin upon a Retour out of the Chancery muſt be given by the Sheriff Clerk, Sheriff of *Forreſt*, 640. Seaſin Written by another than the Nottar, Giver thereof ſuſtained, though neither Named nor Deſigned, Lo: *Johnſton*, 722. and though the Nottar was not formally admitted, *ibid.*

Seaſin with fourty years Poſſeſſion, though without a Warrant ſuſtained, *vid:* appearand Heir. Seaſin of united Lands at any other than the place appointed is null, L: *Lawriſtoun*, 806. Seaſin *propriis manibus*, with a Reverſion, *Wood*, 839. and by a Husband to his Wife, without any other Adminicle, not ſuſtained in prejudice of a Compryſer, *Hamilton*. 884.

Sequeſtration of Mailis and Duties upon a verbal deſire, Lo: *Johnſton*, 727.

Service of a Minor, though without conſent of his Curators, proves him Heir, and is not null *ope exceptionis*, *Clerk* 5. contrair *Simſon*, 277. In the Reduction whereof, not only the party, but the Director of the Chancery, and the Judge and Clerk muſt be cited, Lo: *Elphingſtoun*, 111.

Service without Retour ſufficient to exclude Baſtardy, *M'culloch*, 214. and is a paſſive Title, *Simſon*, 277. the Retour of the neareſt Heir will be preferred to any other without a Reduction, Lo: *Colvil*, 276. Service before the Sheriff of one in another Sheriffdom is null, *Martine*, 395.

No ſpecial Service requiſit to an Annualrent by a naked Contract, *Morits*, 435. Service to the Defunct who died in the Faith and Peace of King *James* the third, muſt inſtruct his deceaſe, and his deſcent from him to the Inqueſt, E: *Caſſils*, 466. Service Reduced upon Baſtardy, though not opponed at the time, nor thereafter within ſix Moneths, and the Lords found Judges thereto, L: *Pitſligo*, 534.

Service may be reduced by any who is Infeft, *ibid:* Services before Bailies of Regality needs not be Retoured to the Chancery, L: *Cleiſh*, 605. Services or Duties uſed and wont, accepted from Tennents after warning, ſtops Removing, La: *Kilbirnie*, 213. In the Conſtitution of Services the Maſter muſt be called, L: *Wardis*, 343.

Perſonal Services ſupplied by a Subſtitute in favours of the Wife Liferentrix in the Tack, L: *Rowallan*, 492. Infeftment in a Bailliary with the Connexis & Services, and 50 years Poſſeſſion ſuſtained, though done without the Maſters knowledge and conſent, who was not reſtricted thereto by his Infeftments, Sheriff of *Galloway*, 711. and found to extend to Oates and Straw yearly, though predial Duties, *ibid.*

Servitudes needs no Seaſin, and obliges ſingular Succeſſors, *Turnbul*, 11. and are conſtitute without writ, as of a Way by uſe and poſſeſſion paſt Memory of man, *Neilſon*, 67.

Seſſion, *vid:* Lords.

Sheriff cannot unlaw in fifty pounds, nor in as much for abſence and Contumacy, as for the Crime, *Sandilands*, 107. after the Impriſonment of a Rebel, is not further lyable, *Brown*, 284. except he keep him in his own houſe, *Hay*, 530. Sheriff poynded for the Relief of Lands, albeit the obtainer of the Precept was not Seized, and the Lands lay in Non-entry, L: *Lawriſtoun*, 359.

Sheriff may ſit at any time after the Head-Court without Diſpenſation, L: *Banff*, 454. Sheriff lyable for not apprehending the Rebel, ſitting with him in Judgment, *Hume*, 550. he is Judge competent to perſons purſued, as lawfully Charged to enter Heir, *Seton*, 586. and *inter concives* within Burgh, *vid:* Burgeſſes: and poynding ſuſtained upon his precept, without the Lords Letters, *vid:* poynding.

Silver-plate though of great value and Importance; the property proven by Witneſſes, *Mitchel*, 246.

Simulation, *vid:* Creditor, *vid:* Declarator, Simulation of a Gift proven, being taken in the Rebels Bairns names, Lo: *Borthwick*, 27. yet ſuſtained to the eldeſt Sons behove, *Dalgarno*, 59.

Single-Eſcheat, *vid:* Declarator, *vid:* Eſcheat.

Singular Succeſſor cannot remove a Tennent, though his Entry was after the acquiring of the Right, 32. has no right to a Clauſe in a Contract, whereby the parties were obliged to communicat each others Rights, *Seton*, 785. a Bond to poſſeſs a Houſe till payment, found effectual againſt a ſingular Succeſſor; *Ronald*, 158.

But a Bond a-part from a Feu-Charter not ſuſtained, *Cockburn*, 873: a ſon repute a ſingular Succeſſor to his Fathers Lands upon a Right from the Superior, and allowed to Renounce, *Dunbar*, 383. a ſingular Succeſſor may purſue Improbation of Writes made by his Authors predeceſſors, to whom, though not Heir, he might ſucceed *Jure ſanguinis*, *Hamilton*, 218.

Singular Succeſſor may Remove thoſe who are in poſſeſſion upon a perſonal Contract, *Bennet*, 388. *Sems* if he be Heir, or behave as Heir, *Geichen*, 391. & though it be a Contract of Wodſet clad with poſſeſſion, and after Redemption, the ſingular Succeſſor not obliged to receive them as kindly Tennents, *Hunter*, 474.

Singular Succeſſor cannot purſue Regiſtration of a Bond made to his Author, but *via ordinaria*, *Crichton*, 584. and may charge upon general Letters upon his Authors Decreet of Aſtriction, without Tranſferring, though not Aſſigned thereto, *Guthrie*, 798

Siſters ſucceeding as Heirs, the eldeſt has right to the cuſtody of the Writs, though the younger has a right to two Siſters parts, *Denholms*, 858. *vid:* Heirs portioners.

Slaughter Advocat from a Baron Court to the Lords, and remitted to the Juſtice General, or Secret Council, Baron of *Broughtoun*, 413. *vid:* Advocation. Bond granted not to purſue a Slaughter and Adultery ſuſtained, E: *Murray*, 483.

Society the Partners therein lyable only as they ſubſcribed the Contract, L: *Lamington*, 620.

In ſolidum Provoſt of *Inverneſs*, 566. *vid:* Intromettors.

Solutio vid: payment and uſe of payment: how *aliud pro alio ſolvi poteſt*, *vid:* Victual.

Sons begotten of ones Body not extended to Oyers boones the Daughter, *La Durnhill*, 183. *vid.* Improbation, *vid.* Obligements.

Spuilzie prescribes within three years, unless pursued, *Stevenson*, 11. but may be retricted to wrongous Intromission, *Dunmore*, 113. the quantities and prices must be proven by the Pursuers Oath of Credulity, even though he should prove the same by Witnesses, *Lockhart*, 168. and though he prove one Article by Witnesses, he will be allowed to prove the rest by his Oath, *Brown*, 336.

Possession is a sufficient Title in Spuilzie, and the Pursuer has *Jus retentionis* in *Rem*, *Russel*, 228. Spuilzie sustained upon a Tack, if the Duty was therein Discharged, *Ross*, 266. and notwithstanding of a Disposition for Relief, if intromitted with before Distress, or the Term of payment, *Kirkhead*, 685.

Spuilzie of Teinds Elcided by payment of the old Duty, L. *Linlithgow*, 271. and by the exception of payment to the Master, *vid.* Tennent. Spuilzie of Corns Sustained against one who had not actually commited the Spuilzie, but reset the same, L. *Roxburgh*, 334. how Sustained against a Tacksman of Teinds, *vid.* Teinds.

Messenger poynding upon Letters wrongously raised, not lyable to a Spuilzie, *Sol.* 353. Officer poynding, notwithstanding a party compears and makes Faith the Goods are his, is lyable in a Spuilzie *Brown*, 537.

Spoliatus ante omnia est restituendus, though his Title be null, L. *Renton*, 456. Spuilzie without violence not sustained, *Allison*, 384. nor of a Horse carrying Thirled Corns to another Mill, *Menzies*, 743. Spuilzie of Teind fish, *vid.* use of payment.

Stante Matrimonio, *vid.* Wife. *vid.* Oath.

Steelbow goods may be poynded for the Tennents Debt, *Arnot*, 151. comes under single Eicheat, *Lawson*, 486. and if there be no Tack, the Tennent is forced to deliver them at the next Term after the Crop is separate, *Vid. Bellenden*, 853. the Offspring, & Broad thereof, of the same nature, and pertains to the Executors, L. *Dirleton*, 865. to Steelbow Corn and Straw belongs to the m, *Dundas*, 889.

Stent, *vid.* Kirk. *vid.* Minister.

Stipend, *vid.* Horning. *vid.* Minister. *vid.* Generall Letters. *vid.* Wodset. *vid.* Teinds.

Stipulatio inter absentes invalida, albeit the party be neither present nor knows anything thereof, L. *Renton*, 720.

Stranger dwelling out of the Country *animo revertendi*, though a *Burgesman*, how pursued in *Scotland*, *vid.* Bond. *vid.* Allegation. *vid.* Tutor Dative. Sustained though an *Englishman*, & the Pursuer dwelt in *Berwick*, and the Defender at *London* for personal Execution, where he should come to *Scotland*, and against his goods there *Muirhead*, 235. the contrair, *Gallowa*, *Hope*, 885. also a Reduction of a Decreet against a Stranger sustained, the Pursuer producing a Procuratory, *Law Processe*, *Pursuer*, 474. in *English* Bond ordained to be put to Execution against the Debitors goods in *Scotland*, *Douglas*, 889.

Submission by two Neuters in three Wholl, sustained the blank on the back, being subscribed by five Witnesses, *Forbes*, 119. Submission to the King does not preclude the Lord of Erection of his Casualties, *Medo* to report, *Kar*, 64. *vid.* General Clause. *vid.* Decreet Arbitral. *vid.* Minor.

Subscription of a Writ elcided by the Pursuers Oath, that a Clause therein was not read to him at the Subscribing, *Erth*, 241. Subscription of writing Witnesses must be improven, and needs not be Approven, *Stranger* of *Muirhead*, 243. Writs of importance must be Subscribed by two Nottars, and four Witnesses, *Locke*, 315.

Subscription cannot be tryed or improven before the Commissar, *Kirk*, 505. *Disposition* by a Wife of her Liferent to the Heirs of Marriage Subscribed by one Nottar Sustained, *Nisbet*, 546. Bond Subscribed by two Initial Letters before Witnesses Sustained, *Hamilton*, 556. without Witnesses supplied by his Oath, *Barons Dutchman*, 588.

Subscription by four Debitors not Sustained without Witnesses, *Rankin*, 871. unless both the Debt and Subscription be referred to their Oath, *ibid.* the like where the Debt was but but seven years old, *Cassilnes*, 702. Subscription of a Contract by two Nottars and four Witnesse, but not at one time, found null, *Cow*, 681.

The like in an Assignation, *Johnston*, 712. Bond Subscribed by two Witnesses not insert, Sustained, *Hume*, 723. Disposition of a Tennent to his Master of goods worth 500 Merks sustained, albeit Subscribed only by one Nottar, *Sutor*, 784.

And a Writ Subscribed by two Nottars and four Witnesses sustained, albeit the party could Write, *Vitch*, 825. as also a Contract of Marriage, though subscribed only by one Nottar, because Marriage followed thereupon, *Lockhart*, 832. *vid.* Decreet. *vid.* Obligation &c.

Subsidiary action against a Magistrat, both Letters of Caption and Horning must be produced as a Title therein, B. B. *Kilrinny*, 137. it needs not be Transcribed against the Heir of the Debitor, *Dunbar*, 717. Eleided by a protection, though conditional, if the Debitor payed his Annualrents, *Paterson*, 782. *vid.* Caption. *vid.* Baillies. *vid.* Magistrats, *vid.* Pillorer, &c.

Substitute in a Bond, if preferred to the Heirs and Executors of the Defunct, *Wat.* 157. he may Charge for the Money after the principal Partie Creditor is dead, *Keith*, 721. *vid.* Service.

Sub-tack a sufficient Title till the principal Tack be produced *in processu*. L. *Steell*, 18. a Subtacksman brooking *pertactam relocationem*, cannot be lyable in Spuilzie, till the principal Tack be expyred, *Douglass*, 188. Sub-tack does not fall in consequence upon Reduction of the principal Tack, L. *Galloway* 245. though Inhibition be used against the Subtacksman before Declarator of Failzie, *ibid.*

Subvassal. *vid* Vassal.

Succeeding into the Vice of a party removed, cannot quarrel the Master or his Authors Right, L. *Hatchill*, 61.

Successor titulo lucrativo absolvized, because his Right was Reduced, without necessity to renounce, *Kinnier*, 663. though he get Money to ratifie the Reduction, *Straton*, 791. She may be conveened and Decerned *in solidum*, but not as Heir, or appeared Heir, if there be more Sisters, *Orr*, 704. reserving Action against the other Sisters as accords, *Watson*, 714.

The Son of a second Marriage cannot be Universall Successor, when the Son of the first is living, *Crawford*, 734. The Fathers Resignation of Wodset Lands to the Son, who Redeemed the same with his own Tocher, and renouncing all other benefit, does not make him Successor, *titulo lucrativo* &c. *Courtil*, 822.

But the Father Infefting the Son in Liferent, and the Oye in Fee, makes him Successor *titulo lucrativo* &c. *Flint*, and *Flintrian*, 807. but Seasin upon a prior Contract of Marriage will not, *Lyston*, 818. A Bond by the Son, bearing, *That his Father had Given way to his Possession in some Lands pertaining to him*, found to prove the Son successor *titulo lucrativo*, *Renton*, 868. an Oye being infeft by the Goodsir, reserving the Faithers Liferent, still lieing, found Successor to his Goodsir, L. *Sutton*, 878.

Summons against an appearand Heir sustained, though executed before the 40 dayes expire, L. *Mo-*

chal, 15. Summons of Declarator of Liferent being general of all and sundry Lands in favours of a Subject not sustained, L: *Muchal*, 3. at the Superiors instance abides no Continuation, Visc: *Stormonth*, 165. and is execute upon 21 dayes, L: *Renton*, 748.

In an Improbation all and sundry Writs in General may be called for, but in an Incident they must be *specifié* Lybelled, E: *Mar*, 64. Summons consisting *in facto*, abides Continuation, *Stuart* 42. so if not instantly proven, or that they are not priviledged, *Mowat*, 133. or proven by Oath; except for the Comprysings, *Purvis*, 375. and priviledged actions, *Baillie*, 401. *vid*: Adjudication. *vid*: Aliment.

Summons sustained upon an Assignation of a posterior date, relating to a prior that was lost, *Scot*, 206. Summons for Delivery, though the thing be produced, must abide Continuation, the rest of the Defenders not compearing, *Ker*, 269.

Summons past from does not so much as put an Executor in *Mala fide* to pay to another, *Rochhead*, 87. Summons may be Elked, Mended and Altered *in Substantialibus*, without a new Citation, *Hume*, 706. Summons once casten, the Defenders may be again Summoned upon a Copy off the Signet, L: *Renton*, 748.

Summons for bygone Tack-duties, and finding Caution, sustained upon six dayes Citation, *Scot*, 845. Summons of violent profits without a priviledge, abides Continuation, *Halpland*, 853.

Sunday is not a lawful Day to Execute Letters of Poynding, &c. *Mortimer*, 16. nor Caption, *Rachillet*, 382.

Superior, due 2 years Rent for Entry of a Compryser, if it be not an Annualrent, *Ramsay*, 23. and needs not Infeft him, unless he shew his Debitor is Infeft, or apparand Heir, *Ibid*: neither to Infeft upon a Retour, till the Retoured Maills during the Non-entry be payed, L: *Covington*, 68.

The Feu-duties and Casualities belong to the Immediat Superior, though he refuse to Infeft his Vassal, *Stark*, 549. except only the Non entry, *Hay* 633. how the mediat Superior may be Charged to receive a Sub-Vassal; L: *Caprington*, 142. not decided, if a Superior of Ward-lands can be compelled to Enter a Compryser during his Vassals Minority, L: *Covington*, 679.

Superior in the Entry must defalk what burden by Infeftments is upon the Lands to which he himself has consented, *Baird*, 686. and allow what Maills & Duties he himself has intromitted with, though by vertue of another Right, *Black*, 668. nether does the Superior sell more nor the Lands payed to the Vassal, albeit sub feued for a Feu Duty without his consent, L: *Monktoun*, 705.

Superior compelled to enter a Compryser, *in casu rebellionis*, *Cowan*, 809. albeit the bygone Feu-duties be unpayed, *Ibid*: and albeit the Debitor was never Infeft, only upon a Decreet against the Superior to Infeft him, *Paterson*, 844. But the Annualrent of the Sum Comprysed, is not enough, except nothing be Comprysed but an Annualrent, *Ibid*: nether is the Feu duty of the Sub-vassal enough, L: *Almond*, 881.

Superior how compelled to enter an Heir of Ward-lands, without payment of the full Duties for the Non-entry, *Peebles*, 485. how the Director of the Chancery may be compelled *Stark*, 549. a Superior not bound to enter a Compryser, if he offer to pay him his principal Annualrent and Expences, *vid*: Comprysing.

How a Superior being *Prebendar* may Infeft himself, *Supplicant*, 719. how Magistrats may be compelled to enter Vassals within Burgh, *vid*: Burgh. Superior cannot intromet with the Maills and Duties of his Vassals Lands, though Rebel before a Declarator, *Hamilton*, 792.

Superior compelled to enter a Compryser, though he be Proprietar *Salvo Jure*, *Scot*, 804. but will get a whole years Duty, though the Lands be Liferented, superceeding the payment to the Liferenters Decease, *Ibid*. and will be compelled though he has received other Comprysers already, *Fergason*, 358. and if they be equal in Diligence, he may prefer the Debitors Son, *Ibid*: from whom he receives but one years Duty amongst them all, L: *Borthwick*, &c. 392. Superior not bound to Infeft a Compryser, unless he shew his Author was Infeft, *Grant*, 426. nor a Comprysers Assigney, unless Judicial, *Colmslie*, 436.

Superior, though he may be Charged to enter to the Superiority within fourty dayes, yet not compelled to enter one, to whom his Vassal is obliged to give Infeftment of Annualrent out of the Land, *Young*, 474. A Superior may either poynd the ground or Charge a singular Successor personally, for payment of the Feu Duties due to him, *Monteith*, 532.

Suspension no Warrant to put at Liberty without a Charge, *Gimmil*, 201. Reasons of Suspension being *in facto*, will be allowed one Term to prove, *Ker*, 98. sometimes must be instantly proven, *Stevinson*, 100. One person bound conjunctly & severally, & suspending, hinders not the other to suspend, notwithstanding the first Suspension be undiscussed, *Brown*, 210.

A New Cautioner in a Suspension how found, *Rddicks*, 626 Decreets Suspended, and not the Precept only, must be produced for a Charge, *Dickson*, 297. Decreet *in foro* taken away by a Suspension, *Kennedy*, 331. A reason of a Suspension being admitted to probation and the Term Circumduced, not received in a second Suspension, *vid*: Exception. The contrair, *Hume*, 642.

Such Reasons as requires probation, are only receivable by way of Reduction, L: *Johnston*, 411. But all Reasons ought to be instantly verified, *Stirling*, 802. Suspension of a Decreet for poynding the Ground for the last year, Suspends all preceedings, *Brantfield*, 733. Suspension hinders not a forthcoming *Declaratoris*, *Stirling*, 888. *vid*: Bailies. *vid*. Minority.

T.

TAck no Title against a Spulizie, the Setter dying before Entry, *Gaits*, 4. and sett by a Minor with consent of his Curators, will not defend the Curator in a Removing, though in Possession by tolerance of the Tacksman, L: *Burgny*, 5.

Tack or Rental is null, if Relocat to a Subtacksman, though he offer to Repone, *Bonar*, 35. and though it carry a power to In-put, or out-put Tennents, it cannot be Assigned in whole or in part, L: *Craigiewallace*, 60. unless expreis mention be made of Assigney thereto, *Rattray*, 46.

Tacks belong to the General Heir, *Cranston*, 74. and being Reduced, the Sub-Tack falls in Consequence, E: *Wigton*, 91. and the Tacksman after Inhibition is *male fidei possessor*, *Ibid*: A Tack wanting an Entry is null, but conferred to a year before the Sute sustained, as being but an Informality, *Main*, 137.

Tack of Teinds sustained without the consent of the Bishop or his Chapter, *Hope*, 144. and a Tack set by an Inferior beneficed person, for five years after his Death, notwithstanding the Act of Parliament, 1617. *vid*. Bond. A Tack wanting an Ish not sustained, *Hamilton*, 186.

Tack set by a Wife who had no Right, with consent of her Husband, sustained against her in a Removing, upon a supervenient Right, L: *Kilbirnie*, 215. Tack with a Discharge of the Duty, not sustained against a singular Successor, *Reid*, 266. Tack wherein the Duty is ordained to be payed to a Creditor, and accordingly in possession effectuall against a Compryser, *Samuel*,

Samuel, 271. *Secus*, if the Tack be Sett after Comprysing of the Lands from the Setter, nor admitted to come in *pari passu* therewith, L. *Ley*, 290.

Tack to a Father and Son, the longest liver of them two, divides equally betwixt them, while living, and accresces to the Survivor, *Lidderdale*, 298. Tack with the first Possession, preferred to a prior Tack, *Hamilton*, 259. *Secus*, if the prior, was ever clad with Possession, L. *Balvenie*, 340.

Tack of Teinds, or any part of a Forefault Estate, falls with the Forefaulture, though for onerous Causes, when the person is Re-abilitate, *Stuart*, 301. Comprysing before a Tack be clad with Possession, preferred, if Infeft, *Wallace*, 307. Long Tacks of Lands and Teinds, comes not under Lands and Heretages Conquest during the Marriage, though in favours of a Wife, La. *Dumfermling*, 359.

Tack before Denounciation preferred to the Compryser, *Blackburn*, 370. Tack clad with Possession, preferred to a posterior Annualrent, though for Implement of a Contract of Marriage prior thereto, La. *Ednam*, 393. Tack ending at *Martinmas*, the Warning to remove may be before *Whitsunday*, *Inglis*, 409. Tack after Denounciation, though the Party be neither Bankrupt nor Inhibited, the Compryser preferred thereto, *Blaickburn*, 427.

Tack being Reduced with the Setters Right, doth not convalesce to the Heir and his Wife, acquiring a supervenient Right, but the Liferenter preferred upon a Right from her Husbands Author, La. *Berthwick*, 432. Tack without a Clause, to in-put, and out-put Tennents, a sufficient Title in a Removing, L. *Gallowshiells*, 436.

Tack of Lands pertaining to a Deanry, Sett without consent of the Bishop and Chapter, found null, and not to extinguish the Ecclesiastick Dignity, though mortified to a Colledge, the Col. of *Aberdene*, 443. A second Tacksman may Remove a first, whose Tack is expired, although his Entry be conferred to the Setters death, *Secus in Ecclesiasticis Dunbar*, 446. But will not be heard to quarrel his Masters Right, *ibid.*

Tack wanting a Dury, though in place of a Wodset, not sustained, *Keith*, 448. Tacksmen how compelled to find Caution, *vid.* Caution. Tack vitiat in the Body, though not subscribed on the Margine, sustained, *Oliphant*, 472. and Sett during lifetime, needs no time of Entry, it being understood from the date, *ibid.*

Tack to a Party and his Heirs Male, for two nineteen years, the first in the Tack assigning it with reservation of his own Liferent, and thereafter Comprised from the Heir Male; the Comptiser in Possession was preferred to the Assigney, *Ross*, 524. Tack by a Compryser for 40 shillings of Tack-duty, excludes the Heretor, *vid.* Liferent.

Tack with 10 years Possession taken away by a Reply in a Removing, L. *Marshall*, 664. Tack elder than 30 years, wanting Ish, yet the Tacksman being in possession, may pursue Warrandice if Removed, in which neither the Setter nor his Heir can object that nullity, though a singular Successor might, *Crighton*, 600.

Tack of Teind-fish Sett by a Bishop unexpired, a second Tack thereof may be reduced by the Bishops Successor, Bishop of the *Isles*, 601. As likewise a Tack Sett in diminution of the Rental, *ibid.* A posterior Tack Sett for fewer years, and less Duty, derogats from a prior Tack, though the Party had no right to the second Tack, but accepted thereof, which was found proven by his Judicial Confession ellaerly in the Masters Court, L. *Lauderdale*, 612.

Tacksman, whose Tack is expired, his Sub-Tacksman Removed without Warning of the Tacksman, as brulking *per tacitam relocationem*, because not actual possessor, La. *Lawriston*, 627. Tacksman compelled to find Caution to the Heretor, or to Remove without Warning, *Carnegie*, 18. The like in a Tacksmans Wife, *Fisher*, 6421

Tack after the Redemption of a Wodset, whereupon Infestment did not follow, nor sustained against a singular Successor, *Hamilton*, 651. Yet a Tack containing an obligment to receive the Tacksman kindly Tennent after expiring thereof, during his lifetime, sustained against a Compriser, *Gordon*, 669.

Tacksman accepting of a posterior Right of Wodset, doth not extinguish his Tack, but he may recur thereto, if the Wodset be reduced, L. *Lesmore*, 740. But a Tack Sett for payment of Creditors *nominatim* expreft, will not exclude a Compriser, *Morison*, 780. A Tacksman pursued to enter, and labour the Ground, L. *Randisford*, 52.

Tack during lifetime may be Assigned, though neither Heirs nor Assigneys be expreft therein, *Hume*, 832. Tack with 40 years Possession sustained against a Spuilzie, without necessity of alledging or producing the Authors Right, Bishop of *Edinburgh*, 814. Where diminution of the Rental is not receivable by way of exception, *ibid.* Till a Tack be in Writ, there is *locus pœnitentiæ*, even after two years Possession, *Keith*, 816. Tack to the Husband and the Wife, the longest liver of them two, pertains to the Wife, if she survive, and not to the Heir, *Hume* 825.

Tailzie by way of Contract, cannot be broken without consent of both, *secus* in simple Tailzies, *Sharp* 553. and is not *nudum pactum*, *ibid.* but hinders not the Contracters to Sell or Annailzie, *ibid.* and *Drummond*, 815. and one parties contraveening, is no reason to repone the other, and reduce the Contract, *Hume*, 706.

Taliziat Money is to be repay'd according to the current rate the time of the pursuit, L. *Linlithgow*, 55.

Taxation vid. Removing. *vid.* King. *vid.* Chamberlain.

Taxative, *vid.* Clause.

Teinds Rentalled or valued, Intromitted with after Inhibition, not of the nature of Spuilzie, *Gordon*, 24. but a Tacksman entring thereto without warrandice is lyable in a Spuilzie, *Naismith*, 337. a Wife provided to the Terce of all Lands and Heretages, includes the Teinds, La. *Dumfermling*, 344.

Tennents having payed Stock and Teind to their Master after Citation, will not be lyable to the Titular, *Murray*, 366. one having right to Teinds, dying after the Corns are shorn, but before *Martinmas*, transmits them to his Executors, *secus* in a Liferenter, who transmits but the half, *ibid.* but will be lyable to the Minister for his Stipend, *Kirk*, 427.

Bond or Disposition of Teinds, to bruik till one be payed of his Debt, not *habilis modus* without a Tack, though he was in Possession, La. *Blantyre*, 372. Obligment to warrant Lands to be free of all Teinds, except seven bolls for the Tack-duty, with Possession, preferred to an Assigney, L. *Finmouth*, 440.

Teinds, the Buyers of Fish allwell as the Takers are lyable for the Teinds, Tacksmen to the Bishop of the *Isles*, 569. Wrongous intromission of Teinds, notwithstanding of a Warrant from the high Commission, *Douglas*, 651. Rentalled Teind bolls decerned to be payed where the Teind was not offered, Colledge of *Glasgow*, 677.

A Minister may Charge any intromettor with Teinds for his Stipend, who has his relief *pro rata*, *Keith*, 682. Tack of Teind Bolls obliges only the Tacksmen and his Heirs, and not singular Successors to the Lands, but according to their proportions

Parson of *Stracrock*, 689. Teinds pays no Multures, L: *Innerweek*, 774.

Viccarage Teinds and *decima inclusa*, *vid.* Clause. *vid:* Minister. Commission for Valuation of Teinds, though Liferenters have the benefit thereof, yet Rentallers have not, L: *Heasilrigg*, 881.

Tenor of a Bond granted by a Defunct not sustained, without calling the Executors, and how proven, Hammermen in *Glasgow*, 354. proven by Circumstances referred to the parties Oath, but the Tenor of real Rights will not be sustained without Adminicles in Writ, L: *Prendergast*, 817. a proving the Tenor of a Charter may be pursued at any persons instance who is Infeft in the Lands, or has a personal Obligment to be Infeft, Mr: of *Jedburgh*, 345.

Tennent compelled to enter to Possession, conform to his Tack, L: *Randisford*, 52. a Moveable Tennent may be Witness to his Landlord in a Burgh Royal, *Watson*, 64. and may give over his House before *Martinmas*, allwell as *Whitsunday*, and be Removed in like manner, *Kr.* 75.

Tennents Corns, Cattel and other Goods, though taken off the Ground, are Hypothecat to the Master for his years Rent, L: *Dun*, 126. and the buyer in a publick Mercat is lyable therefore, *Hay*, 886. Tennents having once made lawful payment to an Arrester, cannot be thereafter poynded, *Gray*, 197.

Tennent admitted to defend a Spuilzie of Teinds upon their Masters Right, *vid:* Exception. Tennent pursued for Mails and Duties, alledging payment to his Master before the year controverted, this Elyded by this answer, that payment was made two years before the year controverted to his author, which was admitted to the Pursuers probation, *Portsfield*, 447.

Tennent bound in a Bond with his Master, for payment of a yearly Annualrent, to be allowed to him in his Duty, was found a personal Obligment, which could not affect a Comprayser, yet the Tennent declared only lyable in single payment, *Cochran*, 425. Tennent lyable to his Master for Dampage and Interesse, in his unusual Labouring of the Ground, L: *Haddo*, 669.

Tennent taking Land and promising to enter thereto, or to pay a years Duty, sustained in the Alternative, though there be *Locus penitentiæ*, as to the Bargain, *Skein*, 852.

Terce is by a Brieve and Service, *Cunninghame*, 117. whereto the Relict must be Served and Kenned, *Tennent*, 153. and will be preferred to the Mails and Duties thereof, since her Husbands decease, before the Heretor, Tennents of *Eashouses*, 317. and to the Terms Mails, before which the Defunct died, before either his Heirs or Executors, *ibid.* & L: *Dunfermling*, 336. and may remove from the Terce, though the Possessors, bruik *pro indiviso*, 339.

Tercer has no Right to a third of Fee-duties, due to her Husband as Superior, L: *Dunfermling*, 344. but to her Terce of Teinds, *ibid.* nor to a Terce of Coali, but to her proportion only, L: *Lennieston*, 345. Tercer pursuing Removing needs produce no more but her Instrument of Kenning, and needs not cite the appearand Heir, L: *Maxwell*, 397.

Tercer, her Service is sufficient in Mails and Duties, Relict of *Veitch*, 630. no defalcation allowed for persons, for gathering up of the Terce, with the other two parts, L: *Dunfermling*, 717. not debarred from her Terce by a Bond in satisfaction, without a Renunciation, L: *Lawriston*, 764.

Terce of a Wodset not prejudged by a Charge for payment, yet the Heir may Renunce the Wodset, and exclude her, *Veitch*, 894. but has the Terce of the Money payed upon the Redemption, *Murray*, 803.

Term of payment not being come, neither Summons nor Decreet, or other Diligence can follow thereupon, *Hope*, 106.

Testament Dative of a Father, with a Tripartie division, because of a *Posthuma*, *Spotts*, 23. and because there is a Relict living, either of a first or second Marriage, unless otherways provided, *Cherman*, 591. Testament out of the Countrey upon Heretables, not sustained, Colonel *Henderson*, Children, 88.

A Testament in *Scotland* and Confirmed in *England*, not sustained, *Rob*, 831. but in Moveables sustained against a Debtor in *Scotland*, *Lawder*, 777. How a Testament may be Advocat, *vide* Advocation.

Testament Dative *ad omissa* sufficient to pursue without production of the Decreet Dative, *Dal*, 581. *Testament Dative* of an Executor Cited for Confirmed, Reduced at the instance of the nearest of Kin, *Wiseham*, 586. Testament Homologat, *vid:* Homologation.

Testimonial, *vid:* Kirk-Session.

Thirlage naturally of Lands lying within one Barony, without any Act or Constitution, and a Fee for a Duty *pro omni alio opere*, it bear not *cum Molendinis & Multuris*, Liberats not, L: *Newliston*, 464. Use and Custom to go to the King: Miln, and to pay Multures sufficient to Constitute a Thirlage, but not so to private persons, *Dog*, 749.

Thirlage of all Corns in-brought, that should be grund, how interpret, L: *Wauchton*, 768. Infeftment of Lands with a Thirlage, and thereafter resigned for new Infeftment *cum Molendinis*, the first Infeftment preferred, *Rowan*, 858. *vide* Nullity.

Thirlage must be expressly Constituted, & not by Acts of Court Decreets, nor fourty years Possession, *Douglas*, 2. yet may be constitute by an old Indenture, *Mackenzie*, 122. Thirladge of all Corns thollin, Fire and Water, extended to all Corns Killed and Cobled, & how extended as to others, *Cuthbert* 840.

Titles of Honour may be Acquired by use and custom, als well as by Erection, and goes to Heirs Female, als well as Male, *Oliphant*, 685. and cannot be Disponed without the King's consent, though the Disposition sufficiently denudes the Granter, *Ibid.*

Titles in one Summons conjoyned, preferr'd to a simple Title, though prior in Diligence, *Halburton*, 52. but if posterior to the Lybel, not valid to pursue thereupon, *Stevinson*, 56.

Titular how he may Infeft himself, *Sandilands*, 719.

Tocher returns to the Father or Mother Contracter if their Daughter die within year and day after Marriage, without Children, *King*, 309. Tocher provided to be Imployed upon Land, or Annualrent, by advice of the Husbands Father, and the Wife's Goodame, she was found to have right to the Liferent thereof, though sufficiently provided by her Contract, and the Heir had nothing, *Nisbet*, 370.

Tollerance from a Rentaller, sustained as sufficient against a Removing, but only probable *fovita*, L: *Maxwell*, 285. Tollerance from a Comprizer, *Mitchelson*, 395.

Town-Clerk no Member of Court, L: *Drumlanrig*, 97. yet a Town-Clerks subscription will oblige the Magistrats, *Peebles* Relict, 262.

Transferring of a Decreet, of Division, *Fairlie*, 62. Of a Registrat Bond against the Heirs and Executors, *Muirhead*, 58. Of a Suspension and Act of Caution in an Advocat, *Cunninghame*, 69. Without calling any but the Cautioner, *Hare*, 800. Of a Decreet *mobilitatis causa*, *Thomson*, 4. Of a Reduction against an Appearand Heir, *Cranston*, 82. And of a Process against an appearand Heir, though not charged to enter, *Stevinson*, 203. And of a Lis-contestation betwixt two Debtors, without citing

eiding the principal Party, *Bannatyne* Donatar, 390. Of a Gift and Declarator, *vid.* Donatar. Of a Decreet of Poynding the Ground, in the Heirs or Executors of the Defunct *Active*, but needs not *Passive*, L. *Balmanno*, 471. Of Decreets of Inferior Courts before no other Inferior Courts but themselves, *Liddel*, 124. Of the Avail of a Marriage against a third appeirand Heir, *vid.* Marriage, and of Removing at the Instance of a general Heir, L. *Corsbie*, 835.

Transferring necessary against the Party for his Interest in a forthcoming, *Thomson*, 71. Not against Bailies and Magistrats succeeding in the Office, L. *Drumlangrig*, 97. Nor of a priviledged Summons, *Wirran*, 242. Nor of an Act of Lists contestation at an Executors Instance to the Defuncts Executor *Active*, Duke of *Lennox*, 279. Not against a Judge and Clerk, and such persons as are only called for their Interest, *Hay*, 725.

Translation, *vid.* Pension.

Transumpt of a Sasin, *Hopringle*, 47. Of an old Instrument, L. *Corsbie*, 550. A Vassal cannot pursue a Superior for a Transumpt, though he be his Author, L. *Blackader*, 40.

Trust of an Assignation found probable by Witnesses, La. *Stanipath*, 141.

Turpis causa, *vid.* Adultery.

Tutor not lyable for diligence against Debitors not solvendo, *Watson*, 45. And the Pupills maintenance after Tutory allowed him, *ibid.* he cannot quarrel his Pupills Title against himself, *Stevinson*, 56. Cannot transact the Office, by submitting or otherways, *Ramsay*, 149. But may constitute a Factor, *Musbet*, 878. Nor Assign their Pupills Debts to their own Creditors, *vid.* Assignation. Nor take the Gift of his Pupills Ward to his own use, *Dabitatur*, L. *Rothes*, 420. Neither can he quarrel his Pupills Right, nor defend himself upon a Right acquired, even before the Tutory, *Stevinson*, 56.

Tutors are not lyable for Annualrents yearly, *Nasmith*, 465. but lyable for Annualrent, though discharged by the Liferenter, as accresceing to the Pupill, *White*, 433. And a Tutrix Testamentar, lyable in Annualrent for Money, intromerted with after her second Marriage, *Vallange*, 531.

Tutors may pursue their Pupills *durante curatela*, Lo. *Bargenie*, 56. They renouncing their Office, La. *Stanibill*, 185. Which they cannot return to, *Campbel*, 304. A Father may be Tutor to his Natural Son, L. *Touch*, 120. How lyable for Annualrent to their Pupills, *Goldman*, 168. and *Hamilton*, 379. and *Davidson*, 705. they may be cited generally, E. *Kinghorn*, 189. How lyable for Commission and Omission, Commissar of *Dunkeld*, 333. Are lyable *in solidum*, though Decerned *pro rata*. *Souter*, 407. and *Davidson*, 705. And may be pursued for Compt and Reckoning before the Commissars, *Horsburgh*, 420. Their Accompts may be quarrelled *inter annos utiles*, after Decreet of Exoneration against the Minor and his Curators, *Stuart*, 863.

Tutor Testamentar preferred to a Dative, after six years lying out, though Curator to the Heir, and so Tutor and Curator to both Pursuer and Defender, *Campbel*, 304. Tutor preferred to a Mother, in the custody of the Pupill, though an Infant, after her second Marriage, *Gordon*, 625. Though the Husband appointed her Tutrix during his Pupillarity, *Stuart*, 801.

Tutor lawful preferred to a Dative, after he was admitted, *Irvin*, 638. And though the Tutor was suspect as nearest Successor to the Pupill, L. *Langshaw*, 455. Because she loses the Office after her second Marriage, *Grant*, 596.

Tutor Dative to a Stranger pursuing in *Scotland*, *Donaldson*, 322. he must find Caution, Commissar of *Dunkeld*, 333. Tutor to an Idiot, being the nearest of kin, preferred to a Dative, *Colquhoun*, 349. Tutor nominat pursued to accept or Renounce, *Mairand Thomson*, 356.

Tutor nominat by a Goodsir to his Oyes, till their perfect age, will not hinder them to choose Curators, *Harpers*, 608. not accepting, may Renounce, though both pursuing and defending as Tutor, but without his knowledge, *Baird &c.* 480. A Father being Tutor to his own Child, not allowed to lift her Money without Caution, *Govan*, 670.

Pro Tutore lyable for Intromission and Annualrents *de Iure*, 848. Tutors and Curators needs not be Warned in a Premonition, generally, they being specially called, L. *Carnegie*, 475. Tutor in Law must find Caution, *Grant*, 596.

U.

Unfree Craftsmen Discharged within Burghs Royal, *Websters* in *Striveling*, 365.

Union of Lands discontinue, is only by the King, La. *Berthwick*, 410. but once Unite, may be Transmitted, though not Confirmed, *Stuart*, 263. and though they ly discontigue, yet if under one Jurisdiction, *vid* Seasin. But Seasin to be taken at one place by a Superior, without the King's Confirmation, is not valid, E. *Galloway*, 567. unless Confirmed by the King, La. *Berthwick*, 790. and La. *Blairgabrey*, 845.

Universal intromitter conveened, though there be an Executor, but not Confirmed, *Stot* 86.

Universal Legatar has Right to the Defuncts third part, and if the Testament has no division, he has right to the whole Moveables, *Oliphant*, 219. and may pursue an Intromettor, though there be Executors Confirmed, *Bisset*, 279. *vid:* Legatar, *vid:* Executor, *vid:* Successor.

University, *vid:* Charter.

Unlaws for absence in Baron Courts, should not exceed ten pounds *Scots*, L. *Bequben*, 22. The like for not Compearance in Sheriff Courts, though cited for a Bloodwit, *Crighton*, 406. *vid:* Penalty, *vid:* Oath.

Use of payment of fewer Teind Bolls than formerly to a Vicar, not sustained, though his Stipend was modified to no more, *Symmer*, 525. Use of payment of Teind-Fish, *vid:* Teind. Not sustained against a Spuilzie thereof, *Drummond*, 636. Use of payment, *vid:* Services. *vid:* Mulmures, *vid.* Teind-Fishes. Bishop of the Isles, 569. Use of coming to the Superior's Court, at another place than is contained in his Infestment, Sustained, *Innes*, 37.

Usury sustained, when one is obliged to pay Bolls of Victual over and above the ordinary Annualrent, King's Advocat, 57.

V.

Vacante, Decreets given be Inferior Courts in the time thereof, null; *secus* if this Objection be omitted in *prima instantia*, *Maxwel*, 406. Sheriffs may and even poynd in time of *Vacance*, *Suter*, 784.

Vacua Possessio, *Gruthlaw*, 103.

Valuation, *vid:* Teinds.

Vassal may not pursue his Superior for Transumpts of his Writs, L. *Blackader*, 40. Vassal Infeft *cum Curiis*, may convein his Tennents not only for his Rents, but for cutting of Green-wood, *Dennistoun*, 489 Pensioner by the King, may not only Compryse the King's Immediat Vassals Lands therefore, but the Sub-Vassals, which will only carry their Feu-duties, but not the full Mailis, till after Citation, *Monsries*, &c. 833 and the King's Vassal can make no Subaltern Right to prejudge the King, *ibid.*

In Rem Versum, *vid:* Minor.

Vicarage, *vid:* Teinds. *vid:* Minister.

Viccars Manse and Glebe discharged to be Feued: *vid:* Feu.

Vice succeeding therein, sustained against him, against whom Decreet of Removing is obtained, L: *Hunthil*, 61. *vid:* Succeeding. *vid:* Violent profits. *vid:* Ejection.

Victual assigned for the Annualrent of Money allowed, though exceeding the ordinary Annualrent, *Cunninghame*, 49. The Delivery thereof probable by Witnesses, though Bond be given for the same, *Bisset*, 152. and though it tend to take away Writ, L: *Abercrudie*, 689. yet receipt of Victual only probable *scripto vel juramento*, upon the same reason, *Porteous*, 657.

Violent Profits how due after Decreet of Removing, Master of *Jedburgh*, 53. and by those who succeeds in the Vice of those Removed, but neither Violent Profits, nor succeeding in the Vice are competent to the Heir without Transferring, L: *Drumlanrig*, 172. *vid:* Transferring. *vid:* House-Maill. Violent Profits, though proven, the Pursuer ought to give his Oath of Credulity, *Gladstanes*, 115.

Vis & metus sustained, to reduce a Wodset subscribed by the Wife, without saying she was compelled, or the Receiver knowing any thing thereof, *Cassie*, 634. *vid:* Bond. *vid:* Consent. yet a Bond granted to a Robber, who fled with the Granter, and saved his Life, sustained, *Grant*, 892. *vid: Metus causa.*

Vitiation of a Writ will put the user thereof to approve, neither will the Defender be obliged to improve the same, *Hepburn*, 321. and *Oliphant*, 472. *vid:* Tack.

Vitious intromission purged by a subsequent Gift of Escheat, and general Declarator thereupon, Lo: *Johnston*, 771. *secus* if the Gift be to the Rebels behove, *vid:* Gift of Escheat. Vitious Intromettors Assigney only lyable *in quantum*, *Pride*, 540. *vid:* Intromettor.

Voluntar, *vid:* Deeds. *vid.* Payment.

W.

Waird, *vid:* Prisoner.

Wakening cannot alter the Process wakened, neither can other parties be called for their interests therein, but must be *in statu quo*, L: *Renton*, 476. *vid.* Transferring.

Ward, *vid:* Marriage.

Ward Lands set in Feu-ferm by the Heretor, though null by Act of Parliament 1606. will exclude the Wardator from any thing but the Feu-duty preceeding the date of his Summons, Interrupting the Fenar, L: *Ley*, 290. Donatar of Ward will exclude an Infeftment of Annualrent, and Poyndling thereupon, though he be appearand Heir, *Wyms*, 440.

Ward falls not, if any be standing Infeft Confirmed by the Superior, and taken to be holden of the Superior, *secus* if it be taken to hold of the Vassal, though Confirmed, L: *Cathcart*, 456. But if the Infeftment was taken without consent, and the Seasin not Registrat, though it hinder not Ward, yet the Nullity might be proponed, L: *Cathcart*, 467.

Warning how against a Party out of the Countrey, L: *Faldonside*, 8. and L: *Lie*, 531. A Compryser needs no Warning against the Heretor his Debitor, E: *Lothian*, 42. Warning not sustained upon a Denunciation without Comprysing, L: *Legg*, 150. Nor upon 40 dayes before *Candlemas*, *Whitsunday* being the legal Term, *Ramsay*, 590.

Warning not sustained against a Tennent before the Liferenters decease, *Ardwell*, 646. Warning sustained before the Expiring of a Tack, though Removing will not, *Foulis*, 211. and before Sentence in the Reduction of an Heretable Right, L: *Pitmedden*, 306.

Warning sustained, though not Execute against Tutors and Curators, *vid:* Removing, must be Execute at the Paroch Kirk where the Lands lye, L: *Drumquhassel*, 392. though the Kirks be united, *Ardwell*, 646. *secus* within Burgh where its only by Chalking the Doors, *Hart*, 729.

Warning not necessary where the Land is set from *Martinmas* to *Martinmas*, *Bruce*, 400. Sustained at the Instance of a Liar, though made by the Liferenter, *Ramsay*, 470. and to Remove a Son, the Father being warned, *Hume*, 486. sustained upon an Infestment posterior thereto, *Dalrymple*, 659. and at an appearand Heirs Instance, upon a Warning used by the Defunct, L: *Haddington*, 855.

Warrandice of a prior Tack sustained upon a posterior Tacksmans Possession, though without Order of Law, *Hamilton*, 53. As also when the Pursuer was not actually troubled, but might be troubled in his Possession, Lo: *Prendergast*, 133. And before Distress superceeding Execution, *Salmond*, 453.

Warrandice to free Lands of all Burdens which might affect the same, extended only *in quantum* really payed for Relief thereof, *Logan*, 628. Warrandice of a Rental extended to relieve a Relict of Ministers Stipends, though due by a publick Law, La. *Cardross*, 776.

Warrandice not inferred upon the Lands falling by negligence, or by the unseasonableness of the Weather, L: *Dunipace*, 802. Warrandice not inferred upon a prior Tack, far inferior to the Avail of the Lands, L: *Pitfirren*, 447. nor extended to supervenient Burdens imposed by *Law*, La: *Dumfermling*, 719.

Warrandice sustained to free Conjunct fee-Lands, of Annualrents, Teinds, and Feu-duties, because *specifica* so provided against, L: *Balbegno*, 849. Infestment in Warrandice Lands, no impediment to poynd the Ground for a posterior Annualrent, if before Distress, *Fleming*, 875.

Water being diverted, ordain'd to be restor'd, without alledging any prejudice, *Rannentie*, 130.

Wife pursuing the Executors of her Husband, for the half or third, and the Officelf they refuse, *Stevin*, 17. and may Charge for Implement of her Contract without her Husbands consent, *Marshel*, 40. and may pursue her Father in Law, and after his Decease, her Husband as Heir to him therefore, *Inglis*, 898.

Wife can pursue none but the Defuncts Executors, not the Debitors, *Stevin*, 17. Contract of Marriage, whereby she Dispones all her Debts to her Husband and her other Heirs, not decided, if it would import a Division, L: *Hassingtoun*, 594. But *in mobilibus* decided thereafter *inter eosdem*, 617.

A Bond giving the Husband power to uplift the Annualrent, but not the principal Sum, found to be conceived in favours of the Debitor, albeit the Wife consented thereto, Goodman of *Hambie*, 729. her consenting to her Husbands Testament, will not prejudge her of her own Third, *Guild*, 43. but consenting to Possession of her Liferent Lands, it will prejudge her, *Solata*, though she did no Deed to prejudge her own Right, *Irwine*, 89. Bonds granted by the Wife after Contract and Proclamation, found null by way of Exception, *Scot*, 665. *secus* if the Proclamation be not at her Parish Church, *M'dougal*, 70.

Wife and her Husband with her consent may Annailzie or Wodset her Lands, *secus*, if the Security be otherwayes conceived, *Greenlaw*, 198. but can do no Deed to affect her part of the Moveables, and the reason of difference, *Matthew*, 248. she may pursue for her Maintainance *stante Matrimonio*, *vid:* Aliment. and a Bond subscribed with her Husband, or alone, as *proposita negotiis*, will not make her lyable after his Decease, but only his Heirs and Executors, *Porter*, 561.

A wife Married either before the first or second Citation, the Husband must be called, and how the same is done, *Baillie*, 300. Wifes Oath refused in an Improbation, being to the prejudice of her Husband, L: *Renton*, 641.

Wifes Oath taken upon a Promise, affects her goods after the Marriage, *Ker*, 287. But a Decreet against her in her Widowhood, will affect the Husbands *stante matrimonio*, but not thereafter, if he be alienerly Charged thereupon, *Knows*, 292. neither is he lyable for her wrongous Intromission, *Scot*, 339.

A Bond granted to the Wife and her Heirs, yet belongs to the Husband, and his Executors, *June* 15. 1627. *Nicolson*. And though it be blank, it cannot be filled up to his prejudice, *Drummond*, 702. yet a Contract betwixt Husband and Wife, to repone each others *in statu quo* sustained, *Gib*, 712.

A Wife may pursue her Daughter and her Husband, for Goods in the Mothers Possession, though they belonged to the Husband, the Daughter not being Executor to the Father, *Cranstoun*, 406. The Husband being *Dominus Bonorum*, cannot be convened as Vitious Intromettor, for retaining Possession of his Wifes Goods, though he was Decerned for his Interest, *Brown*, 422.

A Wife may be convened for Wines or other Merchandise bought by her, without Citing the Husband, who was long out of the Countrey, *Russel*, 438. A Wife Marrying a second Husband, falls from the Office of Tutory, and if she intromet then, how the third Husband may be pursued, *Matheson*, 443.

Bond granted by a Wife for Money bestowed upon her Aliment, not sustained against her, till the Husband be discuss, *Aiton*, 477. neither will her Oath prove against him, *Ibid.* But she may Impugn the said Bond, and Alledge it wanted her Husbands Subscription, *Ibid: vid:* Bond. yet not lyable for furnishing to the Wife without his Warrant, *Hamilton*, 719.

Wife may pursue for her Liferent after Divorce, upon the Husbands Adultery, *Crawford*, 803. yet a Compryser of Teinds found to be *bona fide possessor*, before the Wifes Pursuit, L: *Mandirstoun*. 840. *Secus* If it be a voluntar Deed after her Conjunctfee, *Keith*, 834. A Wife preferred for her Conjunctfee to all other Creditors, the Creditors of *Brown*, 556. *vid: donatio inter virum & uxorem.*

Witnesses and their Depositions received *ad futuram rei memoriam*, as well in Improbation as other Actions, *Stuart*, 62. Their Depositions declared null, upon promise of good Deed, *Gechin*, 117. Refused to be taken, though going out of the Countrey to ly *in Retentis*, because the Defender was out of the Countrey, and could not object, *Bisset*, 428.

Subscribing as Witness imports not consent, *Walwood*, 179. Though there be a Clause in it to his behove, *Ibid.* A Buyer of Lands may use the Seller for a Witness, in a Removing from the same Lands, *Butler*, 561. Tacksmen for 15 or 19 years may not be Witness to the Seller, 183. though his Tennents only since Citation, 630. nor against them to whom their Master is bound in Warrandice, *Ibid.* Nor a Nottar to his own Instrument, *vid:* Subscription, nor a Party to his own Bond, *Robertson*, 315. But Sub-tennents and Sons of Moveable Tennents may be Witnesses in their Masters Cause, in a Contravention, L: *Haddington*, 658.

Witnesses Examined *ex officio* upon the cause of a Bond upon a Commission, *Landit*, 256. though it was a Wife *ad Informandam Judicis Conscientiam*, L: *Johnston*, 550.

Witnesses Summoned upon 80 dayes, further Diligence allowed against them, as against other Witnesses, *Norkat*, 289. Witnesses out of the Countrey Examined upon Commission, Town of *Irving*, 422. Advocats compelled to be Witnesses against their own Clients in Exhibitions, *Betson*, 396.

Paction for delivery of four Mares, though after three years, probable by Witnesses, *Stirling*, 401. Witnesses how honourable or noble soever, will not be admitted *ex officio* to take away a Bond, L: *Murray*, 483. *vid:* Poynding. Yet admitted to take away an Assignation upon trust, *Williamson*, 54.

Designation of Witnesses belongs only to the Messenger, *vid:* Messengers. Subborning of Witnesses received against a Decreet, without protesting for a Reprobator, *Robison*, 781. Sum within 100 pounds, found probable by Witnesses, L: *Ernock*, 798.

Wodset Lands Comprysed by the Wodsetter, craving wishes the Wodset, La: *Dowhill*, 43. The Back-Tack Duty may be made payable before the principal Sum, La: *Pitsligo*, 15. Action anent a Commonty, sustained against a Wodsetter, without calling his Author, *Irwing*, 53.

Singular Successor lyable to the receiver of the Wodset for the Back-Tack Duty, *Turnball*, 212. *vid:* Back-tack. A Wodsetter allowed by the Lords to big a Harbour, and the Expences thereof ordained to be Liked to the Reversion, *Murison*, 223. Wodset without Infestment, not sustained against a Compryser in a Removing, *Hill*, 400. *vid:* Removing. *vid:* Tack. *vid:* Comprysing.

Oblidgment by the Granter of a Wodset to the Wodsetter, that the Lands should be worth yearly so many bolls of Victual, more than his Annualrent, not sustained, though it was a proper Wodset, *Nisbet*, 526. *vid:* Reversion. A Wodsetter cannot poynd the Ground, *vid:* Poynding.

Wodset for a greater Duty in a Back-tack than ten *per cent*, not quarrellable by a second Wodsetter, as Usurary, the Back-tack being Renounced, L: *Clackmannan*, 578. An Annualrent cannot be effectually granted out of Wodset Lands, *Ibid.* a prior Base Infestment of a Wodset, with payment of the Back-tack Duty from the Granter of the Wodset, preferred to a posterior publick Right, clad with Possession, L: *Auchinleck*, 647.

Wodset with a Back-tack once clad with Possession, though thereafter he ly out 20 or 30 years, will have repetition from a person having a posterior publick Infestment, and in Possession without Reduction, *Gordon*, 665. Wodsetter of Teinds lyable to the Minister for his Stipend *in quantum*, *Keith*, 682. *vid:* Teinds.

Wrack not Sustained where there escapes a living Creature out of the Ship, *Hamilton*, 39.

Writ, the cause proven by the Witnesses insert, *Davidson*, 33 and L: *Stanipath*, 141. the contrair sustained, *Crawford*, 167. nor ordinarly taken away so, albeit the Sum be within 40 pounds, *Nisbet*, 138. nor any condition to affect the same, *Maxwel*, 205. Writs of Importance, *vid:* Obligation. *vid:* Reversion.

Tenor of a Bond or Writ, how proven by Witnesses, *vid:* Tenor. A Writ undelivered by the Defunct, not sustained against the Helr, *Dickson*, 322. Though thereafter Registrat, and Comprysing deduced thereon, and the user will be Examined *ex officio*, *Scot*, 366. A Writ not relating to another of the same date, betwixt the same parties, and before the same Witnesses, found to be a part thereof, *Cobran*, 522.

Writer of a Contract may be condescended upon, though not insert, *VVolf*, 823.

FINIS.

These Errors, occasioned through the want of an Original and exact Coppie of the First Part, Correct, as follows. P. *signifies* Page, l. *Line*, r. *read*, d. *delet.*

PAge 8. l. 45. Headbugh, r. Edinburgh. p. 13. l. 3. their, r. the. l. 18. albeit, r. and albeit. p. 14. l. 3. his, r. has. p. 19. l. 29. L. *Muckhal*, r. *Patrick Lyfit.* p. 16. l. 37. parties, r. parts. p. 17. l. 34. specified, r. *specifie.* p. 20. l. 22. *add* their words, the like to this Decision is seldom was done, *Feb.* 13. 1631. L. *Cuttenball* con. *Tenth. vid. March* 23. 1622. L. *Bonytan.* p. 21. l. 2. clause, r. cause. p. 23. l. 18. severally, r. not specially. l. 32. only, r. not. p. 30. l. 16. but, r. and. p. 32. l. 37. specified, r. *specifie.* l. 49. d. not. p. 34. l. 5. that as, r. as that. l. 19. also, r. heir also. p. 39. l. 6. Pursuer, r. Defender. l. 9. pursuers, r. defenders. p. 42. l. 13. having, r. holding. p. 42. l. 29. and, r. one to. p. 45. l. 17. admitted, r. admit it. p. 46. l. 20. and that, r. and that it. p. 51. l. 33 but, r. by. p. 55. l. 33. pursued, r. granted. p. 58. l. 45 ad. r. action. p. 62. l. 15. for relief, r. relief for. l. 40. impute, r. input. p. 64. l. 42. against, r. for. *Ibid.* l. 50. or, r. persons to. p. 65. l. 7. improbation, r. probation. l. 11. these, r. there. p. 71. l. 26. fought, r. called. p. 74. l. 20. d. for. p. 76. l. 3. nor, r. nor made. p. 78. l. 10. own, r. authors. p. 82. l. 24. bond. r. land. p. 86. l. 32. owing, r. selling. p. 89. l. 23. their esse, r. this cases. p. 94. l. 44. gifts, r. rights. p. 97. l. 49. or, r. to. p. 98. l. 2. there, r. the. p. 99. l. 5. a, r. one. p. 100. l. 2. d. no. p. 103. l. 3. by, r. he *Ibid.* l. 23. valued, r. united. p. 106. l. 32. 1662. r. 1622. p. 110. l. 1. was, r. was no. p. 112. l. 19. ought to r. mention. *Ibid.* l. 37. affected, r. offered. p. 119. l. 30. by, r. to. p. 120. l. 52. d. was. p. 123. l. 41. *November* r. *January* p. 128. l. 4. decerned. r. desired. p. 133. l. 13. d. to. p. 135. l. 45. that right, r. their rights. p. 136. l. 29. by, r. her. p. 138. l. 36. same, r. him. p. 139. l. 49. Creditor, r. Debitor. l. 50. Debitor, r. Creditor to the Debitor. p. 140. l. 42. d. as. p. 147. l. 17. the said, r. upon the said. p. 152. l. 3. this, r. there. p. 154. l. 26. to take, r. by tack. p. 156. l. 11. for, r. from. p. 166. l. 27. that, r. their. p. 174. l. 21. parliament, r. plat. p. 175. l. 36. payment, r. part. p. 176. l. 51. expeded, r. expected. p. 184. l. 35. was, r. this was. p. 192. l. 25. expired, r. was expired. p. 196. l. 29 expired, r. exped. p. 198. l. 45 no-band, *add*, and her, p. 199. l. 51. in r. off p. 201. l. 4. 1621. r. 1629. p. 203. l. 28. d. after. p. 208. l. 27. and, r. and as. l. 41. as, r. that as long as. p. 212. l. 11. these debitors, r. this debitor. p. 234. l. 44. responsor, r. responsal, or. p. 238. l. 21. borrowed, r. hired. p. 233. l. 9. him, r. them. l. 50. was the, r. were they. p. 254. l. 5. *February*, r. *January* p. 260. l. 51. albeit, r. and albeit. p. 262. l. 30. exhibited. r. inhibited. p. 263. l. 1. defender, r. pursuer. p. 268. l. 30. *January* 2, r. 25. p. 271. l. 7. after albeit, *add*, the Debitor was not called, and. p. 272. l. 8. after possession, *add*, before his Compryfing. p. 279. l. 47. was r. was only. p. 280. l. 51. party, *add*, to depone. p. 281. l. 4 no, r. as. p. 286. l. 31. procuratory, r. premonition, p. 287. l. 19 single r. double. p. 300. l. 43. which Acts were, r. by which Act it was. p. 309. l. 12. from, *add*, him from. l. 42. of, r. offered to prove that. *Ibid.* their, r. his. p. 309. l. 36. that, r. that albeit. p. 315. l. 6. Minors, r. Cautioners. p. 316. l. 51. d. their. p. 317. l. 39. and, r. and were. p. 320. l. 51. the Teind, r. for the Teinds. p. 323. l. 8. giving. r. governing. *Ibid.* l. 9. Estate, r. Estate left. l. 22. Facts, r. Pursuits, l. 31. after Defender, *add simul & semel.* Likeas, that obligation was at that time of the making of the Discharge, and subscribing thereof, also subscribed by the Defender. p. 328. l. 39. 1628. r. 1627. p. 330. l. 8. after the word Clerk, *add*, *vid.* last of *March* 1624. L. *Dunipace* and the cases there. p. 333. l. 3. father, *add*, for sums. p. 340. l. 9. servant, *add*, after his knowledge of the fact, if he received the servant. l. 16. by her. r. by her, or. p. 341. l. 38. d. and was. p. 344. l. 33. alledged, r. allowed. p. 346. l. 39. violence, *add*, and that he should remove without warning after the separation of the crops from the ground. p. 353. l. 20. being pursued, r. pursuing. p. 357. l. 23. pertinent, r. provenient. p. 371. l. 5. and, r. that, p. 477 l. 8. 28. r. 1628. p. 382. l. 17. noon, r. Sermon. p. 383. l. 12. the sums, r. these sums. p. 394. l. 30. Terms. r. Forms. p. 402. l. 50. taken, r. Tack, or. p. 405. l. 13. Clerk, *add vid. ult: January* 1628 *Mark Hamilton.* p. 406. l. 19. hath, *add*, power. l. 23. *Lawson*, *add*, it was found that. p. 407. l. 28. obtained, r. ordained. p. 409. l. 40. sustained, r. subsumed. p. 412. l. 39. *Christ*, add, *January* 13. 1629. betwixt the same parties. p. 415. l. 16. by, r. which by. p. 417. l. 8. as r. or. p. 418 l. 5. provided, r. payed. p. 423. l. 41. on, r. only. l. 50. was Heir, r. as Heir. p. 427. l. 51. Minister, r. Master. p. 434 l. 10. was, r. was not. p. 436. l. 22. the same, r. of some. p. 439. l. 29. incompetible, r. incompatible. l. 30, they, r. the same. p. 448. l. 49 defence, *add*, which might liberat the Magistrat. p. 453. l. 31. defender, r. pursuer. p. 455. l. 17. possessors, r. and possessors. p. 457 l. 9 pursuer, r. defender. p. 463. l. 39. convened, r. charged. p. 466. l. 10. *Cassils*, *add*, to his. p. 469. l. 3. therefore, r. for, l. 13. Decreet, r. direction. p. 472. l. 3. designed, r. desired. l. 16. only, *add*, to take away the liferent from him. l. 23 which failing, r. as failing if. l. 27. d. not. l. 28. whereas, r. whereas here. l. 44. duty r. entry. l. 45. margin, *add*, bearing the entry. l. 47. duty, r. entry. p. 473 l. 9. that the Contract was, r. by the Contract as. l. 30. not relieve, r. not bear to relieve. p. 474 l. 9 him, r. his Creditor. l. 45. which all, r. all which. p. 475. l. 27. debt, r. Decreet. p. 476. l. 5. by, *add*, that comprising. l. 31. Lands, r. Teinds. p. 479. l. 52. was, r. was not. p. 480. l. 5. same, r. sum. l. 26. for, r. as for. l. 31. all only, r. allanerly. p. 482. l. 3. subscriptions, r. substitutions. p. 483. l. 3. In, r. in case of. l. 11. d. not. p. 484 l. 3. nearest r. interested. l. 10. Cause, r. Case. p. 485. l. 18. nonentry, *add*, by the retour, seing the Duties of the Lands were craved by the said nonentry. *Ibid.* l. 29. nonentry, r. entry. p. 487. l. 42. should, r. should only.

P. 499. l. 6. principal, r. preceeding. p. 500. l. 35. other, r. of their. p. 505. l. 32. Reduction, r. *Edinburgh.* p. 507. l. 19. Executors, r. Executrie. l. 49 1623. r. 1632. p. 513. l. 25. sums, r. forms. p. 583. l. 38. thereof. r. therefore. p. 589. l. 23. offence. r. essence. l. 29. ordainer, r. ordained. p. 604 l. 28. yet, r. for. p. 625 l. 15. d. no. p. 627 l. 4. alledged, r. obliged. p. 636. l. 19. mers, r. *mota.* p. 643. l. 52. the haver, r. he have. p. 649. l. 49. Donatar, *add*, not Superior. p. 670. l. 24. referred, r. reserved. p. 712. l. 50. *vince*, r. *unice.* p. 743. l. 31. d. should have. l. 43. pursuer, r. defender. p. 752. l. 51. Clause, r. Cause. p. 758. l. 13. sustained, r. esteemed. p. 759. l. 19 that he, r. that as he. p. 766. l. 1. subed, r. subscribed. p. 788 l. 11. mediar, r. medler, l. 18. his r. her. p. 823. l. 41. sums, r. sum. p. 837, l. 38. of r. to. p. 869. l. 38. resolved, r. received. l. 41. this, r. the former. p. 884. l. 39. bond, r. land.